STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2008AP1968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK R. PATTERSON,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ALL ENTERED IN THE CIRCUIT COURT FOR JUNEAU COUNTY, HONORABLE CHARLES A. POLLEX PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ISSUES PRESENTED

1. Are convictions for contributing to the delinquency of a child resulting in death and first degree reckless homicide multiplicitous under Wis. Stat. § 939.66(2)?

How the court of appeals decided this issue: The court of appeals went beyond the plain meaning of Wis. Stat. §939.66(2) and determined that *State v. Davison*, 2003 WI 89,

263 Wis.2d 145, 666 N.W.2d 1 (concerning multiple battery convictions), controlled this case rather than *State v. Lechner*, 217 Wis.2d 392, 576 N.W.2d 912 (1998) (concerning multiple homicide convictions).

Why the Supreme Court should reverse the decision of the court of appeals: The Court should clarify that *State v. Lechner*, 217 Wis.2d 392, 407-408, 576 N.W.2d 912 (1998) is still good law. The Court should determine that the analysis in *State v. Davison*, 2003 WI 89, 263 Wis.2d 145, 666 N.W.2d 1, is one specific to the special problems of battery statutes, and does not apply to homicides under Wis. Stat. § 939.66(2).

2. Since seventeen-year-olds cannot be prosecuted as juveniles for a delinquent act, does it follow that a defendant cannot be guilty of contributing to the delinquency of a seventeen-year-old, and thus was the evidence in this case insufficient to support conviction?

How the court of appeals decided this issue: The court of appeals found that a juvenile is exempted from delinquency only for investigative and prosecutorial purposes, and not for the purpose of contributing to a minor's delinquency.

Why the Supreme Court should reverse the decision of the court of appeals: It creates an inconsistency in the law to allow a conviction for contributing to the delinquency of a person who was too old for the state to have pursued by a delinquency petition.

3. Was the reckless homicide instruction defective because it gave as an element to be proved that the deceased used and died from the substance "alleged to have been delivered by the defendant?"

How the court of appeals decided this issue: The court of appeals found that the error was harmless because the rest of the jury instruction properly instructed the jury that it had to find beyond a reasonable doubt that the defendant delivered a drug to the deceased.

Why the Supreme Court should reverse the decision of the court of appeals: A harmless error finding is inappropriate because this error is structural, not harmless: the jury may have found that the defendant delivered a drug to the deceased, but it only found that there was an allegation that the defendant caused her death. The jury found Patterson guilty even though it may

have had a reasonable doubt that the deceased died as a result of a drug delivered by someone other than the defendant.

4. Did the prosecutor engage in prosecutorial misconduct by "refreshing the recollection" of witnesses with the testimony and statements of other witnesses?

How the court of appeals decided this issue: The court of appeals ruled harmless the one error in violation of *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), finding the other instances not to be error.

Why the Supreme Court should reverse the decision of the court of appeals: Although only one of the errors violated *Haseltine* the general tenor of the trial was unfair due to these repeated instances of improper questioning.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Patterson requests oral argument and publication. The decision of the court of appeals in this matter is published at 2009 WI App 161, 321 Wis.2d 752, 776 N.W.2d 602.

RELEVANT CONSTITUTIONAL PROVISIONS

"[N]or shall any person be subject for the same offense, to be twice put in jeopardy of life and limb ..."

U.S. Const. Amend. V.

"[N]or shall any state deprive any person of life, liberty, or property without due process of law ..."

U.S. Const. Amend. XIV.

"[N]o person for the same offense may be put twice in jeopardy of punishment."

Wis. Const. Art. I, §8.

RELEVANT STATUTORY PROVISIONS

Wisconsin Stat. § 939.66. Conviction of included crime permitted. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

(1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

(2) A crime which is a less serious type of criminal homicide than the one charged.

(2m) A crime which is a less serious or equally serious type of battery than the one charged.

(2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.

(2r) A crime which is a less serious type of violation under s. 943.23 than the one charged.

(3) A crime which is the same as the crime charged except

that it requires recklessness or negligence while the crime charged requires a criminal intent.
(4) An attempt in violation of s. 939.32 to commit the crime charged.
(4m) A crime of failure to timely pay child support under s. 948.22 (3) when the crime charged is failure to pay child support for more than 120 days under s. 948.22 (2) .
(5) The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem or aggravated battery or an attempt to commit any of them.
(6) A crime specified in s. 940.285 (2) (b) 4. or 5. when the crime charged is specified in s. 940.19 (2) to (6) , 940.225 (1), (2) or (3) or 940.30.
(6)(c) A crime that is a less serious type of violation under s. 940.285 than the one charged.
(6)(e) A crime that is a less serious type of violation under s. 940.295 than the one charged.
(7) The crime specified in s. 940.11 (2) when the crime charged is specified in s. 940.11 (1)

Wisconsin Stat. § 940.02. First degree reckless homicide.[1]

(2) Whoever causes the death of another human being under any of the following circumstances is guilty of a Class B felony

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[1]Wisconsin Stat. 940.02(2) is Wisconsin's version of the "Len Bias" law. It is well-known that many states issued such laws issued in the wake of the cocaine-induced death of young basketball star Len Bias.

(a) By manufacture, distribution or delivery, in violation of s. 961.41, of a controlled substance included in schedule I or II under ch. 961 or of ketamine or flunitrazepam, if another human being uses the controlled substance or controlled substance analog and dies as a result of that use. This paragraph applies:

1. Whether the human being dies as a result of using the controlled substance or controlled substance analog by itself or with any compound, mixture, diluent or other substance mixed or combined with the controlled substance or controlled substance analog.

2. Whether or not the controlled substance or controlled substance analog is mixed or combined with any compound, mixture, diluent or other substance after the violation of s. 961.41 occurs.

3. To any distribution or delivery described in this paragraph, regardless of whether the distribution or delivery is made directly to the human being who dies. If possession of the controlled substance included in schedule I or II under ch. 961 of the controlled substance analog of the controlled substance included in schedule I or II under ch. 961 or of the ketamine or flunitrazepam is transferred more than once prior to the death as described in this paragraph, each person who distributes or delivers the controlled substance or controlled substance analog in violation of is guilty under this paragraph.

Wisconsin Stat. § 948.40. Contributing to the delinquency of a child.

(1) No person may intentionally encourage or contribute to the delinquency of a child. This subsection includes intentionally encouraging or contributing to an act by a child under the age of 10 which would be a delinquent act if committed by a child 10 years of age or older.

(2) No person responsible for the child's welfare may, by disregard of the welfare of the child, contribute to the delinquency of the child. This subsection includes disregard that contributes to an act by a child under the age of 10 that would be a delinquent act if committed by a child 10 years of age or older.

(3) Under this section, a person encourages or contributes to the delinquency of a child although the child does not actually become delinquent if the natural and probable consequences of the person's actions or failure to take action would be to cause the child to become delinquent.

4) A person who violates this section is guilty of a Class A misdemeanor, except:

(a) If death is a consequence, the person is guilty of a Class C felony; or

(b) If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class D felony.

STATEMENT OF THE CASE

This is a review of a published decision of the Wisconsin Court of Appeals following a direct appeal under Wis. Stat. (Rule) § 809.30 of a conviction in a criminal felony matter.

The facts as stated in the decision of the court of appeals are essentially correct and *not* disputed. *State v. Patterson,* 2009 WI App 161, ¶¶2-3, 321 Wis.2d 752, 776 N.W.2d 602. In essence, Patterson was convicted after a jury trial of giving and selling Oxycodone, a controlled narcotic, to several individuals, in particular to Tanya S., a seventeen-year-old who died as a result of taking the drug.

The state filed a criminal complaint in Juneau County Circuit Court alleging that Patterson committed the crimes of delivery of Oxycodone, in violation of Wis. Stat. §961.41(1)(a) (originally four counts: counts one, two, five and six), first degree reckless homicide, in violation of Wis. Stat. §940.02(2)(a) (count three), and contributing to the delinquency of a minor resulting in death, in violation of Wis. Stat. §948.40(1) (count four). (Rec. 6).

The jury found Patterson not guilty of count six, but guilty as to all the other counts. (Rec. 66). The circuit court

sentenced Patterson to serve 5 years on count 1 (followed by 3 years extended supervision), 5 years on count 2 (followed by 3 years extended supervision), concurrent with count 1, 15 years on count 3 (followed by 6 years extended supervision), consecutive to counts 1 and 2, 5 years on count 4 (followed by 3 years extended supervision), concurrent and 5 concurrent years on count 5 (followed by 3 years extended supervision). (Rec. 76).

Patterson filed a motion for postconviction relief. (Rec. 134). The circuit court denied all his claims save one by written order filed July 24, 2008. (Rec. 143). The circuit court agreed with Patterson that count 5 (Delivery of Oxycodone to the deceased, in violation of Wis. Stat. § 961.41(1)(a)) was multiplicitous and as such ordered count 5 dismissed. The trial court denied all other claims.

Patterson filed an appeal, resulting in a published decision issued on October 1, 2009. *See State v. Patterson*, 2009 WI App 161, 321 Wis.2d 752, 776 N.W.2d 602. The court of appeals held there was no reversible error and affirmed Patterson's convictions.

Regarding the multiplicity question, the court of appeals

determined that convictions for the same act under the first degree reckless homicide statute and the contributing to the delinquency of a child resulting in death statute is permitted because the analysis of Wis. Stat. § 939.66(2m) concerning battery statutes in *State v. Davison*, 2003 WI 89, 263 Wis.2d 145, 666 N.W.2d 1, applies equally to homicides. *Patterson*, 2009 WI 161 at ¶¶ 4-21.

In its analysis of § 939.66(2), the court of appeals went beyond a plain meaning interpretation, essentially declining to find that *State v. Lechner*, 217 Wis.2d 392, 407-408, 576 N.W.2d 912 (1998) controlled. *Patterson*, at ¶15. The court of appeals determined instead that since the *Davison* court acknowledged *Lechner,* that the court of appeals should follow *Davison* as the later case.

The court of appeals also found that the evidence was sufficient that Patterson contributed to the delinquency of a child causing death. *Patterson*, at ¶¶ 23-29. Specifically, the court rejected Patterson's argument that it is legally impossible to convict a person of contributing to the delinquency of a seventeen-year-old despite that offenses committed after one's seventeenth birthday may not be used as the basis for a petition

in delinquency. The court determined that a seventeen-year-old is a juvenile for the purposes of prosecuting an individual accused of contributing to the seventeen-year-old's violation of state law. *Patterson* at ¶29.

Patterson's third argument that the court of appeals declined to adopt concerned the use of the word "alleged" in the stock jury instruction for first degree reckless homicide, specifically the language that the deceased died as a result of the substance "alleged to have been delivered by the defendant." *See* Wis. JI — Crim 1021 (2006). *Patterson* at ¶¶30-32. The court found that taking the instruction as a whole, there was not reasonable likelihood that the jury would have convicted based on a mere allegation.

Lastly, the court of appeals declined to overturn Patterson's convictions based on four instances of prosecutorial misconduct that occurred during the trial, one of which the court determined ran afoul of *State v. Haseltine*, 120 Wis.2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). The court of appeals found that the error was harmless.

STATEMENT OF FACTS

Tanya S. died on May 2, 2003, at the home of the defendant-appellant-respondent, Patrick Patterson, as a result of ingesting narcotics, specifically, Oxycodone and methadone, with the Oxycodone being a substantial factor. (Rec. 117:35).

Several witnesses testified that they were at Patterson's home the evening before Tanya's death, and that both Tanya and Patterson were "messed up" on drugs. (Rec. 117:222). One prosecution witness, Sara Loutsch, testified that, distraught over her brother's recent death, she went to Patterson's house (along with a 15-year old friend, B.D.) to get drugs. (Rec. 117:96). She and B.D. both testified that Patterson gave Tanya a pill. (Id. and Rec. 117:186). Loutsch was inconsistent about whether Patterson told Tanya to chew the pill. (Rec. 117:137). Sara Cormack, who was also present at the night of drug consumption, testified that Patterson gave Tanya four pills and told her to chew. (Rec. 118:102).

According to Loutsch, Patterson offered Tanya a second pill in the course of the evening. (Rec. 117:107). Loutsch sensed that Tanya was reluctant to continue taking drugs, and suggested that Tanya leave with Loutsch. (Id.). At some other

point, according to another witness, Richard Beck, Tanya participated in sniffing white powder, although she seemed reluctant to do so. (Rec. 118:63).

Tanya did not leave. She stayed, and apparently continued to take drugs. Two witnesses testified that they saw Tanya in the bathroom, showering; one witness said her eyes looked "googly," and the other one said Tanya looked "messed-up." (Rec. 117:222, Rec. 118:26). One of these witnesses, Brenda Tanton, said that she heard Patterson ask Tanya, "Do you want another one." (Rec. 118:30). At one point, Tanya nodded out while eating a bowl of cereal. (Rec. 117:113,195).

Loutsch took drugs with Patterson and helped him inject a triple dose of Oxycodone. (Rec. 117:115). As a result, Patterson passed out. (Rec. 117:195). He woke from his slumber and discovered that some of his pills were missing. (Rec. 117:113-114, 192, 206, Rec. 119:121). He began accusing those present of stealing his drugs, even having Loutsch turn out her pockets and trousers to show she did not have pills cached. (Rec. 117:194).

Ronald Beck testified that he bought some Oxycodone from Patterson that night, and he, Beck, did indeed steal some

extra pills from Patterson when Patterson dropped them. Rec. 118:60).

The next morning, Patterson and his mother observed that Tanya was unconscious. (Rec. 119:141). Patterson's brother, Daniel Perez, testified that he helped move Tanya from a bedroom to a couch in the living room. (Rec. 119:196). Perez testified that Patterson said that Tanya had gotten into his pills and overdosed. (Rec. 118:212, Rec. 119:155).

Patterson and his mother attempted to resuscitate Tanya to no avail. (Rec. 119:178).

At trial, the defense tried to establish that there had been a different source for the drugs that killed Tanya, focusing particularly on Tanya's mother, Robbie M. (Rec. 121:132). Robbie M. testified at trial, and admitted that she had sold Oxycodone to a third party, but denied ever giving it to her daughter. (Rec. 122:123). The defense also emphasized Robbie M.'s interference in the police investigation into her daughter's death. (Rec. 122:157).

ARGUMENT

I. Convictions of Contributing to the Delinquency of a Child Resulting in Death and First Degree Reckless Homicide are Multiplicitous.

Whether charges are multiplicitous is a question of law reviewed *de novo. State v. Davison*, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1; *State v. Gruetzmacher,* 2004 WI 55, ¶15, 271 Wis.2d 585, 679 N.W.2d 533; *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801 and *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

Multiplicity arises where the defendant is charged in more than one count for a single offense. *United States v. Free*, 574 F.2d 1221 (5th Cir. 1978); *State v. Dreske*, 88 Wis. 2d 60, 74, 276 N.W.2d 324 (Ct. App. 1979), cited in *Davison*, 2003 WI 89 at ¶40. If the same offense is involved in a single prosecution, Wisconsin courts look to whether the same offense is part of: (1) a "second sentence" challenge, (2) a unit-of-prosecution challenge, or (3) a cumulative punishments challenge. *Davison*, 2003 WI 89, ¶26, 263 Wis.2d at 161, *citing Whalen v. United States*, 445 U.S. 684, 702-705 (1980) (Rehnquist, J., joined by Burger, C.J., dissenting) (describing the

three strands of multiple punishment precedent).

Where convictions are for two offenses that are not the same in both law and fact, the constitutional claim arises under due process rather than double jeopardy, although it would appear that the analysis is informed by double jeopardy analysis. *See Davison* at ¶33, 43-44. In order to simplify the discussion, Patterson will commence by conceding that the well-known "elements-only" test does not prohibit convictions in a single prosecution for both contributing to the delinquency of a child resulting in death and first degree reckless homicide. *Cf. Blockburger v. United States,* 284 U.S. 299, 304 (1932).[2]

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[2]The elements of first degree reckless homicide under Wis. Stat. § 940.02(2) are: (1) that the defendant delivered a substance, (2) that the substance was Oxycodone, (3) that the defendant knew or believed the substance was Oxycodone, (4) that the victim used the substance "alleged to have been delivered by the defendant" and died as a result. *See* Wis. JI — Crim 1021 (2006). The elements of contributing to the delinquency of a child resulting in death under Wis. Stat. §948.40(1) are: (1) that the victim was under the age of 18, (2) that the defendant intentionally encouraged or contributed to the delinquency of the victim, and (3) that the victim's death was a consequence of the defendant's intentionally encouraging or contributing to the delinquency of the victim. *See* Wis. JI —

When the charged offenses are *not* identical in law and fact under *Blockburger*, then there is a presumption that the legislature intended to permit cumulative punishments. *See State v. Derango*, 2000 WI 89, ¶30, 236 Wis. 2d 721, 216 N.W.2d 833; *Lechner*, 217 Wis. 2d at 407; *Davison,* 2003 WI 89 at ¶44. "This presumption can only be rebutted by clear legislative intent to the contrary..." *Derango*, 2000 WI 89 at ¶30.

