STATE OF WISCONSIN
SUPREME COURT

APPEAL # 22AP1202-CR

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State of Wisconsin,

*Plaintiff – Respondent,*

vs.

Aman Deep Singh,

*Defendant – Appellant – Petitioner.*

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# PETITION FOR REVIEW

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Aman Deep Singh
Defendant - Appellant

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## INTRODUCTION

The criminal statute of limitations, Wis. Stat. 939.74(1), sets a three-year limit for misdemeanors and a six-year limit for felonies. This appeal concerns the important yet novel question of whether this criminal statute of limitations applies to penalty enhancers, or solely to the base offense. If it applies to penalty enhancers, Singh's case should have been dismissed with prejudice. If it does not apply to penalty enhancers, the dismissal without prejudice is appropriate.

## ISSUES PRESENTED

1) If the relevant statute of limitations has expired, is a criminal case to be dismissed with prejudice or without prejudice?

2) Does a prosecution alleging a base offense and a specific penalty enhancer toll the statute of limitations for a prosecution alleging the same base offense but a different penalty enhancer?

3) Can an effort to avoid issue preclusion in a second court ever be the basis for contempt remedial sanctions in the first court?

4) Does Wis. Stat. 809.24 require the court of appeals to explain its reasons for denying a motion for reconsideration?

5) Should the court of appeals be required to explain its decisions in its own words instead of wholesale copying from a party's brief?

## CRITERIA FOR REVIEW

Issue #1 calls for the court to resolve an apparent conflict between two controlling cases regarding when dismissals in criminal cases may be with prejudice. Wis. Stat. 809.62(1r)(d). *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980) created a bright

line rule that criminal cases cannot be dismissed with prejudice prior to the attachment of jeopardy absent a speedy trial violation. *State v. Davis*, 2001 WI 136, 248 Wis.2d 986, 637 N.W.2d 62 appeared to cabin this bright line rule substantially, but did not specifically deal with a statute of limitations. The trial court, State's brief, and court of appeals all concluded *Braunsdorf* controlled here and not *Davis*, but without any convincing explanation for how to reconcile the two cases. Because both *Braunsdorf* and *Davis* are Wisconsin supreme court opinions, only this court can resolve the conflict as to whether dismissals of criminal cases where the statute of limitations has expired are to be with prejudice or without prejudice.

Issue #2 presents a novel issue of statewide impact. Wis. Stat. 809.62(1r)(c). It is purely a question of law and will likely recur until resolved by this court. Wis. Stat. 939.74(1) sets the statute of limitations for criminal prosecutions, but sub. (3) permits tolling for the period during which a defendant is facing prosecution for the "same act". It has never been resolved whether the "same act" applies only to the base charge or also to alleged penalty enhancers. Phrased a little differently, does a prosecution alleging one specific penalty enhancer toll the statute of limitations for a future prosecution alleging the same base offense but a different penalty enhancer? This is an important question that has never been resolved.

Issue #3 involves a novel question of law of statewide importance. Issue preclusion prevents a party from arguing for a different outcome in a subsequent proceeding an issue that was decided against that party in an earlier proceeding. But what rights does this create for the other side? Can the other side argue to the original court that a contempt is ongoing? Or is their sole remedy arguing issue preclusion in the second court?

Issue #4 is a recurring problem that only the supreme court can resolve. *State v. Scott*, 2018 WI 74, ¶35-41, 382 Wis. 2d 476, 914 N.W.2d 141, held that the court of appeals must provide reasoning for its discretionary decisions. However, the waters were muddied by *State v. Jendusa*, 2021 WI 24, ¶21, 396 Wis. 2d 34, 955 N.W.2d 777, where this court held that not all discretionary decisions by the court of appeals require explanation. As in this case, the court of appeals continues its longstanding practice of summarily denying Wis. Stat. 809.24 motions for reconsideration without giving its reasons.

