STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2020AP1756

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROMAN T. WISE Defendant-Appellant-Petitioner

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS AND STEPHANIE G. ROTHSTEIN PRESIDING.

PETITION FOR REVIEW AND APPENDIX

ZALESKI LAW FIRM
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net
Attorney for Defendant-Appellant-Petitioner

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STATEMENT OF ISSUES

Did Wise receive ineffective assistance of counsel where trial counsel failed to seek dismissal of three counts of fleeing under Wis. Stat. Sec. 346.04(3) on grounds that such charges were multiplicitous?

In a decision recommended for publication, the court of appeals determined that the charges against Wise were not multiplicitous under *Blockburger v. United States*, 284 U.S. 299 (1932), and that trial counsel was not ineffective for failing to seek dismissal on such grounds. Ap.1-16.

CRITERIA FOR REVIEW

Review is warranted under Rule 809.62(1r)(a) because the case presents a real and significant question of state and federal constitutional law.

Review is also warranted under Rule 809.62(1r)(d) because the court of appeals decision is in conflict with this court's

decision in *State v. Beamon*, 2013 WI 47, 347 Wis.2d 559, 830 N.W.2d 861.

STATEMENT OF THE CASE

In Milwaukee County Case No. 18CF2885, the State charged Wise with four counts of fleeing under Wis. Stat. Sec. 346.04(3). 4:1-4, 6:1-2, Ap.21-22. Count One alleged fleeing that resulted in death, Count Two alleged fleeing that resulted in great bodily harm, and Counts Three and Four alleged fleeing that resulted in damage to property. Ap.21-22.

The complaint alleged that around 7:00 p.m. on December 27, 2017, in the City of Milwaukee, Wise fled from officers while driving a Lexus that had been taken by force in a robbery earlier in the day. Ap.18. The complaint alleged that after leading officers on a high speed chase, during which Wise allegedly drove the Lexus without headlights and in the wrong lane of traffic, Wise ran a red light at the intersection of Fond du Lac Avenue and Locust Street, and collided with two other cars, a Toyota

RAV4 operated by CW, and a Chevrolet Monte Carlo operated by CD. Ap.19. The complaint alleged that officers apprehended Wise as he was "crawling out the driver's side of the rear windshield." Ap.19. The complaint alleged that also inside the car was an unconscious juvenile female, QLH, and an unconscious and unresponsive male, QRD. Ap.19. The complaint alleged that QLH was taken to the hospital and treated for a spinal fracture, pelvic fracture, and lacerations to the liver, spleen and kidney. Ap.19. The complaint alleged that QRD was also taken to the hospital where he died. Ap.19.

After various pre-trial proceedings, the case proceeded to a jury trial during which the jury found Wise guilty of all charges.

At sentencing, the circuit court imposed the following sentences:

Count One: 7 years initial confinement/5 years extended supervision;

Count Two: 4 years initial confinement/2 years extended supervision;

Count Three: 1 year confinement/1 year extended supervision;

Count Four: 1 year confinement/1 year extended supervision. 116:37-38.

The court ordered that the sentences on Counts One, Two, and Three run consecutively. 116:37-38.

Wise timely filed a notice of intent to pursue postconviction relief. 79:1-2. By and through counsel, Wise then filed a motion to vacate the judgment of conviction and sentence as to counts two, three and four. 91:1-18. The circuit court denied the motion without a hearing. Ap.26-30. Wise appealed and the court of appeals affirmed. These proceedings follow.

STATEMENT OF FACTS

As to Count one, the information alleged as follows:

> The above-named defendant on or about Sunday, December 17, 2017, at 3100 West Locust Street, in the City of Milwaukee, Milwaukee County, Wisconsin, while operating a motor vehicle on a highway, after having received a visual or audible signal from a marked police vehicle, did knowingly flee or attempt to elude a traffic officer by increasing the speed of the vehicle in an attempt to flee, resulting in the death of QRD, contrary to sec. 346.04(3) and 346.17(3)(d), 939.50(3)(e) Wis. Stats.
>
> Upon conviction for this offense, a Class E Felony, the defendant may be fined nor more than Fifty Thousand Dollars ($50,000) or imprisoned not more than fifteen (15) years or both. Ap.21.

As to Count Two, the information alleged as follows:

The above-named defendant on or about Sunday, December 17, 2017, at 3100 West Locust Street, in the City of Milwaukee, Milwaukee County, Wisconsin, while operating a motor vehicle on a highway, after having received a visual or audible signal from a marked police vehicle, did knowingly flee or attempt to elude a traffic officer by increasing the speed of the vehicle in an attempt to flee, resulting in great bodily harm to QLH, contrary to sec. 346.04(3) and 346.17(3)(c), 939.50(3)(f) Wis. Stats.