The critical issue is thus whether Wis. Stat. § 939.66(2) represents a clear legislative intent to prohibit cumulative punishments on these facts, rebutting the presumption to the contrary. *See Davison* at ¶49.

Wisconsin Stat. § 939.66 reads in part as follows:

> **Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following: ... (2) A crime which is a less serious type of criminal homicide than the one charged.

Where statutory language is clear and unambiguous, there is no need to seek legislative intent outside of the text of the

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Crim 2170A (2001). The instruction was revised in 2009.

statute. *See Davison,* 263 Wis.2d at 195 ¶108. and at 201 ¶122 and n. 9 (Abrahamson, C.J., dissenting). *See also Heaton v. Larson*, 97 Wis.2d 379, 394, 294 N.W.2d 15 (1980) ("Where one of several interpretations of a statute is possible, the court must ascertain the legislative intent from the language of the statute in relation to its scope, history, context, subject matter and object intended to be accomplished.").

The Court need not go beyond the plain meaning of Wis. Stat. § 939.66(2) because the plain language of Wis. Stat. §939.66(2) supports the conclusion that the legislature did not intend that Patterson be convicted of both these homicide crimes. The language of Wis. Stat. § 939.66 shows the purpose of the statute: "the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following: ... (2) A crime which is a less serious type of criminal homicide than the one charged." Contributing to the delinquency of a child resulting in death is a lesser-included offense of first degree reckless homicide because it is a "less serious type of criminal homicide than" first degree reckless homicide. As Chief Justice Abrahamson stated in her dissent in *Davison*, "It is rare that the plain language of a

statute covers the fact situation in issue as clearly as it does in this case." *Davison,* 2003 WI 89 at ¶120 (dissent by Abrahamson, C.J.).

To paraphrase the Chief Justice's position, applying it to the facts of the case at bar, "according to the plain meaning of Wis. Stat. § 939.66[(2)], the legislature plainly intended not to permit conviction and punishment for both [forms of homicides]."

The plain language of Wis. Stat. § 939.66(2) applies to Patterson's situation. The legislature intended not to permit conviction and punishment for both delinquency of a child resulting in death and first degree reckless homicide for the same death.

Wis. Stat. § 939.66(2) contains no language limiting its application to any particular provisions of the statutes or any types of homicide. Instead, the statute is applicable to the entire criminal code.

Blockburger was codified in Wis. Stat. § 939.66(1), *see Davison* at ¶52, (as well as in Wis. Stat. § 939.71) so the inclusion of subsection (2) with non-*Blockburger* criteria shows that the drafters of the code did not intend that there be multiple

convictions for *different* offense levels of homicide regardless of whether *Blockburger* would prohibit such multiple convictions. By contrast, in *Lechner*, *supra,* the Court permitted multiple convictions at the *same punishment level* because Wis. Stat. §939.66(2) specifically prohibits conviction only of "a crime which is a less serious type of criminal homicide than the one charged." Lechner had pleaded no contest to both second degree reckless homicide and homicide by intoxicated use of a vehicle, and he argued on appeal that he could not be convicted twice for killing the same person. In rejecting his claim, the Court found that the legislature, by enacting Wis. Stat. §939.66(2), had specifically addressed the issue of multiple homicide convictions for a criminal act causing a single death. Where a single act of a defendant forms the basis for a crime punishable under more than one statutory provision, Wis. Stat. §939.66(2) provides that a defendant may not be convicted for two criminal homicides if one is "a less serious type of criminal homicide." Lechner had argued that this section unequivocally evinced the legislature's intent to allow only one homicide conviction for causing the death of one person. The Court, in rejecting this argument, stated,

> A closer reading of the plain language in Wis. Stat. §939.66(2), however, establishes just the opposite. The plain language of Wis. Stat. § 939.66(2) does not prohibit multiple homicide convictions for killing one person. It bars multiple convictions only when one of the homicide convictions is for a "less serious type" of homicide. Noticeably absent from the prohibitions of Wis. Stat. §939.66(2) is a bar against multiple homicide convictions when the homicides are "equally serious."

Lechner, 217 Wis.2d at 408.

There is no question but that the legislature enacted §939.66(2) as a prohibition against multiple homicide convictions in situations where one homicide conviction is for a "less serious type of criminal homicide." *Lechner,* 217 Wis.2d at 408. As the Court found in *Lechner*, the word "serious" in this context is defined by the maximum penalty which may be imposed. *Id.* at 410.

Had the Court intended that multiple homicide convictions be permitted regardless of whether the offense level was the same or different, then the whole discussion in *Lechner* regarding different levels of offense would have been unnecessary.

First degree reckless homicide is a class C felony,

carrying a maximum penalty of 40 years imprisonment and a fine of up to $100,000. Wis. Stat. §939.50(3)(c). Contributing to delinquency causing death is a class D felony, carrying a maximum penalty of 25 years imprisonment and a fine of up to $100,000. Wis. Stat. § 939.50(3)(d). Therefore, contributing to delinquency causing death is a "less serious type of homicide" than first degree reckless homicide under *Lechner.*[3]

In *Davison*, *supra,* declining to find two battery convictions multiplicitous, the Court went beyond a plain-meaning analysis of a different subsection, Wis. Stat. § 939.66 (2m): "A crime which is a less serious or equally serious type of battery than the one charged." The Court held that (2m) did not prohibit conviction for both aggravated battery under Wis. Stat. § 940.19(6) and battery by a prisoner under Wis. Stat. § 940.20(1) because the broad language of §939.66(2m) was intended to address specific problems pertaining to §940.19 rather than to prohibit cumulative punishments from convictions under §940.19 and §940.20. *Davison*, 2003 WI at 78 ¶¶2-3

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[3]Assuming we do not get lost in a discussion about what is meant by "type of criminal homicide."

("Viewed in its full context and considering its legislative history as well as the different harms addressed by different battery statutes, multiple convictions for battery, one under §940.19 and one under §940.20, are allowed.").

In *Davison*, because the Court found that Wis. Stat. §939.66(2m) was ambiguous, the language of the statute became simply one of four factors from which the Court determined intent. Those factors are: (1) all applicable statutory language; (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. *See Davison,* 2003 WI 89 at ¶50.

Neither the analysis or the holding of *Davison* should apply to multiple convictions for homicides. Homicide is not battery, and there is no compelling reason to apply a rule about battery to homicide. The Court found in *Davison* that the language in (2m) was intended to interact only with § 940.19, and not with any other statute forbidding specific circumstances of battery. *Davison*, 263 Wis.2d at 187, ¶86.

The special problems of the battery statute and Wis. Stat. § 939.66(2m) do not apply to the instant case. There is no statute

called simply "Homicide" comparable to §940.19, which is entitled "Battery; substantial battery; aggravated battery" and contains within it five different forms (and four different punishment levels) of battery.

On the contrary, the different forms of homicide are spread over the statutes in many different numbered sections, *e.g.* Wis. Stat. §346.74(5)(d), §940.01, §940.02, etc.[4] Yet, in

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[4]Patterson would not agree that Wis. Stat. § 939.66(2) applies only to homicide statutes included in Subchapter I of Chapter 940 (numbered sequence §§940.01-.10). This subsection contains no language limiting its application to any particular provisions of the statutes or any types of homicide. Instead, the statute is on its face applicable to any homicide found in the criminal code. *See, also* Wayne LaFave et al., CRIMINAL PROCEDURE (3rd ed. 2007) §25.1(f) ("**The 'same offence.'** Offenses for double jeopardy purposes are not necessarily defined by reference to separate titles or separate statutory sections. Two offenses may have different titles and be prohibited by different statutory sections yet constitute the 'same offence' for double jeopardy purposes."). Even if Patterson has no double jeopardy claim, surely it cannot be disputed that double jeopardy jurisprudence informs the multiplicity analysis, and the point here is that separate titles or separate statutory sections prove little unless the state shows the drafters intended Wis. Stat. § 939.66(2) to apply only to certain statutes. In any case, the legislative history does not support that

Davison, the Supreme Court found that it was acceptable to allow multiple convictions of different punishment levels for a single act resulting in a single injury for offenses included in §940.19 and § 940.20 because § 940.20 established special circumstances of battery. On the other hand, contributing to the delinquency of a child resulting in death may establish special circumstances of contributing to the delinquency of a child, but that does not prove that contributing to the delinquency of a child resulting in death establishes special circumstances of

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§ 939.66(2) applies only to chapter 940 offenses. This subsection was first drafted in 1951 Senate Bill 784, creating Wis. Stat. § 339.45(2). The legislature enacted §339.45 (later changed to §339.66 per 1953 Assembly Bill 100) specifically to disallow homicide convictions that differed as to mental states and levels of penalty. *See* Legislative Council Comment to 1951 Senate Bill 784. The former statute, which §§ 939.65 and 939.66 supplemented, simply stated that a defendant could be convicted of a lesser although acquitted on the greater. *See* Wis. Stat. § 357.09 (1953). Section 939.66 was first published in the 1955 statutes. The original statute had five subsections. Subs 1-4 have come down to us unchanged. Language in subsection 5 was altered so as to substitute the words "sexual assault, sexual assault of a child" in place of the word "rape." All the other subsections in § 939.66 have been added since the statute first appeared in the 1955 code.

homicide.

Another ground for interpreting subsections (2) and (2m) differently is that subsection (2m) excludes multiple convictions for "a crime which is a less serious or *equally serious type* of battery than the one charged," whereas for homicide, it must clearly be a "less serious type of criminal homicide." Compare *Lechner* and *Davison*.

Further, the legislature chose to specify that the homicide be "criminal" in subsection (2), whereas subsection (2m) does not contain the word "criminal." One could create a myth of ambiguity in Wis. Stat. § 939.66(2), in wondering if its use of the words "type of criminal homicide" is discussing physical acts or statutory violations but it would be incorrect to do so. This discussion figured in *Davison*:

> [T]he phrase "type of battery" is subject to different interpretations, depending on whether "battery" refers to a statutory offense or a physical act. If one interprets "type of battery" to refer to the "act" as affected by the actor's state of mind and the seriousness of the resulting injury, then those elements are discussed only in § 94[0].19.

Davison at ¶70.

This point seemed to carry the day for the prosecution in

Davison. While a distinction between an illegal act in the physical world and an act that is a violation of a statute borders on the metaphysical, the legislature must necessarily be discussing both physical acts and statutory violations, because otherwise why would this be in the criminal code? Granted, the universe of physical acts is greater than violations of criminal statutes, but if the legislature refers to "criminal homicide" than it is obvious that it is discussing only acts that are violations of the code, not other acts. As another example of Patterson's thesis that double jeopardy law informs the multiplicity analysis, it is apparent that *Davison*'s physical act/statutory offense dichotomy is taken from the double jeopardy context. *See, e.g.*, *State v. Hansen*, 2001 WI 53, ¶22, 243 Wis.2d 328, 627 N.W.2d 195 ("[T]he State's interpretation conflicts with the marked distinction between 'act' and 'offense' found in the case law. The terms are often juxtaposed, and this distinction has been described as the 'act-offense dichotomy.'")[5]

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[5]Interestingly, in *Hansen*, the Court held that Wis. Stat. § 961.45 does not require identity in law between the prior conviction or acquittal and the alleged violation of Chapter 961 in order to bar a state prosecution following a federal one.

Even in the event the Court should decide that subsection (2) is ambiguous, which it should not, the Court would then reach the other three points of the statutory analysis that go beyond the statutory language, that is, the legislative history and context of the statute, the nature of the proscribed conduct, and the appropriateness of multiple punishment for the conduct. *See Davison,* 2003 WI 89 at ¶50.

Regarding the legislative history component of this analysis, the logic of *Davison* should be found inapplicable to the case at bar because the legislative history of § 939.66(2) is vastly different than the history of § 939.66(2m). As *Davison* discusses at length, §939.66(2m) was a reaction to *State v. Richards*, 123 Wis.2d 1, 365 N.W.2d 7(1985). *See Davison*, ¶¶78-90.

> In truth, then, all critical language in the 1994 legislation was drafted by the Wisconsin Department of Justice, with no indication that the language was intended to interact with any statute beyond § 940.19. Rather, the new

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Hansen, 2001 WI 53 at ¶22. This shows that the Wisconsin Supreme Court has not always held strictly to *Blockburger* in interpreting Wisconsin statutes dealing with double jeopardy-related issues.

> language in (2m) appears to reflect the changes proposed for § 940.19.

Davison, 263 Wis.2d at 187, ¶86.

By contrast, the legislative history of § 939.66(2), does not support the interpretation that § 939.66(2) is meant only to make it easier for the prosecution to obtain convictions. It is part of what I will term the original core of the present form of the Wisconsin criminal code. Numerous items related to criminal substance and procedure have been added on and moved around within the organization of the statutes since 1955. Items in the original code that the drafters meant as protection for the constitutional rights of defendants are entitled to greater weight than items added on afterwards that do not go to a constitutional right.

Subsection (2m) may have been drafted late in the game for the benefit of prosecutors (a) to allow them to obtain multiple battery convictions and (b) to allow for multiple charges of the same offense level within §940.19. The original 1955 criminal code drafters, however, who wrote subsection (2), were also concerned about what they termed the double jeopardy

rights of defendants. *See* Introduction and General Comment to 1951 Senate Bill 784 at ii. ("For example, the protection of the double jeopardy rule was extended ..."). Part of this concern expressed itself in Wis. Stat. § 939.71, which clearly goes to subsequent prosecutions which would be prohibited by *Blockburger*.[6] It would thus appear that the original drafters' intent was to extend rather than limit double jeopardy rights, and that they did not anticipate that the Court would develop a narrow definition of lesser-included homicides.[7]

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[6]This section demonstrates an attitude towards expansion of traditional double jeopardy rights in that Wis. Stat. § 939.71 prohibits Wisconsin state prosecutions where the past prosecution was by another sovereign. See Wisconsin Legislative Council, V Judiciary Committee Report on the Criminal Code (Feb. 1953), at 55 (regarding proposed §339.71).

[7]The Court seems to have held that non-*Blockburger* multiplicity issues do not implicate double jeopardy. *Davison* at ¶¶45-46. There is no question but that multiplicity implicates an individual's constitutional right to be free from double jeopardy when the two offenses are the "same offence" under *Blockburger*. It is Patterson's thesis that even if the dual convictions do not violate *Blockburger*, nonetheless, double jeopardy jurisprudence seems to inform the discussion.

The state and federal constitutional provisions forbidding

The legislative history of Wis. Stat. § 939.66(2) supports that the legislative intent was to prohibit dual convictions like Patterson's. The 1953 Judiciary Committee Report on the Criminal Code states:

> This section [(then numbered § 339.66)] permits conviction of a crime included within the crime charged and states what crimes are included crimes. The reason behind the rule of this section is the state's difficulty in determining before a trial exactly what crime or degree of

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double jeopardy bear strong resemblance to each other. Compare U.S. Const. Amend. V("[N]or shall any person be subject for the same offense, to be twice put in jeopardy of life and limb ..."), and Wis. Const. Art. I, §8 ("[N]o person for the same offense may be put twice in jeopardy of punishment."). These provisions are "identical in scope and purpose." *State v. Lechner*, 217 Wis.2d 392, 401 n.5, 576 N.W.2d 912 (1998). The Fifth Amendment prohibition of double jeopardy is incorporated to the states through the Fourteenth Amendment. *Benton v. Maryland*, 359 U.S. 784, 794 (1969).