The question of whether the *Scott* mandate applies to 809.24 reconsideration motions has already been in front of this court but was not resolved in *State v. X.S.*, 2022 WI 49, ¶ 55, n.14, 402 Wis. 2d 481, 976 N.W.2d 425. Other recent petitions for review have raised the same question. (State v. Taylor, Appeal No. 2019AP001770-CR, State v. Cloyd, Appeals #18AP1589-CR and 19AP1045-CR; State v. Howard, Appeal #22AP1608-CR) Review is warranted because this question is purely a legal issue that keeps recurring without clarification. Wis. Stat. 809.62(1r)(c)3.

Issue #5 is also a recurring problem that has vexed courts across the country but that the Wisconsin Supreme Court has never issued any guidance on. Is it an acceptable practice for the court of appeals to simply cut and paste from a party's brief, wholesale adopt a party's arguments and oratory as its own? Or is this a form of judicial plagiarism where the court abandons its duty to independently weigh the arguments and explain its reasoning in its own words? On this subject, there is "a need for the supreme court to consider establishing, implementing or changing a policy within its authority." Wis. Stat. 809.62(1r)(b).

## STATEMENT OF THE CASE

A traffic stop happened in Hales Corners in January 2017 where police suspected Singh was driving drunk. This was almost seven years ago now. Barack Obama was still president. At that time, Singh was charged with third offense OWI. [R3] The alleged prior offenses were a 2005 OWI conviction and a 2001 Implied Consent violation for refusing to submit to a blood test.

The prosecution lingered for years over whether the refusal could be counted as a penalty enhancer. In February 2019, Singh filed a motion to dismiss the repeater allegation and amend the charges to first offense OWI. [R25] Singh alleged it was unconstitutional to count prior refusal to submit to a blood test as a penalty enhancer. Since the other alleged prior offense was outside the ten-year lookback window for second offense OWI, Singh moved the court to amend the charges to first offense OWI.

Multiple motions, response briefs and hearings followed trying to resolve this one question. [R25, R27, R30, R35, R45, R49, R66, R78] There was even a petition for interlocutory appeal over the issue. *State v. Singh*, 2019AP807, (petition for interlocutory appeal denied). In a case involving a different defendant, this court eventually ruled that counting prior blood test refusals indeed is unconstitutional. *State v. Forrett*, 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422.

After *Forrett*, Singh filed a motion to dismiss. [R49] Singh argued first that the charge must be amended to first offense OWI in light of *Forrett*. Second, Singh argued the Wis. Stat. 893.93(2)(b) statute of limitations for civil first offense OWI had expired so the cases should be dismissed. A motion hearing was held on 10/14/21, where the State conceded they could not count the refusal and the sole issue in dispute was whether the statute of limitations for first offense

OWI had expired. [R78] "I do agree with Counsel there in terms of we cannot count that implied consent conviction." (pg7, ln 22-24) "I agree with Counsel that there is a two-year statute of limitations to file civil forfeiture matters." (pg8, ln 22-24) "I think the main disagreement is whether or not the statute of limitations was violated." (pgl9-20, ln 24-1) On 02/17/21 orally in court, the trial court granted Singh's motion and dismissed the case without prejudice.

Seizing upon the "without prejudice" clause, prosecutors have continued to charge Singh. Throughout much of 2022 and early 2023, Singh was facing municipal First Offense OWI charges in the Hales Corners Municipal Court for this incident. Singh was also facing first offense OWI charges in the Greenfield Municipal Court for a different incident dating back to 2017, for which he was convicted of first offense OWI in 2023. Citing this 2023 conviction as a "prior offense", Hales Corners reissued criminal OWI citations to Singh for this January 2017 offense, but no criminal complaint has been issued yet.