Upon conviction for this offense, a Class F Felony, the defendant may be fined nor more than Twenty Five Thousand Dollars ($25,000) or imprisoned not more than twelve (12) and six (6) months or both. Ap.21.

As to Count Three, the information alleged as follows:

The above-named defendant on or about Sunday, December 17, 2017, at 3100 West Locust Street, in the City of Milwaukee, Milwaukee County, Wisconsin, while operating a motor vehicle on a highway, after having received a visual or audible signal from a marked police vehicle, did knowingly flee or attempt to elude a traffic officer by increasing the speed of the vehicle in an attempt to flee, causing damage to the property of CW, contrary to sec. 346.04(3) and 346.17(3)(b), 939.50(3)(h) Wis. Stats.

Upon conviction for this offense, a Class H Felony, the defendant may be fined nor more than Ten Thousand Dollars ($10,000) or imprisoned not more than six (6) years or both. Ap.22.

As to Count Four, the information alleged as follows:

The above-named defendant on or about Sunday, December 17, 2017, at 3100 West Locust Street, in the City of Milwaukee, Milwaukee County, Wisconsin, while operating a motor vehicle on a highway, after having received a visual or audible signal from a marked police vehicle, did knowingly flee or attempt to elude a traffic officer by increasing the speed of the vehicle in an attempt to flee, causing damage to the property of CD, contrary to sec. 346.04(3) and 346.17(3)(b), 939.50(3)(h) Wis. Stats.

> Upon conviction for this offense, a Class H Felony, the defendant may be fined nor more than Ten Thousand Dollars ($10,000) or imprisoned not more than six (6) years or both. Ap.22.

Motion to vacate judgments of conviction and sentence

Wise's postconviction motion asserted that the circuit court "should vacate the judgment of conviction and sentence as to Counts Two, Three and Four, because Wise received ineffective assistance of counsel in that trial counsel failed to seek dismissal of these counts on grounds that such charges were multiplicitous" and in violation of his right against double jeopardy and to due process protections. 91:2.

Circuit court and court of appeals decisions

The circuit court denied Wise's postconviction motion without a hearing, and the court of appeals affirmed. Ap.30,16.

ARGUMENT

Trial counsel was ineffective in failing to seek dismissal of three counts of fleeing under Wis. Stat. Sec. 346.04(3) on grounds that such charges were multiplicitous.

A. Standard of review.

Criminal defendants are constitutionally guaranteed the right to counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)); *State v. Trawitzki*, 2001 WI 77, ¶39, 244 Wis.2d 523, 628 N.W.2d 801.

In order to find that counsel rendered ineffective assistance, the defendant must show that trial counsel's representation was deficient. *Strickland*, 446 U.S. at 687. The defendant must also show that he or she was prejudiced by the deficient performance. *Id*. Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness.

Id. at 688. When evaluating counsel's performance, courts are to be "highly deferential" and must avoid the "distorting effects of hindsight." *Id.* at 689. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Williquette*, 180 Wis.2d 589, 605, 510 N.W.2d 708 (1993).

In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985). A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Trawitzki*, 244 Wis.2d 523, ¶19. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of

fact include "the circumstances of the case and the counsel's conduct and strategy." *State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540 (1992). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo. *Id.*

B. Legal principles regarding double jeopardy and multiplicitous charges.

The Wisconsin Constitution provides that "no person for the same offense may be put twice in jeopardy of punishment…." Wis. Const. art. I, §8(1). The United States Constitution similarly provides, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…." U.S. Const. amend. V.

Claims are multiplicitous when the State charges a defendant more than once for the same offense. See *State v. Brantner*, 2020 WI 21, ¶24, 390 Wis.2d 494, 939 N.W.2d 546. Such charges violate our state and federal constitutions because they place the defendant in jeopardy of multiple convictions for the same offense. *Id.* Multiplicity claims are reviewed according to a well-established two-pronged methodology. *Id.* at ¶25. First,

the court employs the "elements-only" test to determine whether the offenses are identical in both law and fact. *Id. citing Blockburger v. United States, 284 U.S. 299, 304 (1932); see also, State v. Ziegler,* 2012 WI 73, ¶60, 342 Wis.2d 256, 816 N.W.2d 838*, State v. Davison,* 2003 WI 89, ¶21, 263 Wis.2d 145, 666 N.W.2d 1*,* and *State v. Rabe,* 96 Wis.2d 48, 64, 291 N.W.2d 809 (1980). The result of this step determines whether the court will presume, in the second step of the analysis, that the statutes provide for cumulative punishment. *Id.* If the offenses are identical in law and fact, the court presumes "that the legislature did not intend to permit multiple punishments." See *id.* "The State may rebut that presumption only by a clear indication of contrary legislative intent." *Id.* If the offenses differ in law or fact, then they are not the "same" for double jeopardy purposes, and the court presumes that the statutes allow for cumulative punishment. *Id.* The defendant can overcome the presumption if he can prove that, notwithstanding the separate offenses, "the legislature did not intend to authorize cumulative punishments."