"The double jeopardy clause embodies ... protection against multiple punishments for the same offense. *Id., citing State v. Sauceda*, 168 Wis.2d 486, 492, 485 N.W.2d 1 (1992) *and North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The double jeopardy clause embodies three protections: it forbids a second prosecution after acquittal, a second prosecution after conviction, and multiple punishments for the same offense. *Lechner* at 401, citing *Pearce*, 395 U.S. at 717.

> the crime it will be able upon the trial to prove beyond a reasonable doubt.

Wisconsin Legislative Council, V Judiciary Committee Report on the Criminal Code (Feb. 1953), at 53.

The focus of the statute was which crime could be proven beyond a reasonable doubt. This comment is evidence (a) that the focus of the legislature was not on limiting the statute to chapter 940, and (b) that the legislature targets the undesirability of multiple convictions. *Cf. State v. Vassos,* 218 Wis.2d 330, 338, 579 N.W.2d 35 (1998) (Section 939.66(2m) prohibits multiple battery convictions for included crimes, not subsequent prosecutions after acquittal).

The legislative history thus shows that Wis. Stat. §939.66(2) was part of a balancing act. On the one hand, this section gave the state rights by permitting conviction of a lesser-included homicide offense where the evidence was insufficient to prove the greater. But, on the other hand, the intent of the drafters is clear that this section was meant to extend the protection of the double jeopardy rule for defendants.

It should be emphasized that while concepts have been

> redefined and occasionally changed, a conscientious effort was made to protect the rights of both the defendant and the state. Technical points which make it difficult to bring to justice a person who has committed a crime have been eliminated ... On the other hand, the defendant's rights have been extended in numerous cases where it was theoretically sound and practically possible to do so. For example, the protection of the double jeopardy rule was extended ...

Introduction and General Comment to 1951 Senate Bill 784 at ii.

The commentary to the predecessor to § 939.65, which permits *charging* under multiple statutes for a single act, explained the purpose of the section as follows:

> This section makes clear that there may be prosecution under more than one section for the same conduct. For example, a person may be prosecuted under a general section even though there is a specific section which covers the conduct, or he may be prosecuted under both; a person may be prosecuted for an attempt rather than the completed crime; a person may be prosecuted for a misdemeanor even though some other section may make his conduct a felony.
>
> This section states a rule of pleading, and does not purport to state the limitations on multiple sentences for the same act or the limitations on multiple convictions and subsequent prosecutions for the same act which may be

> included in the constitutional double jeopardy rule. For some of the limitations which have been incorporated in the code, see sections 339.66, 339.71 and 339.72.

Wisconsin Legislative Council, V Judiciary Committee Report on the Criminal Code (Feb. 1953), at 52.

It is thus obvious that it was the intent of the drafters of the legislation that § 939.65 be limited by, *inter alia,* § 939.66, and that double jeopardy protection be expanded rather than contracted! In other words, conviction is not permitted for a *lesser* offense which § 939.66(2) prohibits. Section 939.66(2) might not prohibit multiple *charges*, but it certainly prohibits multiple *convictions*.

In his article, "The Criminal Code, Thumbnail History of the Code," William Platz, prime architect of the criminal code, discussed § 939.66 briefly, without specifically mentioning subsection (2): "The familiar principle that there may be a conviction of an included crime if the crime charged has not been fully proved to the satisfaction of the court or jury in preserved in section 939." William A. Platz, "The Criminal Code, Thumbnail History of the Code," 1956 Wis. L. Rev. 350, 369. Platz and the other drafters meant to limit the numbers of

convictions allowable for each act.

Further, the nature of the proscribed conduct is the same for both the reckless homicide and the contributing homicide — in each case, conduct causing death to the victim. In terms of "physical acts," *see Davison* 2003 WI 89 at ¶70, the offensive conduct for each crime was the same, that is, administering Oxycodone to the victim, causing her to die.

Regarding the final factor, appropriateness of multiple punishments, multiple punishments for the conduct are not appropriate, because the harm caused by reckless homicide and the harm caused by a contributing to the delinquency of a child homicide are not significantly different to the extent that the state is justified to charge them as separate offenses. In this case, the proof of an act generating the harm is the same, and the evil that each statute targeted was identical. Certainly a chief goal of the criminal code is to protect people against being killed illegally. Society hopes that statutes prohibiting homicide will deter people from causing the death of another. The main interest in these statutes is protection of human life.

The court of appeals found that different interests were protected by contributing to the delinquency of a child causing

death and by first degree reckless homicide. *Patterson,* 2009 WI App 161 at ¶18. That is (a) first degree reckless homicide (at least the "Len Bias" version) targets drug delivery and, (b) contributing to the delinquency of a child causing death targets protection of children and preventing juvenile delinquency (evidenced *inter alia* by the legislature's placement of the statute in Chapter 948, covering crimes against children). *Id.* It seems to Patterson that the raising the level of offense in proportion to the harm done to a child is consistent with a determination that the statute prohibits, *inter alia*, homicide of children. *See also* Wis. Stat. § 948.21(d) (making child neglect a class D felony if death is a consequence of the neglect.)

While there is arguably an additional deterrence in convicting Patterson under two different homicide statutes, that additional deterrence does not justify the dual convictions and consecutive sentences because § 939.66(2) was not created for the sole benefit of the state. It was created in part to assist the state by permitting the state to have juries enter verdicts of guilt for lesser homicide offenses where the evidence supports conviction on the lesser but not on the greater. As such, the rights of the state are adequately protected in such situations,

preventing complete acquittal where, for example, the evidence might fall short of Wis. Stat. § 940.01, first degree intentional homicide but satisfy all the elements of Wis. Stat. § 940.08, homicide by negligent handling of a weapon. That way the state does not come up empty if evidence at trial develops differently than the state hopes. But the drafters of the criminal code intended Wis. Stat. § 939.66(2) as a double-edged sword: it was meant also to enhance the double jeopardy protections of defendants. The Court must acknowledge this intent.

To conclude, the convictions for contributing to the delinquency of a child and first degree reckless homicide are multiplicitous. Because the charges are "types of criminal homicides" and not "types of batteries," *Lechner,* and not *Davison* controls this situation.

II. A Defendant Cannot "Contribute to the Delinquency" Of a Seventeen-year-old, Because Seventeen-year-olds Cannot Be Adjudicated or Even Investigated for Being Delinquent.

Resolution of this issue requires the Court to interpret a statute, which it does *de novo*. *Hansen*, 2001 WI 53 at ¶9. Contributing to the delinquency of a minor resulting in death, in violation of Wis. Stat. § 948.40(1), contains three elements that the state must prove: First, the state must prove that the victim was a "child."[8] Second, the state must prove that the defendant intentionally encouraged or contributed to the delinquency of the victim. Third, the state must prove that the victim's death was a consequence of the defendant's intentionally encouraging or contributing to the delinquency of the victim.

The contributing to the delinquency of a child statute and Wis. Stat. § 938.02(3m), (10m) are to be construed *in pari materia*. *See State v. Jung*, 55 Wis.2d 714, 720, 201 N.W.2d 58 (1972). ("[S]uch statute sets forth the age of children, describes

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[8]According to Wisconsin Jury Instruction 2170A, this first element requires proof that the victim was under 18. However, as discussed herein, this stock jury instruction (which was last revised in 2009) is an incorrect statement of the law.

a delinquent child and makes it a criminal offense to intentionally encourage or contribute to the delinquency of a child.").

Construing statutes together *in pari materia* leads to the conclusion that there can be no seventeen-year-old victim of the crime of contributing to the delinquency of a child. Here are the relevant statutory definitions:

"Delinquent" is defined under Wis. Stat. § 938.02(3m) as a *juvenile* who is 10 years of age or older who has violated any state or federal criminal law.

"Juvenile" is defined under Wis. Stat. § 938.02(10m) as a person under the age of 18 *except* "juvenile" does not include a person over 17 for the purpose of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law.

Viewed in the light most favorable to the state, the evidence adduced at trial shows that Patrick Patterson gave drugs to the victim, Tanya, date of birth May 13, 1985 on May 2, 2003. The victim was thus 17 years old on the day in question, 11 days shy of her eighteenth birthday. Because the victim was 17 years old, she was not a "juvenile" under Wis.

Stat. §938.02(10m). Therefore, the state could not have possibly investigated or prosecuted Tanya under Chapter 938. Hypothetically, had the victim survived and suffered prosecution, she would have to have been prosecuted as an adult under Chapters 967 *et seq*.

Because Tanya was not a juvenile under Wis. Stat. § 938.02(3m) and (10m), it is a matter of legal impossibility that Patrick Patterson's actions or failure to take action would have the natural and probable consequences to cause Tanya to become delinquent.

In *State ex rel. Schulter v. Roraff*, 39 Wis.2d 342, 353-354, 159 N.W.2d 25 (1968), the Court constructed the contributing statute (then § 947.15) and the statutes defining delinquency *in pari materia,* concluding that a seventeen-year-old boy was a victim of this crime, because *at the time, the statutes defining delinquency established that a seventeen-year-old was potentially a juvenile delinquent. See* Wis. Stat. §48.02(3) (as created by chapter 575, laws of 1955). This definition has taken various transformations over the years. For example, the 1993-1994 Wisconsin statutes contain this definition of "delinquent": "'Delinquent' means [with

exceptions that are not relevant here] a child who is less than 18 years of age and 12 years of age or older who has violated any state or federal criminal law..." Wis. Stat. §48.02(3m) (1993-1994). However, once the legislature changed the definition of a delinquent child to exclude all seventeen-year-olds, it limited the age of potential delinquents to those under 17.

In denying Patterson relief on appeal, the court of appeals discussed whether it was appropriate to equate "child" with "juvenile" for the purpose of this analysis, and seemed to conclude that the two terms are interchangeable in this context. *Patterson,* 2009 WI App 161 at ¶29 n. 12. *See Jung*, 55 Wis.2d at 720.

The court of appeals held that the legislature had only excluded seventeen-year-olds from the definition of delinquency for the purpose of prosecuting or investigating the seventeen-year-olds themselves. *Patterson,* 2009 WI App 161 at ¶29. According to the court of appeals, the legislature had changed nothing for the purpose of prosecuting defendants charged with doing acts to contribute to legal offenses by seventeen-year-olds.

However, the legislature did specifically choose to make

an exception for children under 10: "This subsection includes intentionally encouraging or contributing to an act by a child under the age of 10 which would be a delinquent act if committed by a child 10 years of age or older." Wis. Stat. § 948.40(1). If the legislature had wanted to make an exception for 17 year olds, it could have stated so explicitly, and it did not.

The court of appeals did not find that the statutes involved here were ambiguous. Assuming, *arguendo,* that Wis. Stat. § 938.02(10m) is ambiguous, if "juvenile" does *not* include a person over 17 for the purpose of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law, could the statute be narrowly read to mean that this age limit only applies to government actions where the juvenile is the *target* of the investigation or prosecution? If this statutory scheme is ambiguous, then the rule of lenity dictates that the Court should interpret the statutes to Patterson's favor. *See State v. Jackson,* 2004 WI 29, ¶41, 270 Wis.2d 113, 676 N.W.2d 972; *United States v. Santos,* 128 S. Ct. 2020, 2028 (2008) (plurality opinion) (United States Supreme Court interprets ambiguous criminal statutes in favor of defendants and not prosecutors).

The history of the statute lends strength to Patterson's argument. Formerly, a juvenile action with a juvenile respondent seems to have been a condition precedent to charges of contributing to the delinquency of a child. An early version is located in the 1949 statutes, in Chapter 48, Child Protection and Reformation:

> Whenever in the hearing of a case of a child alleged to be delinquent, neglected or dependent, it shall appear that an adult has been guilty of contributing to, encouraging or tending to cause by any act or ommission, the delinquency, neglect or dependency of the child, the court shall have the power to make orders with respect to the conduct of such adult in his relationship with the said child as provided in section 48.08

Wis. Stat. § 48.01(2)(c) (1949).

Wisconsin Stat. § 48.45 (1) (1955) has similar language. The immediate predecessor to the present statute, § 947.15 (1957) was repealed and renumbered § 948.40 by 1987 Act 332 § 53 (effective 1989).

Patterson's interpretation of the statute and the meaning of its legislative history finds support in two Wisconsin Attorney General opinions. *See* 66 Wis. Op. Atty. Gen. 18 (January 28, 1977), 70 Wis. Op. Atty. Gen. 277 (December 21,

1981).

In the 1981 opinion, the Attorney General stated that an adult who furnished alcohol to a minor could not be charged with contributing to the delinquency of a child under the predecessor statute, Wis. Stat. § 947.15 (1979-80). The rationale depended in part on the fact that the juvenile court had "exclusive jurisdiction" over juveniles who violate state or federal criminal law, with the exception of children who were waived into adult court or those charged with certain traffic or boating crimes, civil law or ordinance violations. The Attorney General stated that the contributing to the delinquency of a child statute had to be strictly construed, and since statutes at the time did not permit a delinquency finding based on a civil charge related to the consumption or possession of alcohol, the juvenile court lacked jurisdiction to adjudicate such juvenile offender delinquent. Because the juvenile lacked the ability to make such judgment, the adult furnishing the alcohol was not guilty of contributing to the delinquency of a child. Id.

Similarly, in the 1977 opinion, the Attorney General stated that harboring or assisting a juvenile runaway or truant could not be charged as contributing to the delinquency of a

child either, under the same logic, that the legislature had in 1971 removed truancy and uncontrollability from the definition of delinquency.

This logic applies to the case at bar. The juvenile court would lack jurisdiction over any person who is 17 years of age at the time of the commission of the offense. Tanya S. was 17 at the time of the offense. The juvenile court would have lacked jurisdiction over her. Therefore, Patterson cannot stand convicted of contributing to her delinquency.

III. The "Len Bias" Jury Instruction Violates Due Process.

Wisconsin JI — Crim 1021 (2006) permits conviction of first degree reckless homicide if the jury determines that the deceased used the substance "alleged to have been delivered by the defendant" and died as a result. There is at least a reasonable likelihood that the jury understood the instruction to allow for conviction on less than proof beyond a reasonable doubt, that is, based merely on whether an allegation was made. The court of appeals disagreed with Patterson on this point. *Patterson,* 2009 WI App 161 at ¶¶30-32.

Instructing the jury in this way had a substantial and injurious effect, vitiating the jury's entire finding of guilt. *See Neder v. United States,* 527 U.S. 1, 11 (1999). In *Hedgepeth v. Pulido*, 555 U.S. ___, 129 S.Ct. 530, 532 (2008), the United States Supreme Court recognized the continuing validity of the principle that an instructional error that categorically vitiates all the jury's findings is still a structural error, although the Court ruled that an instruction giving alternative theories of guilt, including one invalid theory, was not a structural error and thus subject to harmless error analysis. The instruction in this case indeed poses such a structural error because the jury was permitted to find guilt on reckless homicide based on their finding that an allegation had been made. In the case at bar, the instruction given was tantamount to one that excluded an essential element of the offense. A defendant's constitutional right to a jury verdict extends to the requirement that a jury specifically find that he is guilty of each essential element of the crime charged. *See California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring). The Court should not try to connect the dots through a theory that the jury must have actually been convinced beyond a reasonable doubt that Patterson delivered

the substance that caused the death of the deceased. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury's finding of guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The instruction to the jury was defective because it permitted conviction if the jury found that the victim used the substance "alleged to have been delivered by the defendant" and died as a result. (Rec. 126:254). The circuit court informed the jury that the elements of Wis. Stat. §940.02(2)(a), first degree reckless homicide, were (1) that the defendant delivered a substance, (2) that the substance was Oxycodone, (3) that the defendant "thought" or believed the substance was Oxycodone, (4) that the victim used the substance "alleged to have been delivered by the defendant" and died as a result. *Compare* Wis. JI — Crim 1021 (2006). The instruction contends that conviction is appropriate if the victim used the substance "*alleged* to have been delivered by the defendant." This language violates principles of fair trial, due process and fundamental fairness because it permits conviction based on an

allegation rather than proof, in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, §§ 5, 7, 8(1) of the Wisconsin Constitution. *See In re Winship*, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required for conviction of criminal offense). The result of this instruction is to relieve the prosecution of the burden of proving that the victim's death was caused by the drug that was actually supplied by the defendant.

IV. The Prosecutor Engaged in Prosecutorial Misconduct by "Refreshing the Recollection" of Witnesses with the Testimony and Statements of Other Witnesses.