Singh filed the present motions seeking to modify the original dismissal order from without prejudice to with prejudice, and to seek remedial sanctions for contempt against the officials continuing to prosecute these matters in other courts. [22AP1202 R53, R56, R58, R59, R70, R74] The trial court denied the motions, concluding that *State v. Braunsdorf*, 98 Wis. 2d 569, 574-75, 297 N.w.2d 808, 811 (1980), requires dismissals to be without prejudice even when the statute of limitations has expired. [R80]

The court of appeals affirmed. *State v. Singh*, Appeal No. 2022AP1202-CR,1203-CR,1204-CR, unpublished slip op., (Wis. Ct. App. July 5, 2023). The court of appeals agreed that *Braunsdorf* does not permit a dismissal with prejudice for a statute of limitations violation, and further that the criminal statute of limitations was

tolled by this prosecution under Wis. Stat. 939.74(3) and so had not yet expired. As will be demonstrated below, the court of appeals essentially cut and pasted its entire substantive discussion from the State's respondent brief. Singh filed a motion for reconsideration which was summarily denied without any reasoning provided.

## ARGUMENT

### I. The court should grant review to resolve an apparent conflict between *State v. Braunsdorf* and *State v. Davis* and hold that dismissals where the relevant statute of limitations has expired must be with prejudice.

Singh argues that where the relevant statute of limitations has expired, a dismissal must be with prejudice. A simple bit of common sense should require this - that time does not move backwards. Once a statute of limitations has elapsed, it has elapsed forever. Therefore, if the relevant statute of limitations has expired, a dismissal should be with prejudice.

Nevertheless, the circuit court, the State's briefs and the court of appeals all conclude that *Braunsdorf* created a bright line rule that statute of limitations dismissals cannot be with prejudice because jeopardy did not attach. "Moreover, as the circuit court stated, *State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808 (1980), held that circuit courts do not possess power to dismiss a criminal case with prejudice prior to the attachment of jeopardy except in the case of a violation of the constitutional right to a speedy trial." *Singh* at ¶13. Although Singh raised it in briefing, the court of appeals did not discuss Singh's argument that the *Braunsdorf* bright line rule was cabined by this court's subsequent decision in *State v. Davis*, 2001 WI 136, ¶22, 248 Wis.2d 986, 637 N.W.2d 62:

> "We agree with the court of appeals that the State's reliance on *Braunsdorf* is misplaced. In *Braunsdorf* there was no statute that authorized or required the dismissal of a criminal case. The *Braunsdorf* court held that in the absence of a statute, the "power to dismiss a criminal case with prejudice prior to jeopardy on nonconstitutional grounds is not ... an inherent power of the trial courts of this state." Because *Braunsdorf* addressed only a circuit court's inherent power to dismiss criminal cases, we conclude that it cannot be interpreted, as the State urges, to mean that a circuit court's authority to dismiss a criminal case is limited to a dismissal of the case without prejudice unless a statute explicitly authorizes a dismissal with prejudice."

So then which case controls a motion to dismiss based on the expiration of the relevant statute of limitations, *Braunsdorf* or *Davis*? The State and the court of appeals claim *Braunsdorf* created a bright line rule that a dismissal based on the statute of limitations must be without prejudice because jeopardy did not attach. Singh argues *Davis* should control based on common sense - time only moves forwards not backwards. The statute of limitations may not contain any explicit language that dismissals must be with prejudice, but it does require that conclusion nonetheless. This court should accept review to resolve the conflict and hold that where the statute of limitations has elapsed, the dismissal must be with prejudice.

Obviously, the court would have to agree with Singh on this question to even bother reaching the remaining questions.

**II. The court should grant review to clarify the law on a novel issue of statewide importance and hold that the Wis. Stat. 939.74 criminal statute of limitations applies to penalty enhancers.**

Wis. Stat. 939.74(1) sets a three-year statute of limitations for misdemeanors and six years for felonies. Wis. Stat. 939.74(3) contains a tolling provision stating that the time "during which a prosecution against the actor for the same act was pending shall not be included."

There are countless penalty enhancers throughout the criminal code, too many to mention. There are enhancers for recidivism, for committing offenses near schools, hate crimes, domestic violence enhancers etc. It has never been resolved whether there is a statute of limitations for charging penalty enhancers.