See *id.* If it did not, then there has been a due process violation as opposed to a double jeopardy violation. See *id.* Four factors are relevant to determining legislative intent: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. *State v. Tappa*, 127 Wis.2d 155, 161, 378 N.W.2d 883, 885 (1985).

C. Principles of statutory construction.

The Wisconsin Supreme Court has stated that statutory interpretation "begins with the language of the statute," and "[i]f the meaning of the statute is plain, we ordinarily stop the inquiry." See *State ex rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶45, 271 Wis.2d 633, 681 N.W.2d 110. However, if the supreme court has addressed the interpretation of a statute or predecessor statute, that controlling authority must be followed or distinguished. See *Hart v. Artisan and Truckers*

Casualty Company, 2017 WI App 45, ¶16, 377 Wis.2d 177, 900 N.W.2d 610.

D. The four counts of fleeing/eluding were identical in law and fact.

In affirming the circuit court's denial of Wise's postconviction motion, the court of appeals determined that the charges against Wise were not the same in law or fact under the *Blockburger* test. See Ap.12-13. In particular, the court of appeals reasoned that that the charges involved proof of different elements and facts. See Ap.7,9,11. Wise respectfully maintains that the court's reasoning in this regard relied upon a faulty interpretation of Sec. 346.04(3), *State v. Beamon*, and WIS JI-CRIMINAL 2630, the standard jury instruction pertaining to the offense of fleeing or attempting to elude an officer.

Wis. Stat. Sec. 346.04(3) provides as follows:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, federal law enforcement officer, or marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer, shall knowingly flee or attempt to elude any officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, the traffic

officer, the law enforcement officer, other vehicles, or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Wis. Stat. Sec. 346.04(3).

Under the plain language of Sec. 346.04(3), a person commits a violation of the statute where, after having received a visual or audible signal from a (law enforcement officer) he or she knowingly flees or attempts to elude the officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, the traffic officer, the law enforcement officer, other vehicles, or pedestrians, or by increasing the speed of the operator's vehicle or extinguishing the lights of the vehicle in an attempt to elude or flee. The plain language of the statute does not require anything more. It specifically does not require that certain damage or injury occur. The statute is entirely silent as to damage or injury that may result from the person's fleeing. In this regard, the plain language of the statute informs that whether the person's fleeing

caused death, great bodily harm, bodily harm or property damage is not an element of the offense.

Authority from this court interpreting Sec. 346.04(3) supports this plain reading of the statute. The court in *State v. Beamon* clarified that an offense under Sec. 346.04(3) has only two elements. See *State v. Beamon,* 2013 WI 47 at ¶31. The first element is that a person received a visual or audible signal from an officer. *Id.* at ¶31; see also, *State v. Sterzinger*, 2002 WI App 171, ¶9, 256 Wis.2d 925, 649 N.W.2d 677. The second element is that person knowingly fled or attempted to elude the officer after he received the signal. Id. This second element can be satisfied in three ways. First, fleeing or attempting to elude may be established by proof that the person acted with wilful or wanton disregard of the visual or audible signal so as to interfere with or endanger the officer, vehicles or pedestrians; second, fleeing or attempting to elude may be established by proof that the person increased his speed; or third, fleeing or attempting to elude may

be established by proof that the person extinguished the lights of his or her vehicle. See *State v. Beamon*, 2013 WI 47 at ¶31.

Wise is unaware of any decision by this court which interprets Sec. 346.04(3) to provide for any elements beyond the two elements discussed in *Beamon*. Wise is unaware of any decision which holds that the fact that the fleeing caused death, great bodily harm, or property damage is an element of the substantive offense.

The pattern jury instruction supports the interpretation that an offense under Sec. 346.04(3) has only two elements. The elements of an offense under Sec. 346.04(3) are set forth in WIS JI-CRIMINAL 2630 which provides in relevant part as follows:

> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.
>
> The first element requires that the defendant operated a motor vehicle on a highway after receiving a (visual)(audible) signal from a (traffic officer)(marked police vehicle). ("Traffic officer" means every officer authorized by law to direct or regulate traffic or to make arrests for violation of traffic regulations.)

The second element requires that the defendant knowingly (fled)(attempted to elude) a traffic officer

[by wilful disregard of the visual or audible signal so as to (interfere with)(endanger)(the operation of the police vehicle)(the traffic officer)(other vehicles)(pedestrians).

[by increasing the speed of the vehicle (in an attempt to elude)(to flee)].

[by extinguishing the lights of the vehicle (in an attempt to elude)(to flee)].