The prosecutor is entitled to deliver hard blows, but not foul blows. *Berger v. United States*, 295 U.S. 78, 88 (1935). It *Berger*, the Supreme Court found that the prosecutor delivered a foul blow during closing arguments by arguing that the defendant had never denied committing the offense until he took the witness stand, when in fact, police reports showed that the defendant did in fact immediately deny the commission of the crime.

In this case, the prosecutor engaged in a course of

conduct that consisted of many foul blows, acts that any reasonable prosecutor should have known were improper.

The prosecutor impeached witnesses, or "refreshed their recollection" with another witness's testimony or statement. Trial counsel did not make a contemporaneous objection to this style of questioning at first. On the fifth day of trial, he expressed his frustration on the record, saying, "... I generally don't object much. And the reason is I believe that by objecting you're allowing the jury to come up with a belief that trying to prevent them from getting at the truth, so I limit my objections. However, I found it difficult in this case doing that because of the fact that her questions are oftentimes improper questions. For example, we've heard a litany of times where she has said if ... a witness testified contrary to that, do you have an opinion, blah, blah." (Rec. 121:6).

Trial counsel's frustration was justified. For example, Janice Tappa testified that in an earlier instance (where Patterson was clearly not involved at all) Tanya had been drugged and said she had taken a pill. The prosecutor asked Tappa, "What if Calvin had said that she [Tanya] told him that she took two pills, would that help to refresh your recollection?"

to which Tappa replied, aptly, "That would be Calvin's statement; and I'm sorry, but I don't remember." (Rec. 121:103).

In examining Patterson's brother, Daniel Perez, the prosecutor, attempting to impeach Perez's version of events, asked him, "What if I told you that Loretta's given statements to law enforcement —" to which trial counsel objected, and the circuit court sustained the objection. (Rec. 118:237). Undeterred, the prosecutor ventured, "So if all other witnesses said that at 11:00 [o'clock] your mom was already home ... that would be wrong." (Id.). This was also met with a *Haseltine* [9] objection, and the circuit court, without directly ruling, asked the prosecutor to rephrase the question. (Rec. 118:238).

The prosecutor asked Investigator Strompolis, "So, if Loretta Patterson had testified that he [Patterson] kept his most recent Oxycontin [a brand name of Oxycodone] 40-milligram prescription in his pants pocket, would this be the first time you heard that?" (Rec. 122:64). The defense objection was

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[9]No witness is permitted to testify that another witness is telling the truth. *See State v. Haseltine,* 120 Wis.2d 92, 95-96, 352 N.W.2d 673 (Ct. App. 1984).

sustained.

The defense moved for a mistrial, complaining that these questions attempted to shift the burden to the defendant. (Rec. 126:122). The trial court denied that motion. Typically a motion for mistrial is directed to the sound discretion of the trial court. *See State v. Ross*, 2003 WI App 27, ¶47, 260 Wis.2d 291, 659 N.W.2d 122. The Court should find that the prosecutor's continuing conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). There was a manifest necessity for the termination of the trial at the time of the motion, and as such the denial of the motion was not a proper use of judicial discretion. Although not all such errors warrant a mistrial, in this case, there should have been a mistrial due to the prosecutor's repeated improper questioning of witnesses, even after the circuit court instructed the prosecutor not to ask questions that "shifted the burden" (and simultaneously admonished defense counsel to make timely objections). (Rec. 126:18-19).

The prosecutor justified her course of behavior by saying, "I can also ask hypothetical questions which defense counsel

must not be aware of, so when a witness is on the stand testifying and I explained, well, if another witness said this, would this refresh your recollection or would your story be — your statement still be the same? That is not asking them if the other individual lied, which would be an improper question, so a hypothetical question is proper." (Rec. 121:10).

Wisconsin Stat. (Rule) § 906.11 does not directly discuss such hypotheticals, but instead simply states that the judge shall exercise reasonable control over the mode and manner of interrogating witnesses. An expert witness, on the other hand, may base an opinion on a hypothetical question, and an expert may base an opinion on facts perceived by others. *See Kolpin v. Pioneer Power & Light*, 162 Wis.2d 1, 36-37, 469 N.W.2d 595 (1991).

As for the prosecutor's claim that she was "refreshing recollection," although almost anything can be used to refresh recollection, the question must be something that in good faith the questioner believes will refresh actual recollection, and of course, there must be a showing that the witness does not remember something (as opposed to a witness's saying something that conflicts with another witness's statement that

the state prefers). *See* Wis. Stat. (Rule) § 906.11 Another person's statement or testimony does not refresh recollection at all. It is a form of impeachment, an attempt to persuade the witness to change her testimony so as either to conform with the other witness, or not to look like a liar in front of the jury.

It is true that any kind of stimulus, "a song, or a face, or a newspaper item," may produce the "flash of recognition, the feeling that 'it all comes back to me now.'" *See* McCormick on Evidence § 9 at 16 (1954). However, how in good faith could a lawyer expect that another witness's testimony or statement which differs from the witness's statement would refresh recollection?

The one instance that the court of appeals found amounted to a *Haseltine* violation occurred when the prosecutor asked her investigator"Do you believe [that Misty Hale] was being truthful when she gave that information to you, or did you stop the tape again?" (Rec. 122:55). *Patterson,* 2009 WI App 161 at ¶37. The court ruled such violation harmless.

It might have been only one such instance, but in the context of the other acts of improper "refreshing of recollection," efforts to get witnesses to change testimony in the

face of other witnesses' version of events, the cumulative effect is not harmless.

CONCLUSION

For the reasons set forth above, Patterson respectfully requests that the Court reverse the decisions below.

Respectfully submitted this 16th day of April, 2010.

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ATTORNEY FOR DEFENDANT-APPELLANT-PETITIONER

SECTION 809.19 (2) CERTIFICATE

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. Per order of the Wisconsin Supreme Court dated March 17, 2010, the appendix contains a copy of the decision of the Wisconsin Court of Appeals.

This appeal was not taken from a circuit court order or judgment entered in a judicial review of an administrative decision, therefore the appendix contains no findings of fact and conclusions of law, or final decision of an administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with

appropriate references to the record.

Signed,

/s/ David R. Karpe

David R. Karpe

RULE 809.19(8) CERTIFICATE

I certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) Stats., for a brief produced with a proportional serif font. The brief is 10,981 words long.

Signed,

/s/ David R. Karpe
David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

/s/ David R. Karpe
David R. Karpe

APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1968-CR

Cir. Ct. No. 2004CF31

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK R. PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Juneau County: CHARLES A. POLLEX, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. Patrick Patterson gave a controlled substance to seventeen-year-old Tanya S., and she died as a result. Among other crimes, Patterson was convicted of first-degree reckless homicide by delivery of a controlled substance, under WIS. STAT. § 940.02(2)(a), and contributing to the

delinquency of a child with death as a consequence, under WIS. STAT. § 948.40(4)(a).[1] Patterson argues that these two charges are multiplicitous and that the evidence was insufficient to convict him for contributing to the delinquency of Tanya S. because it is legally impossible to contribute to the delinquency of someone who is seventeen years old or older. We reject these arguments and others that Patterson makes. We affirm the judgment of conviction and the order denying Patterson's motion for postconviction relief.

Background

¶2 Patterson gave or sold Oxycodone, a controlled narcotic, to multiple individuals. Important here, he gave Oxycodone to Tanya S. at a time when she was seventeen years old, and she died as a result of ingesting the drug.

¶3 The State charged Patterson with first-degree reckless homicide by delivery of a controlled substance, contributing to the delinquency of a child with death as a consequence, and four counts of delivering a schedule I or II narcotic, all as a repeater. A jury trial was held. At the close of evidence, Patterson moved for a mistrial based on an allegation that the prosecutor presented testimony from witnesses as to whether other witnesses were telling the truth, commonly referred to as a ***Haseltine*** violation.[2] The circuit court denied the motion. The jury found Patterson guilty of all of the charges except for one of the delivery counts. We reference additional facts as needed below.

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

Discussion

1. Multiplicity

¶4 Patterson argues that two of his convictions are multiplicitous: first-degree reckless homicide by delivery of a controlled substance and contributing to the delinquency of a child with death as a consequence. We disagree.

¶5 Our framework for analysis was succinctly summarized in ***State v. Eaglefeathers***, 2009 WI App 2, 316 Wis. 2d 152, 762 N.W.2d 690 (Ct. App. 2008), *review denied*, 2009 WI 34, 316 Wis. 2d 717, 765 N.W.2d 578 (No. 2007AP845-CR):

> [M]ultiplicity claims are examined under a two-part test. The first part asks whether the offenses are identical in law and in fact. The second part examines whether the legislature intended to authorize multiple punishments. If it is determined under the first part of the test that the charged offenses are identical in both law and fact, a presumption arises under the second part of the test that the legislature did not intend to authorize cumulative punishments. Conversely, if the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments.

Id., ¶7 (citations omitted). Whether charges are multiplicitous is a question of law subject to *de novo* review. ***State v. Schaefer***, 2003 WI App 164, ¶43, 266 Wis. 2d 719, 668 N.W.2d 760.

¶6 Patterson correctly concedes that the two offenses are not identical in law. As is pertinent here, a conviction of first-degree reckless homicide by delivery of a controlled substance requires proof that the defendant caused the death of a person by delivering a controlled substance; it applies regardless

whether a child victim is involved. WIS. STAT. § 940.02(2)(a).[3] In contrast, a conviction for contributing to the delinquency of a child with death as a consequence need not involve controlled substances and applies only when there is a child involved. WIS. STAT. § 948.40(4)(a).[4]

¶7 Accordingly, we must presume that the legislature intended cumulative punishments. Patterson has the burden to show a clear legislative intent to the contrary. ***Eaglefeathers***, 316 Wis. 2d 152, ¶15.

---

[3] The pattern jury instruction defines first-degree reckless homicide by delivery of a controlled substance as follows:

> 1. The defendant delivered a substance....
>
> 2. The substance was (name controlled substance).
>
> 3. The defendant knew or believed that the substance was [(name controlled substance)] [a controlled substance. A controlled substance is a substance the delivery of which is prohibited by law.] ...
>
> 4. (Name of victim) used the substance alleged to have been delivered by the defendant and died as a result of that use.

WIS JI—CRIMINAL 1021 (footnotes omitted).

[4] The pattern jury instruction defines contributing to the delinquency of a child with death as a consequence as follows:

> 1. (Name of child) was under the age of 18 years....
>
> 2. The defendant intentionally encouraged or contributed to the delinquency of (name of child).
>
> 3. Death of (name of child) was a consequence of intentionally encouraging or contributing to the delinquency of (name of child).

WIS JI—CRIMINAL 2170A (footnote omitted).

¶8 We determine legislative intent for purposes of a multiplicity claim using four factors: (1) statutory language; (2) legislative history and context; (3) the nature of the conduct involved; and (4) the appropriateness of multiple punishments. ***Id.***

¶9 The legislative intent arguments that Patterson makes go primarily to the first and second factors. However, Patterson's arguments based on these two factors have, in effect, already been resolved against him in ***State v. Davison***, 2003 WI 89, 263 Wis. 2d 145, 666 N.W.2d 1. Like the defendant in ***Davison***, Patterson argues that WIS. STAT. § 939.66 shows a clear legislative intent not to allow punishment for both of his crimes.

¶10 Comparable subsections of the same statute are at the heart of both Patterson's multiplicity challenge and the challenge made in ***Davison***. WISCONSIN STAT. § 939.66 provides, in pertinent part:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> ....
>
> **(2)** A crime which is a less serious type of criminal homicide than the one charged.
>
> **(2m)** A crime which is a less serious or equally serious type of battery than the one charged.

In ***Davison***, subsection (2m), covering battery crimes, was at issue. Here, Patterson points to subsection (2), covering homicide crimes.

¶11 There are two differences between the subsections, but neither benefits Patterson. First, subsection (2) covers homicides, and subsection (2m) covers batteries. Second, subsection (2) covers only "less serious" types of the

crime, whereas subsection (2m) covers "less serious or equally serious" types of the crime. Patterson does not suggest any reason why either of these differences matters for purposes of determining whether the legislature intended WIS. STAT. § 939.66(2) or (2m) to preclude punishment for two homicide crimes or two battery crimes based on the same conduct.[5]

¶12 Patterson argues that WIS. STAT. § 939.66(2) shows a clear legislative intent not to allow punishment for both reckless homicide and contributing to the delinquency of a child with death as a consequence. However, this argument, albeit in the context of § 939.66(2m), was rejected in ***Davison***. ***Davison*** explained that the statute is ambiguous and the statute's legislative history does not show a legislative intent to prevent cumulative punishments. ***Davison***, 263 Wis. 2d 145, ¶¶74, 90. Instead, the ***Davison*** court concluded that § 939.66(2m) can reasonably be interpreted as allowing two convictions for battery as long as two battery crimes have been *charged*. *See* ***Davison***, 263 Wis. 2d 145, ¶¶65-67. The reasons why the ***Davison*** court reached these conclusions need not be repeated here. Rather, what matters is that the ***Davison*** court effectively rejected the proposition that § 939.66(2) shows a clear legislative intent not to allow punishment for both a charged criminal homicide and a charged less serious type of criminal homicide.

[5] The State argues, as it did in the circuit court, that Patterson's reliance on WIS. STAT. § 939.66(2) fails because the term "homicide" in § 939.66(2) applies only to homicide crimes listed in WIS. STAT. ch. 940 and does not include the crime of contributing to the delinquency of a child with death as a consequence (WIS. STAT. § 948.40(4)(a)). The circuit court disagreed, concluding that "[n]o statutory or case law support for this position has been presented." We need not reach the State's argument. Rather, we assume, without deciding, that "homicide" in § 939.66(2) includes contributing to the delinquency of a child with death as a consequence.

¶13 Patterson argues that the legislative history of WIS. STAT. § 939.65 supports his interpretation of WIS. STAT. § 939.66(2).[6] He points to a comment to § 939.65, cited in ***Davison***, which states:

> "This section states a rule of pleading, and does not purport to state the limitations on multiple sentences for the same act or the limitations on multiple convictions and subsequent prosecutions for the same act which may be included in the constitutional double jeopardy rule. *For some of the limitations which have been incorporated in the code, see sections 339.66* [now 939.66], 339.71 [now 939.71] and 339.72 [now 939.72]."

See ***Davison***, 263 Wis. 2d 145, ¶51 n.19 (citation omitted; emphasis added). Patterson argues that this comment makes it "obvious" that the legislature intended § 939.66 as a limit on § 939.65.

¶14 Patterson's reliance on this comment fails for at least two reasons. First, there is no dispute that WIS. STAT. § 939.66 is a limitation on WIS. STAT. § 939.65. The question is what kind of limit. Second, the ***Davison*** court plainly was aware of the comment, yet apparently did not find it evidence that the legislature intended § 939.66(2m) to be a blanket prohibition on multiple battery convictions for the same conduct. The import of the comment can be no different for purposes of § 939.66(2) and multiple homicide convictions.

---

[6] WISCONSIN STAT. § 939.65 provides:

> **Prosecution under more than one section permitted.** Except as provided in s. 948.025(3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.

¶15 Patterson also relies on ***State v. Lechner***, 217 Wis. 2d 392, 576 N.W.2d 912 (1998).[7] Our response is twofold. First, the ***Davison*** court acknowledged the ***Lechner*** language that arguably supports Patterson and, in doing so, implicitly rejected the proposition that the ***Lechner*** interpretation of WIS. STAT. § 939.66 was the only reasonable one. *See* ***Davison***, 263 Wis. 2d 145, ¶¶61-67. Second, to the extent ***Lechner*** and ***Davison*** are inconsistent, we are bound to follow the more recent ***Davison*** decision. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) ("When decisions of our supreme court appear to be inconsistent, we follow the court's most recent pronouncement.").

¶16 We now turn our attention to Patterson's arguments based on the third and fourth legislative intent factors, the nature of the conduct involved and the appropriateness of multiple punishments.

¶17 Patterson argues that the nature of the proscribed conduct is the same for both crimes because, "in each case, the proscribed conduct was giving drugs to the victim that caused her death." This argument misses the mark. The fact that the underlying conduct is the same is not, by itself, enough to show that the

---

[7] Specifically, the following language in ***State v. Lechner***, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), is most pertinent:

> [T]he legislature, by enacting Wis. Stat. § 939.66(2), has specifically addressed the issue of multiple homicide convictions for a criminal act causing a single death. Where a single act of a defendant forms the basis for a crime punishable under more than one statutory provision, Wis. Stat. § 939.66(2) provides that a defendant may not be convicted for two criminal homicides if one is "a less serious type of criminal homicide."