This becomes especially relevant for the unique prior offense penalty enhancer for OWI. This court has held that, unlike the general recidivism enhancer, this penalty enhancer applies for all countable prior offenses at the time of sentencing even if they were committed ***after*** the charged offense. *State v. Banks*, 105 Wis. 2d 32, 313 N.W.2d 67 (1981). This raises the question of exactly how long ***after*** an OWI is committed will a defendant be at risk of having the same charge enhanced based on future convictions.

The present case perfectly demonstrates how the uncertainty over whether the statute of limitations applies to penalty enhancers can lead to absurd results. Singh was charged back in January 2017 with criminal OWI. The prosecution took over five years before the State conceded that the alleged prior offense was not countable under *Forrett* so this should have been prosecuted as a first offense OWI all along. All relevant statutes of limitation are now expired. The three-year statute of limitations for misdemeanor OWI as well as the six-year statute for felony OWI has expired. [Wis. Stat. 939.74(1)] The two-year statute of limitations for first offense OWI has expired as well. [Wis. Stat. 893.93(2)(b)] Can the State still recharge Singh with criminal OWI alleging different prior offenses as the penalty enhancer?

The court of appeals holds that the statute of limitations was tolled so the answer is yes. "In this case, however, the only statute of limitations at issue is the one for the criminal OWI which was tolled by the filing of the criminal complaints." *Singh* at ¶12. If this is true,

Singh could conceivably be convicted of an unrelated OWI all the way out to 2025 and the State could recharge this 2017 incident as misdemeanor OWI citing this eight year later conviction as a "prior offense". And if Singh were to get two new OWI convictions by 2028, the State could recharge the 2017 incident as a felony OWI.

This absurd result is reality if the Wis. Stat. 939.74 criminal statute of limitations applies only to base offenses and not penalty enhancers. The only case interpreting the "same act" language *is State v. Pohlhammer*, 78 Wis.2d 516, 523, 254 N.W.2d 478 (1977), which held that the "same act" applies only to the charged crime or a lesser included offense and not a different substantive charge arising out of the same transaction. But whether "same act" includes penalty enhancers has never been resolved.

This court should accept review and hold that the criminal statute of limitations applies to penalty enhancers. The State has three years from the date of the base offense to allege any misdemeanor enhancers and six years from the base offense to allege any felony enhancers. Pending prosecutions do not toll time for adding new and different penalty enhancing allegations.

Since six years elapsed since Singh's January 2017 arrest without any new countable prior OWI offenses, the State's ability to charge Singh with criminal OWI has expired. This court should reverse and remand for the dismissal to be modified to with prejudice.

## III. The court should grant review on a recurring issue of statewide importance and decide that deliberately trying to bypass the issue preclusion effect in a second court is in contempt of the decision made in the first court.

After the State conceded that it could not count the blood test refusal as a penalty enhancer and so the OWI charged needed to be amended to a first offense, Singh's motion to dimiss [R49] and the

arguments at the motion hearing [R78] centered on whether the two-year statute of limitations for first offense OWI contained in Wis. Stat. 893.93(2)(b) permitted this amendment over five years later. "I do agree with Counsel there in terms of we cannot count that implied consent conviction." (pg7, ln 22-24) "I agree with Counsel that there is a two-year statute of limitations to file civil forfeiture matters." (pg8, ln 22-24) "I think the main disagreement is whether or not the statute of limitations was violated." (pgl9-20, ln 24-1) On 02/17/21 orally in court, the trial court granted Singh's motion and dismissed the case without prejudice.

Wis. Stat. 893.93(2)(b) appears to be the statute of limitations for municipal forfeitures, but the State agreed it is the appropriate statute of limitations for first offense OWI charged by the State as well since there does not appear to be any other statute of limitations specifically addressing traffic forfeitures charged by the State. By dismissing the case, the circuit court agreed that Wis. Stat. 893.93(2)(b) did not permit an amendment to first offense OWI.