If you are satisfied beyond a reasonable doubt that the defendant operated a motor vehicle on a highway after receiving a (visual)(audible) signal from (the traffic officer)(marked police vehicle) and knowingly (fled)(attempted to elude) a traffic officer

[by wilful disregard of the visual or audible signal so as to (interfere with)(endanger)(the operation of the police vehicle)(the traffic officer)(other vehicles)(pedestrians),

[by increasing the speed of the vehicle (in an attempt to elude)(to flee)],

[by extinguishing the lights of the vehicle (in an attempt to elude)(to flee)], you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

[ADD THE FOLLOWING IF ONE OF THE MORE SERIOUS OFFENSES IDENTIFIED IN SEC. 346.17(3)(b),(c), or (d) IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT:]

[If you find the defendant guilty, you must answer the following question:

"Did the defendant's operating a vehicle (to flee)(in an attempt to elude) an officer result in (bodily harm to)(damage to the property of)(great bodily harm to)(death to) another?"

WIS JI-CRIMINAL 2630.

It follows then, that under the plain language of the statute, supreme court authority, and the applicable pattern jury instruction, the four offenses charged against Wise were identical in both law and fact.

Different facts distinguish one count from another when the counts are charged under the same statute. *State v. Ziegler, 2012 WI 73* at ¶61. Offenses are identical in law "if one offense does not require proof of any fact in addition to those which must be proved for the other offense." See *id.* at ¶60. Offenses are identical in fact unless they are "separated in time or are of a

significantly different nature." *See State v. Eisch,* 96 Wis.2d 25, 31, 291 N.W.2d 800 (1980). To be "separated in time" means that "there was sufficient time for reflection between the acts such that the defendant re-committed himself to criminal conduct." *State v. Brantner*, 2020 WI 21 at ¶26. Charges are "different in nature" even when they are the same type of facts as long as each required "a new volitional departure in the defendant's course of conduct." *Id.*

In this case, each of the four charges alleged against Wise involved the same two elements: one, that Wise operated a motor vehicle on a highway after receiving a (visual)(audible) signal from a (traffic officer)(marked police vehicle); and two, that Wise knowingly (fled)(attempted to elude) a traffic officer. The facts needed to prove such elements were also exactly the same for all four counts. Those facts were that Wise operated a motor vehicle on a highway after receiving a signal from a traffic officer, and that Wise knowing fled or attempted to elude the officer. For each count, the State alleged that Wise knowing fled or attempted to

elude by increasing the speed of his vehicle. None of the four counts required proof of any other fact in order for the jury to find Wise guilty of the offense. None of the four counts required proof of any fact which did not need to be proved for the other three counts. As such, the four counts were identical in law.

They were also identical in fact. The offenses were not separated in time, but rather, they were contemporaneous with one another. In this regard, there was no "time for reflection between the acts such that the defendant re-committed himself to criminal conduct." The offenses were also not "of a significantly different nature." They did not require "a new volitional departure in the defendant's course of conduct." The offenses occurred at the same time, and involved one volitional departure by Wise. As such, the offenses were identical in fact.

It is true that the State alleged that each offense had a different result. For example, Count One resulted in the death of QRD, Count Two resulted in great bodily harm to QLH, and Counts Three and Four resulted in property damage to CW and

CD. But the resulting damage or injury that occurs as a result of a defendant's fleeing is not determinative of whether separate offenses occurred, but rather, what the penalty is for the offense. Similarly, that different or multiple forms of damage or injury may result from a defendant's fleeing/eluding does not give rise to separate or multiple charges of fleeing. Rather, that different or multiple forms of damage or injury may arise from a defendant's fleeing/eluding triggers the graduated penalty structure based on the resulting harm or injury.

Under Wis. Stat. Sec. 346.17, "the violation" of fleeing/eluding can be a Class I, H, F or E felony depending on the nature of damages or injuries resulting from "the violation." Section 346.17(3) provides in relevant part as follows:

(3)
(a) Except as provided in par. (b), (c) or (d), any person violating s. 346.04 (3) is guilty of a Class I felony.

(b) If the violation results in bodily harm, as defined in s. 939.22 (4), to another, or causes damage to the property of another, as defined in s. 939.22 (28), the person is guilty of a Class H felony.

(c) If the violation results in great bodily harm, as defined in s. 939.22 (14), to another, the person is guilty of a Class F felony.

(d) If the violation results in the death of another, the person is guilty of a Class E felony.

Wis. Stat. Sec. 346.17(3).

Subsection (3) expressly speaks in terms of a singular violation, "the violation." And depending on whether "the violation" resulted in property damage, bodily harm, great bodily harm, or death, the penalty classification for "the violation" will differ.

Once the jury determines that "the violation" has occurred, by finding that the two elements of the offense have been proven, the jury then determines if property damage, bodily harm, great bodily harm, or death resulted from "the violation." The instructions advise,

> [If you find the defendant guilty, you must answer the following question:
>
> "Did the defendant's operating a vehicle (to flee)(in an attempt to elude) an officer result in (bodily harm to)(damage to the property of)(great bodily harm to)(death to) another?"