Id. at 407-08.

legislature intended only one punishment. All it shows here is that the two offenses are identical in fact, a point that is not in dispute.

¶18 Furthermore, the first-degree reckless homicide charge in this case falls under WIS. STAT. § 940.02(2)(a), a special category of first-degree reckless homicide that targets a particular situation, that is, death caused by manufacturing, distributing, or delivering a controlled substance. As we have indicated, that statute applies regardless whether a child is involved. WISCONSIN STAT. § 948.40(4)(a), in contrast, need not involve controlled substances and applies only when there is a child involved.[8] Although § 948.40(4)(a) requires death as a consequence, it focuses on the protection of children and the prevention of their delinquency. This is evidenced by, among other things, the legislature's decision to include it in the chapter of the Wisconsin Statutes covering crimes against children (WIS. STAT. ch. 948), not in the chapter covering crimes against life and bodily security (WIS. STAT. ch. 940).

¶19 In short, WIS. STAT. § 940.02(2)(a) and WIS. STAT. § 948.40(4)(a) address two different categories of proscribed conduct that differ markedly in their essential nature. That Patterson's particular conduct happens to fall within a relatively limited area covered by both statutes does not show that the legislature intended only one punishment.

[8] The State argues that the death required under WIS. STAT. § 948.40(4)(a) need not be that of the child. For example, a defendant might provide controlled substances to a child who then drives while under the influence of those substances and causes an accident resulting in the death of a third party. We need not address the State's argument in order to conclude that the statute applies only when there is a child involved. Regardless of whose death results, the statute requires the involvement of a child because it requires the defendant to contribute to the delinquency of a child. Thus, the State's argument is a question for another day.

¶20 For essentially the same reasons, we are not persuaded that punishment for both crimes would be inappropriate. *See* ***Davison***, 263 Wis. 2d 145, ¶98 (stating that "[o]ften ..., consideration of the appropriateness of multiple punishments is informed by our conclusions regarding the nature of the proscribed conduct," and determining that there was "no need to repeat extensively the analysis from the previous category"). Patterson argues that multiple punishments are not appropriate because the harm caused by the two crimes "do[es] not differ significantly" and because "[t]he act generating the harm is the same." This is simply another way of stating arguments that we have already rejected.

¶21 As we have seen, Patterson's arguments are for the most part foreclosed by ***Davison***. To the extent he asserts that there is something different about this case because of the specific crimes involved, he has cited nothing to support that assertion. Thus, we reject Patterson's multiplicity challenge.

2. Sufficiency Of The Evidence

¶22 Patterson makes two sufficiency of the evidence claims, and we address each separately.

a. Evidence That Tanya S. Possessed A Controlled Substance

¶23 Patterson argues there was insufficient evidence that he contributed to the delinquency of Tanya S. because the alleged delinquency was that Tanya S. possessed a controlled substance, Oxycodone, and the evidence, according to Patterson, does not show that Tanya S. "possessed" the drug. The State concedes, at least implicitly, that the prosecution's theory in this case required a showing that Tanya S. possessed Oxycodone within the meaning of the laws prohibiting drug possession. Accordingly, our focus is on whether there was sufficient evidence to

support a finding that Tanya S. possessed Oxycodone as that term is used in drug possession law.

¶24 "[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Additionally, we consider the reasonable inferences the jury could draw from the evidence presented. ***State v. Toliver***, 104 Wis. 2d 289, 293, 311 N.W.2d 591 (1981).

¶25 There is no dispute that testing revealed that Tanya S. had Oxycodone in her system at the relevant time. However, as Patterson argues, the presence of drugs in someone's system, standing alone, is not sufficient evidence to support a conviction for possession of a controlled substance. *See* ***State v. Griffin***, 220 Wis. 2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). "Possession" in this context requires evidence that the individual had a substance in his or her control. *See* ***id.*** at 381 (citing WIS JI—CRIMINAL 920). Still, as we explained in ***Griffin***, "'when combined with other corroborating evidence of sufficient probative value, evidence of [ingestion] can be sufficient to prove possession.'" ***Griffin***, 220 Wis. 2d at 381 (citation omitted). That is the situation here.

¶26 In addition to evidence that Tanya S.'s system contained Oxycodone, the State directs us to the following evidence regarding Tanya S.'s handling or ingestion of Oxycodone during the time leading up to her death:

- One witness testified that she saw Patterson give what she thought to be Oxycodone pills to Tanya S. three times. Patterson would put the pill in Tanya S.'s mouth, and Tanya S. would chew or swallow it.

- A second witness testified that she saw Patterson give similarly described pills to Tanya S. three times, at least once putting the pill in Tanya S.'s mouth.
- A third witness testified that he saw Patterson offer a pill or pills to Tanya S.
- A fourth witness testified that he saw Patterson encourage Tanya S. to snort a line of OxyContin, and that Tanya S. snorted it.
- A fifth witness testified that she saw Patterson give four Oxycodone pills to Tanya S. and tell Tanya S. to chew them up, which Tanya S. did.

This evidence is sufficient to support a finding that Tanya S. had the requisite control over Oxycodone.[9]

b. Contributing To The Delinquency Of A Seventeen-Year-Old

¶27 Patterson's second sufficiency of the evidence argument has implications beyond the particular facts here because it is directed at whether a recurrent situation is covered by WIS. STAT. § 948.40. Patterson argues that, even assuming he gave Tanya S. Oxycodone, he could not have contributed to the delinquency of Tanya S. because she was seventeen years old at the time. Patterson argues that it is legally impossible to contribute to the delinquency of a person who is seventeen years old or older. Therefore, according to Patterson, the evidence was insufficient because there was no evidence that he contributed to the delinquency of someone who was younger than seventeen.

[9] Patterson makes a one-paragraph argument that, even if Tanya S. did possess drugs, she could have asserted a defense of coercion or necessity based on evidence that Patterson forced her to take the drugs. This argument is inadequately developed and, therefore, we address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

¶28 Patterson's sufficiency argument is based on the following statutory interpretation argument:

(1) The crime of contributing to the delinquency of a child requires proof that a defendant encouraged or contributed to the "delinquency" of a named person.[10]

(2) WISCONSIN STAT. § 938.02 defines "delinquent" as a "juvenile who is 10 years of age or older" and "less than 18 years of age," but there is an exception for seventeen-year-olds.[11]

(3) The exception provides that "'juvenile' does not include a person who has attained 17 years of age" if that person is "alleged to have violated [a law]." WIS. STAT. § 938.02(10m).

(4) If the named person was seventeen at the time, the person's law violation (here illegal drug possession) is not cause to categorize the person as "delinquent" within the meaning of § 938.02(3m).

(5) It follows that it is impossible to contribute to the delinquency of a person who is seventeen years old or older because such a person is too old to be categorized as a delinquent.

---

[10] WISCONSIN STAT. § 948.40(1), which forms the basis for Patterson's conviction under § 948.40(4)(a), states that "[n]o person may intentionally encourage or contribute to the delinquency of a child." For a complete summary of the elements of this crime as set forth in the pattern jury instruction, *see* footnote 4.

[11] WISCONSIN STAT. § 938.02 is the statute that defines terms for purposes of WIS. STAT. ch. 938, the juvenile justice code. Section 938.02 provides, in pertinent part:

> **(3m)** "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law ....
>
> ....
>
> **(10m)** "Juvenile" means a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, "juvenile" does not include a person who has attained 17 years of age.

The interpretation of a statute is a question of law that we review *de novo*. ***State v. Volk***, 2002 WI App 274, ¶34, 258 Wis. 2d 584, 654 N.W.2d 24.

¶29 We will assume, for purposes of Patterson's argument, that the definition of "juvenile" in WIS. STAT. § 938.02 applies for purposes of defining "delinquency" in WIS. STAT. § 948.40. Nonetheless, Patterson's statutory analysis ignores the fact that a seventeen-year-old is only excepted from the definition of "juvenile" for a single purpose, the "purpose[] of investigating or prosecuting" the "person who is less than 18 years of age." *See* § 938.02(10m). Here, the question is not whether Tanya S. is a "juvenile" for purposes of prosecuting her, but instead for purposes of prosecuting Patterson. Thus, Tanya S. was a "juvenile" for purposes of Patterson's prosecution for contributing to the delinquency of a child with death as a consequence.[12]

3. Jury Instruction

¶30 Patterson argues that the circuit court erroneously instructed the jury on the first-degree reckless homicide charge under WIS. STAT. § 940.02(2)(a). His

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[12] We note that the WIS. STAT. ch. 948 definition of "child" tracks the WIS. STAT. ch. 938 definition of "juvenile." WISCONSIN STAT. § 948.01(1) states the definition of a "child" in ch. 948, and provides: "'Child' means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, 'child' does not include a person who has attained the age of 17 years." Thus, to the extent Patterson is also arguing that Tanya S. was not a "child" under the statutes, our analysis would be the same.

Patterson argues in the alternative that the statutory scheme is ambiguous and that, given that ambiguity, he should prevail under the rule of lenity. The rule of lenity "generally establishes that ambiguous penal statutes should be interpreted in favor of the defendant." ***State v. Jackson***, 2004 WI 29, ¶41, 270 Wis. 2d 113, 676 N.W.2d 872. We do not agree with Patterson that the statutes as applied here are ambiguous and, therefore, we need not reach Patterson's lenity argument.

focus is on the use of the term "alleged" in the fourth element of the instruction given to the jury:

> First, that the defendant delivered a substance; second, that the substance was Oxycodone; third, that the defendant thought or believed that the substance was Oxycodone, a controlled substance; and fourth, that Tanya [S.] used the substance *alleged* to have been delivered by the defendant and died as a result of that use.

(Emphasis added.)[13]

¶31 Patterson concedes that we must examine the instruction as a whole and that the dispositive question is whether there is a reasonable likelihood that the jury misunderstood the instruction. *See* ***State v. Avila***, 192 Wis. 2d 870, 889, 532 N.W.2d 423 (1995). He argues, however, that the use of the word "alleged" in the fourth element makes it reasonably likely that the jury would have understood that a conviction could be based on a mere *allegation* that Patterson delivered the drug to Tanya S. This argument is flawed because it does not view the instruction as a whole.

¶32 The "alleged" language in element four is plainly a reference to the substance Patterson was alleged to have delivered to Tanya S. in elements one and two of the crime. Those elements, in turn, require proof that Patterson actually delivered the Oxycodone. We therefore reject Patterson's argument that the jury instruction was erroneous.

[13] This jury instruction directly tracks the pattern instruction, WIS JI—CRIMINAL 1021.

4. Alleged Prosecutorial Misconduct

¶33 Patterson argues that we should overturn his convictions based on prosecutorial misconduct. The circuit court denied Patterson's motion for a mistrial on this ground, and Patterson concedes that we review the circuit court's denial only for an erroneous exercise of discretion. *See* ***State v. Lettice***, 205 Wis. 2d 347, 351-52, 556 N.W.2d 376 (Ct. App. 1996); ***State v. Bembenek***, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983). The underlying question is whether the prosecutor's conduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted).

¶34 Patterson points to four instances of alleged misconduct during his seven-day trial. He contends that in each instance the prosecutor ran afoul of the rule that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

¶35 The first three alleged instances of misconduct are similar. In each instance, the prosecutor sought to demonstrate the possible unreliability of one witness's recollection by using seemingly inconsistent recollections of another witness. For example, in one instance the prosecutor asked: "So if all other witnesses said that at 11:00 your mom was already home ... that would be wrong?" We see no ***Haseltine*** problem with these three instances because the prosecutor was not asking a witness to opine as to whether another witness was telling the truth.

¶36 The fourth alleged instance does appear to have involved a ***Haseltine*** violation. The prosecutor asked a police investigator: "Do you believe

[a witness the investigator interviewed] was being truthful when she gave [certain] information to you ...?" The investigator answered, "I believe she was being truthful." It does not appear that this exchange was offered for any purpose other than bolstering the credibility of the other witness. *Cf.* ***State v. Snider***, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784 (detective's testimony offered to show the detective's thought process during his investigation); ***State v. Smith***, 170 Wis. 2d 701, 718-19, 490 N.W.2d 40 (Ct. App. 1992) (a detective's testimony that he did not believe a witness was properly introduced to show why he continued interrogating the witness). Accordingly, we will assume that the exchange ran afoul of ***Haseltine***.

¶37 Still, this single instance in the context of a seven-day trial does not persuade us that the trial was "'so infected ... with unfairness as to make the resulting conviction a denial of due process.'" ***Neuser***, 191 Wis. 2d at 136 (citation omitted). Patterson suggests no reason why this portion of the testimony was particularly important. Accordingly, Patterson has not persuaded us that the circuit court erroneously exercised its discretion when it denied his motion for a mistrial based on alleged prosecutorial misconduct.

Conclusion

¶38 For the above reasons, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT | JUNEAU COUNTY | *For Official Use Only*

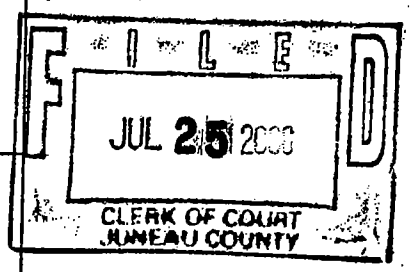
State of Wisconsin vs. Patrick R Patterson

Date of Birth: 10-12-1972

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No.: 2004CF000031



The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Manuf/Deliver Schedule I, II Narcotics [939.62(1)(c) Repeater]	961.41(1)(a)	Not Guilty	Felony E	05-03-2003 on and between the 2nd day of May,	Jury	02-08-2006
2	Manuf/Deliver Schedule I, II Narcotics [939.62(1)(c) Repeater]	961.41(1)(a)	Not Guilty	Felony E	05-03-2003 on and between the 2nd day of May,	Jury	02-08-2006
3	1st Reckless Homicide/Deliver Drugs [939.62(1)(c) Repeater]	940.02(2)(a)	Not Guilty	Felony C	05-03-2003 on and between the 2nd day of May,	Jury	02-08-2006
4	Intent. Contribute/Delinquency (Death) [939.62(1)(c) Repeater]	948.40(1)	Not Guilty	Felony D	05-03-2003 on and between the 2nd day of May,	Jury	02-08-2006
5	Manuf/Deliver Schedule I, II Narcotics [939.62(1)(c) Habitual Criminality (Prison > 10 Yrs)]	961.41(1)(a)	Not Guilty	Felony E	05-03-2003 on and between the 2nd day of May,	Jury	02-08-2006

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

07-25-2006 : On count 1 defendant is confined to prison for 5 years followed by a period of 3 years extended supervision for a total length of sentence of 8 years.

Concurrent with/Consecutive to/Comments: NOT ELIGIBLE FOR CHALLENGE INCARCERATION OR EARNED RELEASE PROGRAMS. PAYMENTS OF COSTS AND RESTITUTION TO BE MADE FROM PRISON FUNDS AT THE MAXIMUM AMOUNT ALLOWABLE.

07-25-2006 : On count 2 defendant is confined to prison for 5 years followed by a period of 3 years extended supervision for a total length of sentence of 8 years.

Concurrent with/Consecutive to/Comments: CONCURRENT

07-25-2006 : On count 3 defendant is confined to prison for 15 years followed by a period of 6 years extended supervision for a total length of sentence of 21 years.