Nevertheless, certain individuals have continued to try to prosecute this case in other courts. A first offense OWI prosecution for this incident was pending against Singh in Hales Corners Municipal Court, which was dismissed later this year and new citations were issued for third offense OWI. The Milwaukee County District Attorney has not yet filed a criminal complaint, but indicated to Singh's trial attorney their intention to continue prosecutions for this OWI.

The court of appeals instead held that Singh's only remedy is to argue issue preclusion in the subsequent prosecutions. Essentially, the court of appeals held that a deliberate violation of issue preclusion is not a contempt. Wis. Stat. 785.01(1) defines contempt. ["Contempt of court" means intentional: (b)Disobedience, resistance or obstruction of

the authority, process or order of a court."] It is Singh's opinion that the circuit court's dismissal accepting the arguments Singh made settles the issue of whether Wis. Stat. 893.93(2)(b) statute of limitations is violated. The further prosecutions in other courts are contempt because they are in resistance to the statute of limitations based dismissal from the circuit court in this case.

This court should accept review and decide that, in appropriate situations, a defendant is not limited to arguing issue preclusion in a second court. A defendant should also be able to argue that violating issue preclusion is a contempt of the first court.

## IV. The court should grant review on a recurring issue and hold that Wis. Stat. 809.24 requires the court of appeals to explain its reasoning denying a motion for reconsideration.

Other recent petitions for review have raised the same question. (State v. Taylor, Appeal No. 2019AP001770-CR, State v. Cloyd, Appeals #18AP1589-CR and 19AP1045-CR; State v. Howard, Appeal #22AP1608-CR) *State v. Scott*, 2018 WI 74, ¶35-41, 382 Wis. 2d 476, 914 N.W.2d 141, held that the court of appeals must provide reasoning for its discretionary decisions. However, the waters were muddied by *State v. Jendusa*, 2021 WI 24, ¶21, 396 Wis. 2d 34, 955 N.W.2d 777, where this court held that not all discretionary decisions by the court of appeals require explanation. As in this case, the court of appeals continues its longstanding practice of summarily denying Wis. Stat. 809.24 motions for reconsideration without giving its reasons.

The question of whether the *Scott* mandate applies to 809.24 reconsideration motions has already been in front of this court but was not resolved in *State v. X.S.*, 2022 WI 49, ¶ 55, n.14, 402 Wis. 2d 481, 976 N.W.2d 425. Review is warranted because this question is purely a legal issue that keeps recurring without clarification. Wis. Stat. 809.62(1r)(c)3. A motion for reconsideration under Wis. Stat. 809.24 is

an important form of relief. It does a disservice to the parties and the system for the court of appeals to not explain its reasoning.

## V. The court should grant review and implement a policy within its authority that Wisconsin judges must explain their decisions in their own words and not merely cut and paste the oratory from a party's brief.

The Court of appeals cut and pasted from the State's Respondent Brief the majority of its substantive paragraphs explaining why it was affirming the without prejudice dismissal. In some cases, sentences were copied in their entirety. In other cases, a word or two were changed. But it's clearly the State's oratory and not the court's own words.

> "¶10 First, Singh argues that because the applicable statute of limitations precludes further prosecution of his OWI offenses, the circuit court should have dismissed his case with prejudice. Relying on State v. Kollross, 2019 WI App 30, 388 Wis. 2d 135, 931 N.W.2d 263, Singh contends that circuit courts have "statutory authority" to dismiss with prejudice and that "cases dismissed due to an expiration of a statute of limitations are to be with prejudice." Singh is mistaken."

Compared to page 9 of the State's brief:

> "Singh argues that State v. Kollross, 2019 WI App 30, 388 Wis. 2d 135, 931 N.W.2d 263 provides trial courts with "statutory authority" to dismiss with prejudice. (Singh's Br., 7).4 Therefore, "cases dismissed due to an expiration of statute of limitations are to be with prejudice." (Singh's Br., 8)."