WIS JI-CRIMINAL 2630.

In light of how WI JI-CRIMINAL 2630 places this question subsequent to the jury's determination of guilt, the instruction makes clear that the damage or injury that results from the

fleeing/eluding is not an element of the offense, or part of the substantive offense. It is therefore illogical to think that multiple damages or injuries give rise to separate or multiple charges of fleeing/eluding when the existence of damages or injuries plays no role in determining whether the substantive offense occurred.

More significantly, the instruction makes clear that by the time the jury answered this question as to Count One, Wise had already been found guilty of "the violation" of fleeing/eluding. As such, when the jury proceeded to fill out the verdict form as to Counts Two, Three, and Four, it proceeded to find Wise guilty of an offense for which it had already found him guilty once, twice, and three times over.

Contrary to the above arguments, the court of appeals specifically rejected Wise's reliance on *Beamon*, and determined that *Beamon* did not support the proposition that the offense of fleeing or attempting to elude an officer requires only two elements. See Ap.11. In relying on *State v. Beasley*, 2004 WI App 42, 271 Wis.2d 469, 678 N.W.2d 600, the court of appeals

determined that Sec. 346.17(3) grafted additional elements onto the substantive offense under Sec. 346.04(3) to create "stand-alone crimes that address separate harms" based on whether death, great bodily harm or property damage occurred. Ap.9.

The court of appeals additionally rejected Wise's reliance on WIS JI-CRIMINAL 2630. In this regard, the court of appeals stated the following about the instruction:

> Wise fails to recognize that the instruction also says to add an additional element of proof if "one of the more serious offenses identified in [WIS. STAT. §346.17(3)(b),(c) or (d) is charged" and it states that the jury must find proof of this element beyond a reasonable doubt in order to result in a conviction on the charged offense.

See Ap.10-11.

Finally, the court of appeals relied upon this court's decision in *State v. Pal,* 2017 WI 44, 374 Wis.2d 759, 893 N.W.2d 848 to conclude that the offenses charged against Wise were different in fact. Ap.12. Wise respectfully maintains that the court of appeals decision is erroneous in numerous respects.

First, the court's reliance on *Beasley* is misplaced. The reason for this is that *Beasley* involved an altogether different

statutory framework than that at issue in this case. The statute at issue in *Beasley*, subsection 943.10(1) provided as follows:

> (1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class C felony.
>
> (a) Any building or dwelling; or
>
> - - -

Subsection (2) additionally provided as follows:

> (2) Whoever violates sub. (1) under any of the following circumstances is guilty of a Class B felony:
>
> (a) While armed with a dangerous weapon or a device or container described under s. 941.26(4)(a); or
>
> (b) While unarmed, but arms himself with a dangerous weapon or a device or container described under s. 941.26()(a) while still in the burglarized enclosure; or
>
> (c) While in the burglarized enclosure opens, or attempts to open, any depository by use of an explosive; or
>
> (d) While in the burglarized enclosure commits a battery upon a person lawfully therein.

The *Beasley* court interpreted subsections (1) and (2) together to find that subsection (2) incorporated the definition of burglary under subsection (1) such that subsection (2) "contains all of the elements of the crime and is properly read as follows:

> Whoever intentionally enters any of the places specified in §943.10(1) without the consent of the person in lawful possession and with intent to seal or

commit a felony, while armed with a dangerous weapon or a device or container described under s. 941.26(4)(a) is guilty of a Class B felony. "

See *State v. Beasley*, 2004 WI App 42 at ¶15.

To the extent that subsection (2) incorporated all of the elements of burglary from subsection (1), the court concluded that it "defines a distinct Class B felony" or "stand alone" crime. *Id.* at ¶¶15-16.

In contrast to the statutory framework at issue in *Beasley*, the statutes at issue in this case, Sec. 346.04(3) and Sec. 346.17 are distinct and independent by nomenclature, structure, and purpose. Sec. 346.04 is entitled "Obedience to traffic officers, signs, and signals; fleeing from officer." The text provides as follows:

No operator of a vehicle, after having received a visual or audible signal from a traffic officer, federal law enforcement officer, or marked or unmarked police vehicle that the operator knows or reasonably should know is being operated by a law enforcement officer, shall knowingly flee or attempt to elude any officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, the traffic officer, the law enforcement officer, other vehicles, or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Wis. Stat. Sec. 346.04(3).

As interpreted by *Beamon* and the pattern jury instruction, the plain language of Sec. 346.04(3) serves to fully define the offense of fleeing. No other elements are part of the cause of action.