Concurrent with/Consecutive to/Comments: CONSECUTIVE TO CTS 1 & 2

07-25-2006 : On count 4 defendant is confined to prison for 5 years followed by a period of 3 years extended supervision for a

State of Wisconsin vs. Patrick R Patterson

Date of Birth: 10-12-1972

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Case No.: 2004CF000031

total length of sentence of 8 years.
Concurrent with/Consecutive to/Comments: CONCURRENT

07-25-2006 : On count 5 defendant is confined to prison for 5 years followed by a period of 3 years extended supervision for a total length of sentence of 8 years.
Concurrent with/Consecutive to/Comments: CONCURRENT

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	07-25-2006	License suspended	5 YR		Department of Transportation
2	07-25-2006	License suspended	5 YR		Department of Transportation
3	07-25-2006	License suspended	5 YR		Department of Transportation
4	07-25-2006	License suspended	5 YR		Department of Transportation
5	07-25-2006	License suspended	5 YR		Department of Transportation

STATE OF WISCONSIN | CIRCUIT COURT | JUNEAU COUNTY | *For Official Use Only*

State of Wisconsin vs. Patrick R Patterson

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Sentence to Wisconsin State Prisons and Extended Supervision

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Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
50.00	100.00		1837.06	25.00	350.00		250.00

Ct.	Condition	Agency/Program	Comments
1	Restitution		
1	Costs		PROVIDE DNA SAMPLE IF HE HAS NOT ALR EADY DONE SO.
1	Alcohol treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED. TO COMMENCE TREATMENT IN PRISON.
1	Drug Treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED. TO COMMENCE IN PRISON.
1	Psych Treatment	Department of Corrections	COGNITIVE THINKING AND ANGER MANAGEMENT PROGRAM - TO COMMENCE IN PRISON.
1	Prohibitions	Department of Corrections	NO CONTACT WITH VICTIMS FAMILY AT ALL.
2	Restitution		
2	Costs		
2	Alcohol treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED.
2	Drug Treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED
2	Psych Treatment	Department of Corrections	COGNITIVE THINKING AND ANGER MANAGEMENT PROGRAM
2	Prohibitions	Department of Corrections	NO CONTACT WITH VICTIMS FAMILY AT ALL.
3	Restitution		
3	Costs		
3	Alcohol treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED
3	Drug Treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED
3	Psych Treatment	Department of Corrections	COGNITIVE THINKING AND ANGER MANAGEMENT PROGRAM

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3	Prohibitions	Department of Corrections	NO CONTACT WITH THE VICTIMS FAMILY AT ALL.
4	Restitution		
4	Costs		
4	Alcohol treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED.
4	Drug Treatment	Department of Corrections	AND ANY FOLLOW UP REQUIRED
4	Psych Treatment	Department of Corrections	COGNITIVE THINKING AND ANGER MANAGEMENT PROGRAM
4	Prohibitions	Department of Corrections	NO CONTACT WITH VICTIMS FAMILY AT ALL
5	Restitution		
5	Costs		
5	Alcohol treatment	Department of Corrections	AND ANY FOLLOW UP RECOMMENDED
5	Drug Treatment	Department of Corrections	AND ANY FOLLOW UP RECOMMENDED
5	Psych Treatment	Department of Corrections	COGNITIVE THINKING AND ANGER MANAGEMENT
5	Prohibitions	Department of Corrections	NOT CONTACT WITH THE VICTIMS FAMILY AT ALL

IT IS ADJUDGED that **888** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

Charles A. Pollex, Judge
Shawn M Mutter, District Attorney
John Marshall Matousek, Defense Attorney

BY THE COURT:

Court Official

7-25-06
Date

STATE OF WISCONSIN CIRCUIT COURT JUNEAU COUNTY

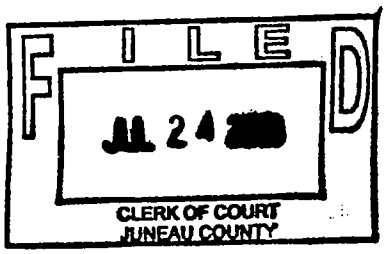
STATE OF WISCONSIN,

Plaintiff,

vs.

PATRICK R. PATTERSON,

Defendant.



Case No. 04CF31

ORDER IN RESPONSE TO DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

On or about February 21, 2008, Patrick R. Patterson, the defendant herein, appearing by and through counsel, Attorney David R. Karpe, Karpe Law Office, Madison, Wisconsin, filed a Motion for Postconviction Relief pursuant to Wisconsin Statute §809.30(2)(h) and §974.02.

The Court held an evidentiary hearing on that matter on April 15, 2008. At that hearing, the defendant's trial counsel, John Matousek appeared and gave testimony in regard to the defendant's claim of ineffective trial counsel. The State was represented at the hearing by District Attorney Scott Southworth. The defendant was represented by Attorney David R. Karpe. The Court received oral argument from counsel and ordered that briefs be submitted. The briefs were filed. This Order reflects the Court's decision with regard to the defendant's pending motion.

The Defendant's Claim that Conviction of Count 4, Contributing to the Delinquency of a Child Causing Death, is Barred Under the Principles of Multiplicity and Double Jeopardy

The defendant argues that Wisconsin Statutes §939.66(2) bars the defendant's conviction of both Count 3, First Degree Reckless Homicide, contrary to §940.02(2), Wis. Stats. and Count 4, Contributing to the Delinquency of a Child with Death as a Consequence, contrary to §948.40(1) & (4)(a), Wis. Stats. Wisconsin Statutes §939.66 reads in pertinent part as follows:

> "Conviction of included crime permitted. Upon prosecution for the crime, the actor may be convicted of either the crime charged

> or an included crime, but not both. An included crime may be any of the following: ... (2) A crime which is a less serious type of criminal homicide than the one charged."

In resolving issues of multiplicity and double jeopardy in cases where the defendant claims to have been charge with more than one count for a single offense, the Court must go through a prescribed analysis before reaching its conclusion. The court must first determine whether the multiple offenses are identical in law and fact, using the elements-only test stated in Wisconsin Statutes §939.66(1). This statute codifies the "elements-only" test set out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

When the charged offenses are not identical in law and fact, the Court must determine whether the legislature intended that multiple convictions be permissible. In this case, the defendant concedes that Counts 3 & 4 are not identical in law and fact. In those instances where the charges are not identical in law and fact, there is a presumption that the legislature intended to permit cumulative punishments. *State v. Derango*, 236 Wis.2d 721. This presumption can only be rebutted by clear legislative intent to the contrary. *Derango*, at 30.

A Court analyzes four factors to determine legislative intent: (1) all applicable statutory language; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments for the conduct. *State v. Davison*, 263 Wis.2d 145.

A. Consideration of All Applicable Statutory Language

In considering §939.66 the Court in *Davison, supra*, pointed out that:

> ..."the introductory sentence and several subsections of §939.66 may be read to apply only to a single charged offense and to a lesser-included offense that is not charged but is later submitted to the jury... This plausible reading of the statute could make the statute inapplicable to the present case because, in the present case, both battery statutes <u>were charged</u>. (emphasis added). *Davison, supra*, pgs. 177-78."

In this case, both First Degree Reckless Homicide and Contributing to the Delinquency of a Child Resulting in Death were charged.

The *Davison* court also pointed out that a literal reading of §939.66(2m) is inconsistent with the general intent of §939.65, which permits multiple charges under different statutes for a single act and may result in multiple convictions. It is also pointed that it is inconsistent with the test set out in §939.66(1) unless

subsection (2m) is narrowly construed. Although subsection (2) is involved in this case, rather than subsection (2m), the same reasoning is applicable.

A review of applicable statutory language therefore is not determinative as to legislative intent.

B. Legislative History and Context of the Statute

Section 939.66(2), Wis. Stats. was formerly §339.45, Wis. Stats. Section 339.66(2), Wis. Stats. was created by 1951 Senate Bill 784. The Legislative Council Comment to 1951 Senate Bill 784 indicates that it was intended to restate former §357.09, Wis. Stats. and to spell out in greater detail the concept of "included crime".

The former §357.09, Wis. Stats. read as follows:

> "Section 357.09 Conviction of included crime. When a defendant is tried for a crime and is acquitted of part of the crime charged and is convicted of the residue thereof, the verdict may be received and thereupon he shall be adjudged guilty of the crime which appears to the court to be substantially charged by such residue of the indictment or information and shall be sentenced accordingly."

The legislative history therefore seems to indicate that the legislature was attempting to address the situation involving a crime which was charged, and an included but uncharged crime. Arguably the intent was to clarify that a defendant could be convicted of a charged offense or a lesser or included offense, but not both.

C. The Nature of the Proscribed Conduct

This factor requires an examination of the policy factors embedded in the homicide statutes in question.

At the core of this phase of the analysis is the question as to whether or not the legislature, in adopting §948.40(1) & (4)(a), Wis. Stat., expressed a policy of providing the potential for an additional penalty where the victim of the homicide was a child.

The Supreme Court in *Davison, supra*, p. 189, recognized that the legislature may impose more severe penalties where the victim(s) of a crime are especially vulnerable. Such a policy would be undermined if conviction of both of the homicide statutes in question was not allowed.

D. Appropriateness of Multiple Punishments

As pointed out in *Davison, supra*, p. 191, the required multiplicity analysis often results in the conclusion that the appropriateness of multiple punishments is informed by the conclusions reached regarding the nature of the proscribed conduct. Because different policy interests are protected by imposing punishment under both §940.02(2) and §948.40(1) & (4)(a), the legislature could have thought it appropriate to convict and punish an offender for both offenses. Although the two charges require proof of several elements in common, the fact that the victim was a child, as required to convict under §948.40(1) & (4)(a) dictates that multiple punishments are appropriate.

The state and trial counsel argued that §936.66(2), Wis. Stats. applies only to Chapter 940 offenses. No statutory or case law support for this position has been presented. The court rejects that argument, but decides the multiplicity and double jeopardy issue regarding §940.02(2) and §948.40(1) & (4)(a), on other grounds as indicated above. In summary, since these two charges are not identical in law and fact, this court would have to determine that a clear legislative intent appeared to limit conviction on one or the other but not both charges. Such a clear legislative intent has not been shown. Therefore, conviction of both offences is permitted.

Is Count 2, Delivery of Oxycodone to TNS, a Lesser-Included Offense of Count 3, Reckless Homicide, Under the "Elements-Only" Test

Under the "elements-only" test, Count 2, Delivery of Oxycodone to TNS is a lesser-included charge of reckless homicide as charged in Count 3. *Blockburger*, 284 U.S., 304. Every element needed to convict as to Count 2 is also included as a necessary element in Count 3. The evidence indicates that the defendant gave Oxycodone to TNS on more than one occasion on May 2 thru May 3, 2003. Each dose contributed to her having a fatal concentration in her body. The volitional act of giving TNS the drug was the same volitional act which eventually caused her death. Each dose of the drug was a part of one ongoing crime.

Following the same analysis as was undertaken above, the presumption is that the legislature did not intend to allow conviction of both of these offenses. This presumption may be rebutted, but it requires that there be clear and convincing evidence that the legislature so intended. In regard to these two charges, the State has failed to meet its burden of showing clear and convincing legislative intent. Based upon these facts, the defendant may not be convicted of both delivery of Oxycodone to TNS and causing her death by delivering Oxycodone to her. These two charges are multiplicitous. The appropriate remedy is the dismissal of Count 2.

Sufficiency of the Evidence to Support a Conviction for Contributing to the Delinquency of a Child

Count 4 alleges a count of Contributing to the Delinquency of a Child, in violation of §948.40(1) & (4)(a), Wis. Stats. Contributing to the Delinquency of a Minor Resulting in Death has three elements that the State must prove. First, the State must prove that the victim was a child. Second, the State must prove that the defendant intentionally encouraged or contributed to the delinquency of the victim. Third, the State must prove that the victim's death was a consequence of the defendant's intentionally encouraging or contributing to the delinquency of the victim.

The defendant argues that because TNS was 17 years of age at the time of the alleged offense, she was not a juvenile under §938.02(3m) & (10m). The defense further argues that since she was 17 years of age at the time in question, that it is a legal impossibility that anything the defendant did or failed to do could contribute to TNS to become delinquent.

The critical words are "child", "delinquent", and "juvenile".

"Child" is defined in §948.01(1), Wis. Stats. "as a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal law, "child" does not include a person who has attained the age of 17 years."

"Delinquent" as defined in §938.02(3m), Wis. Stats. means..."a juvenile who is 10 years of age or older who has violated any state or federal criminal law, except as provided in §938.17, 938.18 and 938.183, or who has committed a contempt of court, as defined in §785.01(1), as specified in §938.355(6g)."

"Juvenile" as defined in §938.02(10m) as "any person who is less than 18 years of age except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law..."juvenile" does not include a person who has attained 17 years of age."

In the case at bar, the State is not prosecuting TNS. Therefore she, being 17 years of age, was a "child" on the date of the alleged offence(s). She was also a "juvenile". She could, as follows, be a "delinquent", although, if she were to be prosecuted, she would be prosecuted in adult court.

The defendant's motion to dismiss the conviction of Count 4 on the grounds of legal impossibility is denied.

Was there Sufficient Evidence Presented to Sustain a Finding that the Defendant Intentionally Encouraged or Contributed to the Delinquency of TNS

The fact that TNS had a lethal concentration of Oxycodone in her body fluids at the time of her death is in evidence. Also in evidence is testimony which indicated that the defendant provided Oxycodone to TNS on more than one occasion during the period of May 2nd thru May 3rd, 2003. That evidence included, but was not limited to testimony describing the defendant to have forced Oxycodone into the mouth of TNS.

Contrary to the assertion of the defendant, the evidence presented at trial, together with the reasonable influences that could be drawn there from, was sufficient on this issue.

Was the Instruction to the Jury as to the Reckless Homicide Count (Count 3) Fatally Flawed

In instructing the jury as to Count 3, the Court informed the jury that the elements of §940.02(2)(a), Wis. Stats., First Degree Reckless Homicide, were (1) that the defendant delivered a substance, (2) that the substance was Oxycodone, (3) that the defendant "thought" or believed the substance was Oxycodone, (4) that the victim used the substance "alleged to have been delivered by the defendant" and died as a result. The instruction as read to the jury departed for the stock instruction in that it used the word "thought" instead of "knew". The Court in a later discussion used the word "knew". The defense argues that the instruction, as given, is fatally flawed and requires that a new trial be granted in this case.

The Court concludes that if the Court's use of the word "thought" instead of "knew" was error on part of the trial judge, it was harmless error. The defendant's motion for relief on this basis is denied.

The defendant further argues that the standard jury instruction in regard to the fourth element of First Degree Reckless Homicide uses the word "alleged." That portion of the instruction then states that element four requires "that TNS used the substance alleged to have been delivered by the defendant and died as a result of that use."

The defendant argues that the use of the word "alleged" is defective because it does not require the jury to convict the defendant on proof of a deliver, only the allegations that such a deliver occurred. This argument fails, since the jury was advised that the State must also proof the first three elements were satisfied beyond a reasonable doubt. Those elements were: (1) that the defendant actually delivered a substance to TNS; (2) that the substance was Oxycodone; and (3) that the defendant knew or believed that Oxycodone was a controlled substance.

Considering all of the elements required proven under the instruction, it is clear that the jury, in order to convict, would have to prove that delivery occurred. The defendant's claim for relief on this ground is therefore denied.

The Defense Claim of Ineffective Counsel

The test for ineffective assistance of counsel has two parts: to establish deficient performance, a defendant must first demonstrate specific acts or omissions of counsel that were outside the range professionally competent assistance. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Then, the defense must prove that they were prejudice as a result of the deficient performance. To prove prejudice a defendant show that the errors of counsel were so serious that there was not a fair and reasonable outcome. *Id.* at 687.

The Court has determined that the defendant's conviction on Count 4 (Contributing to the Delinquency of a Child, Death as a Result) need not be dismissed based upon multiplicity or double jeopardy concerns.

I have also granted the defendant's motion to vacate the defendant's conviction on Count 2 (Delivery of Schedule I or II Narcotics, Repeater). I further find that a request for jury instructions on lesser included offenses would have had no merit.

The defendant therefore has not shown prejudice by any deficient performance by trial counsel, and his request for relief on this ground is denied.

IT IS THEREFORE ORDERED, that the defendant's motion to vacate his conviction on Count 2 (Delivery of Schedule I or II Narcotics, Repeater) is granted.

IT IS FURTHER ORDERED, that the defendant's motion to vacate his conviction of Count 4 (Intentionally Contribute to the Delinquency of a Child – Death as a Consequence, Repeater) is denied.

IT IS FURTHER ORDERED, that the defendant's motion to vacate his conviction on Count 3 (First Degree Reckless Homicide, Repeater) and to grant a new trial on that charge is denied.

Dated this 21st day of July, 2008.