Next paragraph of the court's opinion:

> "¶11 The facts of Kollross are distinguishable from the matter at bar because the primary issue in Kollross was whether the issuance of a non-criminal municipal citation served to toll the criminal statute of limitations under the language of WIS. STAT. § 939.74(1). Singh's pending offenses were criminal charges that were in front of the circuit court. Section 939.74 tolls the time limits for the criminal prosecution from the time the criminal complaint is filed. See § 939.74(3). In addition, the trial court found probable cause for each of Singh's OWI offenses."

Compared to page 11 of the State's brief:

> "Kollross is incompatible with the facts in front of us. In Kollross, the pending OWI offense was a non-criminal municipal citation that was in front of the municipal court. Consequently, there was no complaint or summons to file to begin to toll the time limits. In contrast, Singh's pending offenses were criminal charges that were in front of the circuit court. Wis. Stat. § 939.74 tolls the time limits for the criminal prosecution from the time the criminal complaint is filed. See Wis. Stat. § 939.74(3). In addition, the trial court found probable cause for each of Singh's OWI offenses."

The next paragraph of the court's opinion:

> "¶12 Here, this court's decision in Forrett required Singh's criminal cases be dismissed since the State lacked the requisite prior convictions to make Singh's charges misdemeanors. Contrary to Singh's assertion, our decision does not foreclose the possibility of municipal citations. To the extent Singh complains about the municipal statute of limitations, he must raise that issue in the municipal court. In this case, however, the only statute of limitations at issue is the one for the criminal OWI which was tolled by the filing of the criminal complaints."

Compared to pgs 11-12 of the State's Brief:

> "This Court's decision in Forrett required Singh's criminal cases be dismissed and referred back to the municipal court since the State lacked the requisite prior convictions to make Singh's charges misdemeanors."
>
> "There may be an issue with the municipal statute of limitations but that issue was not in front of the trial court, nor is it an issue for this Court to decide."
>
> "In this case, the only statute of limitations at issue is the one for the criminal Operating While Intoxicated, which was tolled by the filing of the criminal complaints."

And finally, ¶13 of the court of appeals opinion does the same thing, but this time cutting and pasting from page 2 of the trial court order appealed from. [R80]

The Wisconsin Supreme Court has never said anything about whether this sort of "judicial plagiarism" is an accepted practice in Wisconsin. Other courts have generally criticized it and tried to prohibit it. *State v. McDermott*, 2012 WI App 14, 339 Wis. 2d 316, 810 NW2d 237, which bars this practice. "We agree with McDermott that this is inappropriate — judges must not only make their independent analyses of issues presented to them for decision, but should also explain their rationale to the parties and to the public. See *Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541-542, 504 N.W.2d 433, 434 (Ct.App.1993) (Improper to "simply accept[] a [party]'s position on all of the issues of fact and law without stating any reasons for doing so[.]" Id at ¶9 n.2. "[J]udicial decisions at all levels must be explained by the judge or judges in their own words[.]" Id. Other courts are in accord that this is an unacceptable practice. As the Seventh Circuit has explained:

> "A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own."
>
> *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990)

This kind of wholesale adoption of a party's brief "obscures the reasoning process of the judge,...deprives the court of the findings that facilitate intelligent review,....and causes the losing litigants to conclude that they did not receive a fair shake from the court." *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986). "If a judge allows himself to act as a mouthpiece for the winning party, the loser may conclude that the judge was not impartial — that he was an

advocate, using an advocate's words, rather than a disinterested evaluator of the several advocates' urgings." Id.

> "Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions."
>
> *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3rd Cir. 2004).

This court should grant review and implement a policy against this practice by the court of appeals and all courts in Wisconsin.

## CONCLUSION

For the foregoing reasons, this court should grant this petition for review and reverse the court of appeals decision.

Dated this 19th day of August, 2023,

Aman Deep Singh

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