In turn, Sec. 346.17 is entitled "Penalty for violating sections 346.04 to 346.16." It structurally appears in a different section of the code from Sec. 346.04(3), and provides the penalty structure for a violation under Sec. 346.04(3):

(1) Except as provided in subs. (5) and (6), any person violating s. 346.04 (1) or (2), 346.06, 346.12 or 346.13 (1) or (3) may be required to forfeit not less than $20 nor more than $40 for the first offense and not less than $50 nor more than $100 for the 2nd or subsequent conviction within a year.

(2) Except as provided in sub. (6), any person violating ss. 346.05, 346.07 (2) or (3), 346.072, 346.08, 346.09, 346.10 (2) to (4), 346.11, 346.13 (2) or 346.14 to 346.16 may be required to forfeit not less than $30 nor more than $300.

(2m) Any person violating s. 346.10 (1) shall forfeit not less than $60 nor more than $600.

(2t) Any person violating s. 346.04 (2t) may be fined not more than $10,000 or imprisoned for not more than 9 months or both.

(3)

(a) Except as provided in par. (b), (c) or (d), any person violating s. 346.04 (3) is guilty of a Class I felony

.

(b) If the violation results in bodily harm, as defined in s. 939.22 (4), to another, or causes damage to the property of another, as defined in s. 939.22 (28), the person is guilty of a Class H felony.

(c) If the violation results in great bodily harm, as defined in s. 939.22 (14), to another, the person is guilty of a Class F felony.

(d) If the violation results in the death of another, the person is guilty of a Class E felony.

(4) Any person violating s. 346.075 may be required to forfeit not less than $25 nor more than $200 for the first offense and not less than $50 nor more than $500 for the 2nd or subsequent violation within 4 years.

(5) If an operator of a vehicle violates s. 346.04 (1) or (2) where persons engaged in work in a highway maintenance or construction area or in a utility work area are at risk from traffic, any applicable minimum and maximum forfeiture specified in sub. (1) for the violation shall be doubled.

(6)

(a) If a person violates s. 346.05 (1), 346.06, 346.07 (2) or (3), or 346.09 and the violation results in great bodily harm, as defined in s. 939.22 (14), to another, the person shall forfeit $500.
346.17(6)(b)**(b)** If a person violates s. 346.05 (1), 346.06, 346.07 (2) or (3), or 346.09 and the violation results in death to another, the person shall forfeit $1,000.

Given that the subsections of the burglary statute at issue in *Beasley* appeared within the same section, 943.10, and in fact, right next to each other as subsections (1) and (2), the court was easily able to interpret the latter as incorporating the former. That is plainly not the case with respect to Sec. 346.04 and Sec. 346.17. These sections appear in different parts of the code and are structurally independent from each other. This is because by

nomenclature and content, they serve different purposes.[1] Sec. 346.04 defines the offense which is comprised of only two elements, and Sec. 346.17 proscribes the penalty. The nomenclature, plain language, and structure of Sec. 346.04 and Sec. 346.17 are plainly different from the statute at issue in *Beasley,* and do not allow for the same analysis. For this reason, the court of appeals' reliance on *Beasley* is erroneous.

Next, the court of appeals interpretation of WIS JI-CRIMINAL 2630 is also erroneous. The instruction does not speak of adding "an additional element" to the basic, substantive offense as the court of appeals states it does. Rather, it instructs that if one of the more serious offenses is charged, the jury should be instructed to make a "FINDING THAT THE FACT INCREASING THE PENALTY WAS PRESENT." But a finding of fact that determines whether an *increased penalty* should apply is different from a legal element which is necessary for proof of the substantive offense. Such a finding of fact simply creates a

[1] A court may consider titles of statutes to resolve doubt as to statutory meaning. In *Interest of C.D.M.*, 125 Wis.2d 170, 370 N.W.2d 287 (Ct. App. 1981).

different penalty not a different offense. For this reason, the court of appeals' interpretation of WIS JI-CRIMINAL 2630 is erroneous.

Next, the court of appeals' reliance on *Pal* is misplaced. In *Pal*, the defendant was charged with two counts of hit and run resulting in death in violation of Wis. Sec. 346.67(1). *State v. Pal*, 2017 WI 44 at ¶2. Pal challenged the charges on multiplicity grounds. *Id.* at ¶3. In rejecting Pal's challenge, the court determined that the two offenses were not identical in fact. *Id.* at ¶17. The statute at issue in *Pal* provided as follows:

> The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> (a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or any person attending any vehicle collided with; and
>
> (b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
>
> (c) The operator shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon

> or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. Wis. Stat. Sec. 346.67(1).[2]

In rejecting Pal's multiplicity challenge, the court emphasized the plain language and purpose of the statute:

> The State did not simply charge Pal for his failure to stop his vehicle at the scene of the accident; it charged Pal for his failure to stop his vehicle at the scene of the accident until he had fulfilled his statutory obligations of providing information and assistance to each of the two victims he had hit with his vehicle. Because Pal did not perform his statutorily-imposed duties with regard to each of the two victims, the State charged Pal with two violations of the statute. *State v. Pal*, 2017 WI 44 at ¶20.
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> We reiterate that the statute is patently concerned with more than simply flight from the scene of an accident. Instead, the statute prohibits flight until the vehicle operator has fulfilled his or her duties with regard to specified persons at the scene….Given that the statute pertains to a vehicle operator's duties to certain individuals at an accident scene, it makes sense to allow punishment for violations of duties to separate individuals. *State v. Pal*, 2017 WI 44 at ¶27.