BY THE COURT:

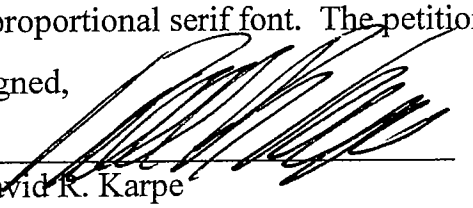
Charles A Pollex

CHARLES A. POLLEX
CIRCUIT COURT JUDGE
ADAMS COUNTY, WISCONSIN

CERTIFICATE

I certify that this petition meets the criteria under Rules 809.19(8)(b), and 809.62(4), Stats., for a petition produced with a proportional serif font. The petition is 5887 words long.

Signed,

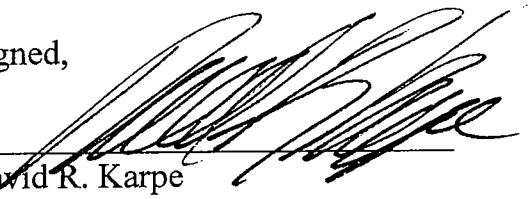


David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition which complies with the requirements of s. 809.62(4)(b). 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 with the paper copies of this petition filed with the court and served on all opposing parties.

Signed,



David R. Karpe

SECTION 809.19 (2) CERTIFICATE

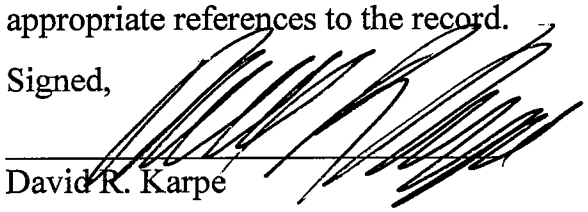
I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. Per order of the Wisconsin Supreme Court dated March 17, 2010, the appendix contains a copy of the decision of the Wisconsin Court of Appeals.

This appeal was not taken from a circuit court order or judgment entered in a judicial review of an administrative decision, therefore the appendix contains no findings of fact and conclusions of law, or final decision of an administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with

appropriate references to the record.

Signed,

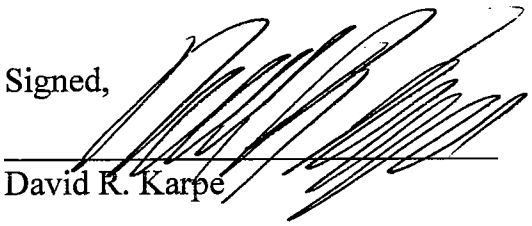


David R. Karpe

RULE 809.19(8) CERTIFICATE

I certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) Stats., for a brief produced with a proportional serif font. The brief is 10,981 words long.

Signed,



David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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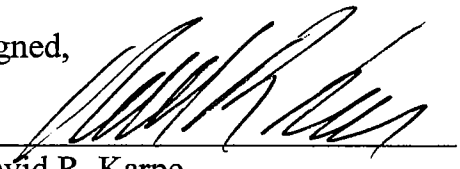

David R. Karpe

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK R. PATTERSON,

Defendant-Appellant-Petitioner.

ON REVIEW OF AN OPINION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR JUNEAU COUNTY, THE HONORABLE CHARLES A. POLLEX, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1968-CR

STATE OF WISCONSIN,

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v.

PATRICK R. PATTERSON,

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Patrick R. Patterson, appeals a judgment convicting him of first-degree reckless homicide, contributing to the delinquency of a child with death as a consequence, and three counts of delivery of a controlled substance (76). He also appeals an order partially denying his motion for postconviction relief (143).

Patterson was charged after Tanya S., his seventeen-year-old girlfriend, died of an overdose of Oxycodone (6). On May 3, 2003, Patterson awoke in the morning to find Tanya S. unresponsive (6:6; 118:192). Rescue and emergency room personnel were unable to revive Tanya S., and she was pronounced dead at the hospital (6:4-5; 117:28-29). The cause of death was determined to be ingestion of Oxycodone (6:5; 117:35).

Patterson was charged with first-degree reckless homicide by delivery of a controlled substance under the "Len Bias law," Wis. Stat. § 940.02(2)(a), and with contributing to the delinquency of Tanya S. with death as a consequence, under Wis. Stat. § 948.40(1) and (4)(a), for encouraging her to become delinquent by possessing a controlled substance (49). Patterson was also charged with four counts of delivery of Oxycodone, one count for delivery to each of Tanya S., Ronald Beck, Sherry Carmack, and fifteen-year-old D.B., all occurring on May 2, 2003 or May 3, 2003 (19; 49). A jury found Patterson guilty of all charges except for the count of delivery of a controlled substance to Carmack (66).

Patterson moved for postconviction relief (134), asserting that he could not properly be convicted of both first-degree reckless homicide and contributing to the delinquency of a child with death as a consequence, because both crimes involved the death of Tanya S. (134:9-11; 140:4-13). He also asserted that there was insufficient evidence to prove him guilty of contributing

to the delinquency of a child with death as a consequence, because Tanya S. was seventeen years old and could not become delinquent, and because the evidence did not show that he intended Tanya S. to become delinquent (134:1-4; 140:13-16). Patterson further argued that the jury instruction for first-degree reckless homicide relieved the State of proving that the substance he delivered was Oxycodone (134:4-6, 11-13; 140:16-25). Patterson also asserted that his trial counsel was ineffective in not raising Patterson's claims in the trial court (134:7, 11, 12-13).

After a hearing and briefing, the circuit court, the Honorable Charles A. Pollex, who also presided over Patterson's trial, granted in part and denied in part Patterson's motion. The court dismissed the charge for delivery ox Oxycodone to Tanya S. on multiplicity grounds (143:4, 7). The court denied the remainder of Patterson's claims (143).

On appeal, Patterson raised all the claims he did in his motion, and also sought a new trial in the interests of justice, on the grounds of prosecutorial misconduct. The court of appeals affirmed the decision of the circuit court in a unanimous, published decision, *State v. Patterson*, 2009 WI App 161, 321 Wis. 2d 752, 776 N.W.2d 602. This court then granted Patterson's petition for review.

ARGUMENT

I. PATTERSON'S CONVICTIONS FOR FIRST-DEGREE RECKLESS HOMICIDE BY DELIVERY OF A CONTROLLED SUBSTANCE, AND CONTRIBUTING TO THE DELINQUENCY OF A CHILD WITH DEATH AS A CONSEQUENCE, ARE NOT MULTIPLICITOUS.

A. Applicable legal principles and standard of review.

Patterson claims that his convictions for both first-degree reckless homicide by delivery of a controlled substance, Wis. Stat. § 940.02(2), and contributing to the delinquency of a child with death as a consequence, Wis. Stat. § 948.40(1) and (4)(a), were multiplicitous in violation of due process (Patterson Br. at 16). This court has explained multiplicity claims as follows:

> Protection against multiple punishments or multiplicity involves three strains of analysis: (1) second sentence challenges in which a court is alleged to have improperly increased a defendant's first sentence for a charged offense; (2) unit-of-prosecution challenges in which the state is alleged to have improperly subdivided the same offense into multiple counts of violating the same statute; and (3) cumulative-punishment challenges in which the state is alleged to have improperly prosecuted the same offense under more than one statute.

State v. Kelty, 2006 WI 101, ¶ 16, 294 Wis. 2d 62, 716 N.W.2d 886, citing *State v. Davison*, 2003 WI 89, ¶ 26, 263 Wis. 2d 145, 666 N.W.2d 1.

Patterson's claim is the third type, a cumulative-punishment challenge alleging prosecution of the same offense under two statutes.

Courts addressing a multiplicity challenge employ an established methodology. First, the court "determines

whether the charged offenses are identical in law and fact using the *Blockburger* test." *Davison*, 263 Wis. 2d 145, ¶ 43 (citations omitted). If "the offenses are identical in law and fact, the presumption is that the legislative body did not intend to punish the same offense under two different statutes." *Id.*, citing *Whalen v. United States*, 445 U.S. 684, 692 (1980). "'Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.'" *Id.*, citing *Whalen*, 445 U.S. at 692.

If "the charged offenses are different in law or fact, a presumption arises that the legislature did intend to permit cumulative punishments." *Id.* ¶ 44 (citations omitted). "'This presumption can only be rebutted by clear legislative intent to the contrary.'" *Id.* (citations omitted).

To determine whether the legislature intended to allow punishment under more than one statute, a court considers four factors: "(1) all applicable statutory language; (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." *Id.* ¶ 50 (citations omitted).

Whether a multiplicity violation exists is a question of law, subject to independent appellate review. *Id.* ¶ 15 (citations omitted).

B. Patterson has not shown clear legislative intent to prohibit convictions under both Wis. Stat. § 940.02(2) and Wis. Stat. § 948.40(1) and (4)(a).

It is undisputed that the two offenses in this case—first-degree reckless homicide by delivery of a controlled substance, and contributing to the delinquency of a child with death as a consequence—are not identical in law

because their elements[1] are different (Patterson Br. at 17). It is therefore presumed that the legislature intended to permit punishment under more than one statute. *See Davison*, 263 Wis. 2d 145, ¶ 44. To overcome this presumption, Patterson must show "clear legislative intent to the contrary." *See id.*

Patterson asserts that Wis. Stat. § 939.66, "Conviction of included crime permitted," provides that clear legislative intent. Section 939.66 states, in relevant part, as follows:

> **939.66 Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> . . . .

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[1]Wisconsin Stat. § 940.02(2)(a) "First-degree reckless homicide" contains four elements: (1) The defendant delivered a substance; (2) the substance was [named controlled substance]; (3) the defendant knew or believed the substance was [named controlled substance]; and (4) the victim used the [named controlled substance] alleged to have been delivered by the defendant, and died as a result. Wis. JI-Criminal 1021 (2006).

Wisconsin Stat. § 948.40(1) and (4)(a) "Contributing to the delinquency of a child," with death as a consequence, contains three elements: (1) the child was under 18 years of age; (2) the defendant intentionally encouraged or contributed to the delinquency of the child; and (3) death was a consequence of intentionally encouraging or contributing to the delinquency of the child. *See* Wis. JI-Criminal 2170A (2002).

A comment to Wis. JI-Criminal 2170A states that "The statutory language does not indicate whether the death must be of the child to whose delinquency the defendant contributes or whether it extends to other persons who are harmed by the child's conduct." Wis. JI-Criminal 2170A, Comment 3 at 3. As the State will explain later in this brief, under its plain language, the statute can apply even if the death is not "of the child."

> **(2)** A crime which is a less serious type of criminal homicide than the one charged.

Patterson contends that contributing to the delinquency of a child with death as a consequence is an included crime under subsection (2) because it is a less serious type of criminal homicide than first-degree reckless homicide (Patterson Br. at 18-38). He argues that § 939.66(2) therefore prohibits punishment under both § 940.02(2)(a) and § 948.40(1) and (4)(a).

The circuit court rejected Patterson's argument, determining that § 939.66(2) does not apply to prohibit conviction under both § 940.02(2)(a) and § 948.40(1) and (4)(a). The court relied on this court's conclusion in *Davison*, 263 Wis. 2d 145, that § 939.66 can be read to bar multiple convictions only when one offense is charged and a lesser included offense is not charged but is submitted to the jury, not when both offenses are charged (143:2-4). The circuit court therefore concluded that Patterson had not shown a clear legislative intent to preclude multiple punishments (143:4).

The court of appeals agreed, concluding that "the *Davison* court effectively rejected the proposition that § 939.66(2) shows a clear legislative intent not to allow punishment for both a charged criminal homicide and a charged less serious type of criminal homicide." *Patterson*, 321 Wis. 2d 752, ¶ 12. The court further rejected Patterson's assertions that the legislative history or this court's decision in *State v. Lechner*, 217 Wis. 2d 392, 576 N.W.2d 912 (1998), shows a clear legislative intent not to allow convictions for both a charged criminal homicide and a charged less serious type of criminal homicide.

The State maintains that the decisions of the circuit court and court of appeals should be affirmed because Wis. Stat. § 939.66(2) does not provide clear legislative intent not to allow conviction for both offenses. This court can affirm on the grounds cited by the circuit court

and court of appeals, that Wis. Stat. § 939.66(2) can reasonably be read as prohibiting multiple convictions only if multiple offenses are not charged. Additionally, this court can affirm on the ground that § 939.66 simply does not apply to § 948.40(1) and (4)(a) because contributing to the delinquency of a child with death as a consequence under § 948.40(1) and (4)(a) is not a "less serious type of criminal homicide than the one charged." Section 948.40 is not a criminal homicide statute. It is a "contributing to the delinquency of a child" statute, and subsection (4)(a) merely provides a greater penalty if death is a consequence of the contributing to the delinquency of a child. Section 939.66 therefore does not show a clear legislative intent to prohibit convictions under both § 940.02(2)(a) and § 948.40(1) and (4)(a).

1. Section 939.66(2) does not apply when multiple offenses are charged.

The circuit court and court of appeals concluded that § 939.66 does not apply to prohibit conviction under both § 940.02(2) and § 948.40(1) and (4)(a), because § 939.66 can be read as applying only to instances in which one offense is charged and a lesser included offense is not charged but is submitted to the jury, not to instances in which multiple offenses are charged (143:2-4); *Patterson*, 321 Wis. 2d 752, ¶¶ 9-15. The courts based their conclusions on the Wisconsin Supreme Court's decision in *Davison*, 263 Wis. 2d 145.

At issue in *Davison* was subsection (2m) of § 939.66, which provides that an included crime may be: "A crime which is a less serious or equally serious type of battery than the one charged." *Davison*, 263 Wis. 2d 145, ¶ 2. After analyzing Wis. Stat. §§ 939.65 and 939.66,[2] the

[2]Wisconsin Stat. § 939.65, "Prosecution under more than one section permitted," provides:

supreme court concluded that conviction for two types of battery were not barred by § 939.66(2m). *Id.* ¶¶ 108-09.

The court in *Davison* noted that it had addressed subsection (2) of § 939.66 in *State v. Lechner*, and had determined that:

> "The plain language of Wis. Stat. § 939.66(2) does not prohibit multiple homicide convictions for killing one person. It bars multiple convictions only when one of the homicide convictions is for a 'less serious type' of homicide. Noticeably absent from the prohibitions of Wis. Stat. § 939.66(2) is a bar against multiple homicide convictions when the homicides are 'equally serious.'"

Davison, 263 Wis. 2d 145, ¶ 61, quoting *Lechner*, 217 Wis. 2d at 407-08.

The court in *Davison*, however, concluded that contrary to the implication of its decision in *Lechner*, § 939.66 can reasonably be read as applying only when a person is charged with a single offense but the jury is also instructed on a lesser included offense, but not when a person is charged with multiple offenses.

> Except as provided in s. 948.025 (3), if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.

Wisconsin Stat. § 939.66, "Conviction of included crime permitted," provides, in relevant part:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> . . . .
>
> **(2)** A crime which is a less serious type of criminal homicide than the one charged.
>
> **(2m)** A crime which is a less serious or equally serious type of battery than the one charged.

The court in *Davison* noted that §§ 939.65 and 939.66 are found in Subchapter V of Chapter 939, under the heading "Rights of the Prosecution." *Id.* ¶ 51. The court concluded that § 939.65 "gives a green light to multiple *charges*, which may result in multiple *convictions*, under different statutory provisions." *Id.*

The *Davison* court then turned to § 939.66, and declared that a "literal reading of subsection (2m) of § 939.66 is inconsistent with the general intent of § 939.65, which permits multiple charges under different statutes for a single act and may result in multiple convictions. It is also inconsistent with the test set out in subsection (1) *unless* (2m) is narrowly construed." *Id.* ¶ 65.

The supreme court concluded that "the introductory sentence and several subsections of § 939.66 may be read to apply only to a single charged offense and to a lesser-included offense that is not charged but is later submitted to the jury." *Id.* ¶ 66. The court stated that: "This plausible reading of the statute could make the statute inapplicable to the present case because, in the present case, both battery statutes *were charged*." *Id.* ¶ 67.

The *Davison* court concluded that § 939.66(2m) could reasonably be read in either of two ways, and therefore was ambiguous. *Id.* ¶ 74. However, it determined that the legislative history showed that the legislature did not intend to limit conviction to only a single type of battery. *Id.* ¶¶ 76-77.