The gravamen of the court's analysis in *Pal* was that the statute explicitly created statutory duties with respect to specified persons at the scene of the accident. Of particular importance, the statute explicitly created an obligation on the part of Pal and other motorists involved in an accident to remain

[2]As noted by *Pal*, this particular version of Sec. 346.67 has been amended. See *State v. Pal*, 2017 WI 44 at ¶18, no. 8, citing 2015 Wis. Act 319.

at the scene and render assistance to "any" injured person. To the extent that Pal failed to render assistance to two injured persons, he violated his express, statutory duties to those two persons. As such, the causes of action against Pal were factually different because they involved separate and distinct violations of statutory duties owed to different persons, and therefore, separate and distinct proof needed to establish such violations. As the court noted, "'[i]f the State were put to their proof in this case," they would have to establish that Pal had failed to complete his statutory responsibilities with regard to each victim." *Id.* at 22.

In contrast, the statute at issue in this case, Sec. 346.04(3) does not create explicit, affirmative duties owed to specified persons. The only duty arguably created by the statute is the duty by the operator of the vehicle to not knowingly flee or attempt to elude the officer who provides the operator with the visual or audible sign. The violation under the statute occurs when the operator breaches this duty by engaging in one of the

three acts which establish fleeing or attempting to elude. In this case, the act alleged by the State for all four offenses was that Wise increased his speed. Unlike in *Pal*, here, all four offenses charged against Wise involved the same breach of duty owed by Wise to the same person, committed in the same way. Unlike in *Pal*, the proof needed to prove all four offenses was the same. Whereas the statutory framework in *Pal* created multiple duties owed by the operator to specified persons, which allowed for multiple breaches of duty, and ultimately, multiple violations requiring different proof, the statutory framework at issue in this case did not. For the above reasons, while *Pal* has superficial similarity to this case, the disparate nature of the statutes at issue does not allow for the same analysis and conclusion as rendered in *Pal*. For this reason, the court of appeals' reliance on *Pal* is misplaced.

While the court of appeals found *Beasley* and *Pal* to be instructive to this case, such decisions are, for reasons discussed above, distinguishable and not squarely applicable to the legal

issues presented by this case. This court should accept review to clarify the interplay between Sec. 346.17(3) and Sec. 346.04(3), and clarify *Beamon*'s precedence in defining the substantive elements of an offense under Sec. 346.0(4(3).

E. Even if the offenses were not identical in law and in fact, multiple punishments are not authorized under a Tappa analysis.

After concluding that Wise's charges were not the same in law or fact, the court of appeals moved to the second step of the *Blockburger* test, and applied the presumption that the legislature intended to permit cumulative punishments. Ap.13. For the reasons discussed above in this petition, Wise maintains that the four offenses charged were identical in law and fact, and that this court must presume "that the legislature did not intend to permit multiple punishments." See *Blockburger v. United States, 284 U.S. at 304*. If this court disagrees however, Wise maintains that this court should nonetheless find under a *Tappa*

analysis that contrary to the court of appeals determination, multiple punishments are not authorized.

The relevant factors are as follows: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. *State v. Tappa*, 127 Wis.2d at 161.

In terms of the "language of the statute," for all reasons previously argued, Sec. 346.04(3) is unambiguous. The plain language of the statute indicates that the gravamen of the offense is the operator's knowing flight from or attempt to elude the officer who gives the visual or audible signal. This is why, as discussed earlier in this brief, under *Beamon* and WIS JI-CRIMINAL 2630, the only two elements of the offense involve the receipt of the officer's signal by the operator, and the knowing flight or attempt to elude by the operator. The degree of injury or extent of damage resulting from the fleeing or attempt to elude, or whether or not any injury or damage resulted at all, plays no

part in the substantive offense itself under the plain language of the statute. As such, multiple injuries or damages do not give rise to multiple offenses or punishments.

Sec. 346.17, which appears in the code separately from Sec. 346.04(3) sets forth the penalty for the offense under Sec. 346.04(3). Sec. 346.17 subsection (3) expressly speaks in terms of a singular violation, "the violation." And depending on whether "the violation" resulted in property damage, bodily harm, great bodily harm, or death, the penalty classification for "the violation" will differ. If the fleeing or attempt to elude involved death to a person, sub. (d) applies. If the fleeing or attempt to elude involved great bodily harm, sub. (c) applies. If the fleeing or attempt to elude involved bodily harm or property damage, sub. (b) applies. The penalties are graduated. The more substantial the resulting injury, the higher the potential penalty will be. The applicable penalty will presumably be based on the most serious injury. The language of the statute plainly indicates that legislature intended that an operator's knowing flight from or

attempt to elude an officer after receipt of the officer's visual or audible signal, should give rise to a single violation, "the violation," subject to one penalty determined by the extent of injury.

The "legislative history and context" of the statute support this plain reading of the statute's text. In this regard, in response to Wise's postconviction motion, the State tendered certain documents pertaining to the legislature's drafting of Sec. 346.04(3). 97:1-7. Consider the following drafter's note:

> Re-do penalties (e.g., fine for "Eluding which causes bodily harm" should be higher than mere "Eluding.") Make penalties similar to those for OWI [i.e., higher penalties where OWI results in injury or death]. 97:2.

This historical reference shows that in providing for different penalty classifications, the legislature did not intend to provide for multiple punishments based on multiple injuries, but graduated punishment based on the severity of the injuries.

With respect to "the nature of the proscribed conduct," again, the gravamen of the offense is the knowing flight from or attempt to elude the officer after receiving the officer's visual or audible signal. Once the operator receives the officer's visual or

audible signal, and knowingly chooses to ignore it, and instead flees or attempts to elude the officer, the operator has engaged in the proscribed conduct, and committed the substantive offense. The proscribed conduct is not the causation of harm or injury. Indeed, Sec. 346.04(3) is entirely silent as to the causation of harm or injury. The resulting harm or injury determines only the penalty for the operator's decision to engage in the proscribed conduct.

With respect to "the appropriateness of allowing multiple punishments," this court in *State v. Grayson*, 172 Wis.2d 156, 493 N.W.2d 23 (1992) noted that the focus should be on deterrence and proportionality. *Id.* at 166. In this case, because Wise's fleeing resulted in the death of another, under Sec. 346.17(3(d), it is a class E felony subject to a maximum penalty of 15 years imprisonment consisting of 10 years initial confinement and 5 years extended supervision. See Wis. Stat. Sec. 973.01(2)(b)5 and (d)4. Whether the maximum penalty is 15 years or something greater, such a lengthy period of imprisonment is clearly a sufficient deterrent to

convince people not to commit the offense of fleeing or attempting to elude. As to proportionality, under the express terms of the statute, the more serious the resulting injury or damage, the higher the appropriate penalty. Proportionality is therefore built into the penalty structure of the statute, and there is no compelling need to provide for multiple punishments in order to achieve it.

F. Trial counsel's failure to seek dismissal of Counts Two, Three and Four was deficient and prejudicial.

The two-pronged methodology for evaluating muliplicitous charges, and the "elements-only" test under *Blockburger* and its progeny were well-established at the time the State filed the charges against *Wise*. Reasonably prudent counsel would have recognized that under such legal framework, all four charges asserted by the State were identical in law and in fact, and as such, were multiplicitous. Reasonably prudent counsel would similarly have recognized that there was no clear indication that the legislature intended to provide for multiple punishments

under the statute. Reasonably prudent counsel therefore would have sought to dismiss the charges, or at least three of them, on grounds that the charges subjected Wise to double jeopardy. Trial counsel failed to do so. Such failure was objectively unreasonable and amounted to deficient performance.

Such failure was also prejudicial. In this regard, rather than being exposed only to the maximum penalty carried on Count One, Wise was exposed to the maximum penalties carried on Counts Two, Three and Four. Ultimately, Wise received multiple punishments for the same offense. In this case, those multiple punishments took the form of the 4 years initial confinement/2 years extended supervision imposed on Count Two, and the 1 year initial confinement/1 year extended supervision imposed on Counts Three and Four.

CONCLUSION

The court of appeals decision misapplies controlling precedent by both this court and the United States Supreme

Court. The issue at stake is one of constitutional magnitude. To the extent the published decision will improperly guide the bench and bar as to a significant issue, this court should accept review to provide clarification and guidance.

Dated this 13th day of December 2021.

Respectfully submitted,
BY:_____/s/_____
Zaleski Law Firm
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Attorney for Defendant- Appellant-Petitioner

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

A copy of this certificate has been served upon all opposing parties.

Dated this 13th day of December 2021.

THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 7676 words.

Dated this 13th day of December 2021

THE ZALESKI LAW FIRM

BY: /s/
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION

I hereby certify that attached to this Petition for Review is an appendix which contains:

1. The decision and opinion of the court of appeals.
2. 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.
3. Any other portions of the record necessary for an understanding of the petition.
4. A copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b).

Dated this 13th day of December 2021

THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant-Petitioner