The supreme court in *Davison* looked to the legislative history, specifically the statutory comments to § 339.66, the predecessor of § 939.66. The court noted that "Wisconsin Stat. § 939.66 was created in two steps in the early 1950s as part of the revision of the state criminal code. Chapter 623, Laws of 1953; ch. 696, Laws of 1955." *Davison*, 263 Wis. 2d 145, ¶ 76. The comment for then § 339.66 provides in part:

> "This section permits conviction of a crime included within the crime charged and states what crimes are included crimes. The reason behind the rule of this section is the state's difficulty in determining before a trial exactly what crime or degree of the crime it will be able upon the trial to prove beyond a reasonable doubt. There is no disadvantage to the defendant in such a rule, *for he is apprised of the charges against him by reason of the fact that the crime charged is broader than the included crime*.
>
> An example of an included crime under subsection (1) is the crime of burglary when the crime charged is aggravated burglary. An example of an included crime under subsection (2) is homicide by reckless conduct when the crime charged is first-degree murder. An example of an included crime under subsection (3) is injury by reckless conduct when the crime charged is battery."

Davison, 263 Wis. 2d 145, ¶ 76, citing V Wisconsin Legislative Council, Judiciary Committee Report on the Criminal Code, at 53 (1953) (hereinafter 1953 A.B. 100).

The supreme court concluded that: "The clear implication of the comment is that a defendant may be charged with one crime but ultimately convicted of an 'included crime'—a lesser included crime *that is not charged*—when the State is unable to prove the more serious crime. In these circumstances, the defendant has no complaint by reason of the fact that the crime charged is broader than the included crime." *Id. ¶* 77, citing 1953 A.B. 100, at 53 (emphasis added).

As the court of appeals recognized in this case, *Patterson*, 321 Wis. 2d 752, ¶¶ 9-15, the supreme court's analysis of subsection (2m) of § 939.66 applies equally to subsection (2). As the supreme court concluded in regards to subsection (2m), subsection (2) can reasonably be read as barring multiple convictions only when the defendant is charged under only one statute, not when the defendant is charged under multiple statutes.

Reading § 939.66 in light of the meaning of "included crime" under subsection (2), the statute provides that an actor may be convicted of either the crime charged or a crime which is a less serious type of criminal homicide than the one charged, but not both. Therefore, if the State charges a defendant with some type of criminal homicide, and the jury is instructed on both the charged homicide and on a less serious form of homicide as a lesser included offense, the defendant may be convicted of either the charged offense or the lesser included offense, but not both. However, § 939.66(2) does not prohibit convictions of both offenses if both are charged.

Patterson argues that under the plain meaning of § 939.66(2), only one conviction is allowed. He states that: "The language of Wis. Stat. § 939.66 shows the purpose of the statute: 'The actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following: . . . (2) A crime which is a less serious type of criminal homicide than the one charged'" (Patterson Br. at 19).

However, in quoting the statute, Patterson omits the opening clause of the statute, which reads: "Upon prosecution for a crime." When read as a whole, as this court did in *Davison*, the meaning seems clear. When a defendant is prosecuted for one crime, he or she may be convicted of that crime or an included crime, but not both. Section 939.66 says nothing about barring conviction for multiple crimes if multiple crimes are charged.

Patterson argues that neither the holding nor the analysis in *Davison* should apply to this case because *Davison* concerns battery, not homicide (Patterson Br. at 24). He asserts that: "The special problems of the battery statute and Wis. Stat. § 939.66(2m) do not apply to the instant case," because "[t]here is no statute called simply 'Homicide' comparable to §940.19, which is entitled 'Battery'; substantial battery; aggravated battery' and contains within it five different forms (and four different punishment levels) of battery" (Patterson Br. at 24-25).

He adds that: "On the contrary, the different forms of homicide are spread over the statutes in many different numbered sections, *e.g.* Wis. Stat. §346.74(5)(d), §940.01, §940.02, etc." (Patterson Br at 25).

Patterson is correct in pointing out that in *Davison*, the supreme court analyzed the battery statutes in determining the meaning of § 939.66(2m). However, the court's interpretation of § 939.66(2m) as applying only when a single offense is charged but the jury is also instructed on a lesser included offense, was buttressed by analysis of the battery statutes, but was not dependent on that analysis. The court in *Davison* addressed the text of the statute, focusing on the introduction, and concluded that the statute could reasonably be read as applying only to prosecution for a single crime, and conviction for that crime or an included crime but not both. *Davison*, 321 Wis. 2d 752, ¶¶ 66-67. The portion of the statute that leads to the court's conclusion in *Davison* is equally applicable to subsection (2) of Wis. Stat. § 939.66. Just as the supreme court in *Davison* concluded that subsection (2m) of § 939.66 does not bar multiple convictions when a person is charged with multiple offenses, this court should affirm the circuit court's conclusion that subsection (2) does not bar multiple convictions when a person is charged with multiple offenses

Patterson seems to assert that this court should not rely on *Davison*, but instead should follow *Lechner*, 217 Wis. 2d at 408, in which the supreme court rejected an argument that § 939.66(2) barred multiple homicide convictions for causing one death, and stated that § 939.66(2) "bars multiple convictions only when one of the homicide convictions is for a 'less serious type' of homicide" (Patterson Br. at 21-23).

However, as the court of appeals concluded, "the *Davison* court acknowledged the *Lechner* language that arguably supports Patterson and, in doing so, implicitly rejected the proposition that the *Lechner* interpretation of

WIS. STAT. § 939.66 was the only reasonable one." *Patterson*, 321 Wis. 2d 752, ¶ 15.

Moreover, in *Lechner*, the issue was: "Whether the State violated the defendant's constitutional rights to be free from double jeopardy when the defendant pled no contest to and was sentenced for both second-degree reckless homicide and homicide by intoxicated use of a vehicle where the defendant's criminal conduct resulted in the death of one person." *Lechner*, 217 Wis. at 396. The arguments in the case focused on whether Wis. Stat. § 939.66 barred two counts of homicide when they were not equally serious. The court held that, under the plain language of § 939.66(2), the two convictions were not barred. The court was not asked to address whether § 939.66 applies at all if two convictions are imposed for two charged crimes. In *Davison*, the court addressed that issue, and concluded that the statute can reasonably be read as applying only if one offense is charged, but more than one offense is submitted to the jury.

Further indication that the *Davison* court was correct is that § 939.66 defines "an included crime" as "A crime which is a less serious type of criminal homicide than the one charged" in subsection (2). In *Lechner*, this court concluded that under subsection (2), a person could be convicted of multiple counts of homicide if they were equally serious, but not if one was less serious than another. *Lechner*, 217 Wis. 2d 392, 407-08. The *Lechner* court did not explain why the legislature would have allowed multiple convictions for equally serious types of criminal homicide, but not allow multiple convictions if one type were more serious than another.

The State maintains that the distinction makes sense because the purpose of the statute is to allow for conviction of a lesser included offense. If one type of homicide is charged but a lesser type is also submitted to the jury or court as a lesser included offense, the jury or court can find the person guilty of one or the other, but not both. The statute logically differentiates between less

serious types of criminal homicide and equally serious types, because it applies to the submission of lesser included offenses, not equal included offenses.

Nothing in the text of § 939.66(2) indicates that the statute applies outside the context of "prosecution for a crime," and the submission of a lesser type of criminal homicide than the one charged. Nothing indicates that the statute applies if two types of criminal homicide are charged, regardless whether they are of equal seriousness or one is less serious than the other.

Patterson urges a different interpretation of the legislative history than the one this court set forth in *Davison*. He looks to the comment to § 339.65, the predecessor of § 939.65, which states as follows:

> This section makes clear that there may be prosecution under more than one section for the same conduct. For example, a person may be prosecuted under a general section even though there is a specific section which covers the conduct, or he may be prosecuted under both; a person may be prosecuted for an attempt rather than the completed crime; a person may be prosecuted for a misdemeanor even though some other section may make his conduct a felony.
>
> This section states a rule of pleading, and does not purport to state the limitations on multiple sentences for the same act or the limitations on multiple convictions and subsequent prosecutions for the same act which may be included in the constitutional double jeopardy rule. For some of the limitations which have been incorporated in the code see sections 339.66, 339.71 and 339.72.

1953 A.B. 100, at 52 (Patterson Br. at 34-35).

Patterson points out that this comment states that § 339.66 (now § 939.66) limits § 339.65 (now § 939.66) (Patterson Br. at 27-28). However, the comment to § 339.65 does not indicate legislative intent to prohibit multiple convictions if the prosecution brings multiple charges. Instead, § 339.66 concerns included offenses that

are not charged. As the comment states: "An example of an included crime under subsection (2) is homicide by reckless conduct when the crime charged is first-degree murder." 1953 A.B. 100, at 53. Therefore, if a defendant is charged with one type of homicide, and the jury is instructed on that form and a less serious type of homicide as a lesser included offense, the defendant can be convicted of either the charged offense or the lesser included offense, but not both. The comment says nothing about further limiting § 339.66 (939.66), by prohibiting convictions for multiple types of homicides if the multiple types are charged.

Patterson points to an article by William Platz, which states, in referring to Wis. Stat. § 939.66, that "The familiar principle that there may be a conviction of an included crime if the crime charged has not been fully proved to the satisfaction of the court or the jury is preserved in section 939" (Patterson Br. at 35); William A. Platz, *The Criminal Code, Thumbnail History of the Code*, 1956 Wis. L. Rev. 350, 369. Patterson asserts that this comment shows that the drafters "meant to limit the numbers of convictions allowable for each act" (Patterson Br. at 36).

Platz's comment shows nothing of the sort. Instead, Platz wrote that under the statute, if a charged crime is not proven, there can be a conviction of an included crime. This says nothing about whether there can be convictions for multiple crimes if multiple crimes are charged.

In summary, as the court of appeals concluded, under the reasoning of *Davison*, Wis. Stat. § 939.66(2) does not show a clear legislative intent that a defendant can be convicted of only one type of criminal homicide if two types of criminal homicide are charged.

2. Wisconsin Stat. § 939.66(2) does not apply to Wis. Stat. § 948.40(1) and (4)(a) because "Contributing to the delinquency of a child with death as a consequence," is not a type of criminal homicide.

A second reason that § 939.66(2) does not show a clear legislative intent to bar the two convictions in this case is that § 939.66(2) applies only to "types of criminal homicide." It is the State's position that contributing to the delinquency of a child with death as a consequence, under § 948.40(1) and (4)(a), is not a type of criminal homicide.[3]

In his brief to this court, Patterson asserts that § 948.40(1) and (4)(a) is a lesser included offense of § 940.02(2) under § 939.66(2), which defines an "included crime" as: "A crime which is a less serious type of criminal homicide." Patterson asserts that ""contributing to the delinquency of a child causing death" is a less serious type of homicide than first degree reckless homicide" (Patterson Br at. 23).

[3] In the circuit court, the district attorney argued that Wis. Stat. § 939.66 applies only to violations of statutes in Chapter 940, not to contributing to the delinquency of a child with death as a consequence (142). Patterson's trial counsel testified that he did not challenge Patterson's convictions for the same reason (138:12-14).

However, the trial court concluded that: "No statutory or case law support for this position has been presented" (143:4).

On appeal, the State argued that § 939.66(2) does not apply to § 948.40(1) and (4)(a) because contributing to the delinquency of a child with death as a consequence is not a type of criminal homicide. The court of appeals did not decide the issue, stating: "We need not reach the State's argument. Rather, we assume, without deciding that 'homicide' in § 939.66(2) includes contributing to the delinquency of a child with death as a consequence." *Patterson*, 321 Wis. 2d 752, ¶11 n.5.

However, Patterson does not squarely address how contributing to the delinquency of a child with death as a consequence is a type of criminal homicide.

"Homicide" is not defined in the Wisconsin Statutes. The common and ordinary meaning of "homicide" is "The killing of one person by another." Black's Law Dictionary 802 (9th ed. 2004); American Heritage Dictionary of the English Language 865 (3rd ed. 1992).

To be convicted of contributing to the delinquency of a child with death as a consequence, Wis. Stat. § 948.40(1) and (4)(a), a person does not have to kill another person.

Section 948.40 provides, in relevant part, as follows:

> **948.40 Contributing to the delinquency of a child. (1)** No person may intentionally encourage or contribute to the delinquency of a child. . . .
>
> . . . .
>
> **(4)** A person who violates this section is guilty of a Class A misdemeanor, except:
>
> (a) If death is a consequence, the person is guilty of a Class D felony;

The statute prohibits the intentional encouragement or contribution to the delinquency of a child. Wis. Stat. § 948.40(1). Subsection (4) provides the penalty for violating subsection (1). Paragraph (a) provides a greater penalty if death is a consequence.

The statute does not refer to "causing death," or "killing another person." It refers instead to contributing to the delinquency of a child "with death as a consequence." Nothing in the language of the statute provides that subsection (4)(a) applies only if the death that is a consequence is that of the child whom the defendant causes to become delinquent.

For instance, if Patterson had given Tanya S. Oxycodone, and Tanya S. had used the Oxycodone and then driven a motor vehicle and had a collision that killed a third person, the State could charge Patterson under § 948.40(1) and (4)(a). He would have contributed to the delinquency of Tanya S. by causing her to possess a controlled substance. A consequence was that the third person was killed.

The State would not be charging Patterson with homicide for causing the death of the third person. It would be charging Patterson for contributing to the delinquency of Tanya S., with death of the third person as a consequence.

Similarly, if an adult encourages a child to drive a car while the child is underage and the child drives and kills someone, the adult could be convicted under Wis. Stat. § 948.40(1) and (4)(a) for contributing to the delinquency of a child with the third person's death as a consequence. He obviously would not be convicted of "homicide" for killing the third person.

That "contributing to the delinquency of a child with death as a consequence" is not a type of criminal homicide is also evident from the organization of the Wisconsin Statutes. The homicide statutes are in Chapter 940, "Crimes against life and bodily security." Subchapter I, "Life," contains: First-degree intentional homicide; First-degree reckless homicide; Felony murder; Second-degree intentional homicide; Second-degree reckless homicide; Homicide resulting from negligent control of vicious animal; Homicide by negligent handling of dangerous weapon, explosives or fire; Homicide by negligent operation of vehicle; and Assisting suicide."[4] Wis. Stat. Ch. 940.

All the statutes listed above, except for one, use the phrase "causes the death of another." Homicide resulting

[4]Subchapter I of Chapter 940 also contains "Mutilating or hiding a corpse," and various abortion statutes.

from negligent control of vicious animal, § 940.07, uses the phrase "kills any human being."

The State's research reveals no statute in any other chapter that prohibits "Homicide" or that provides that a person is guilty of a crime if he or she "causes the death of another."

The State is not asserting that statutes not in Chapter 940 cannot be types of criminal homicide, or that Wis. Stat. § 939.66(2) can apply only to statutes in Chapter 940. The State is asserting, however, that all the types of homicide under Wisconsin law *are* in Chapter 940, and that § 939.66(2), by applying only to types of criminal homicide, therefore applies only to statutes in Chapter 940.

Patterson points out that § 939.66 "contains no language limiting its application to any provisions of the statutes or any type of homicide," (Patterson Br. at 20), and asserts that Wis. Stat. § 939.66 is not limited to the homicide statutes in Chapter 940, because "the different forms of homicide are spread over the statutes in many different numbered sections, *e.g.* Wis. Stat. §346.74(5)(d), §940.01, §940.02, etc." (Patterson Br. at 25).

However, the single example Patterson cites, § 346.74(5)(d), is obviously not a "type of criminal homicide." Section 346.74(5)(d), is the penalty provision for Wis. Stat. § 346.67, "Duty upon striking person or attended or occupied vehicle," which provides that "the operator of any vehicle involved in an accident resulting in injury to or death of any person" must stop his or her vehicle, and "give his or her name, address and registration number of the vehicle he or she is driving"; "exhibit his or her operator's license"; and "render to any person injured in such accident reasonable assistance . . . if it is apparent that such treatment is necessary." Wis. Stat. § 346.67(1)(a)-(c).

This statute concerns leaving the scene of an accident, not criminal homicide.[5]

Section 346.74(5)(d), the penalty provision for § 346.67, states, in relevant part:

> **(5)** Any person violating any provision of s. 346.67 (1):
>
> . . . .
>
> (d) Is guilty of a Class D felony if the accident involved death to a person.

Wis. Stat. § 346.74(5)(d).

It cannot reasonably be argued that by providing for a greater penalty when the accident results in death, § 346.74(5)(d) makes leaving the scene of an accident a type of criminal homicide.

Moreover, the greater penalty applies even if the person charged was not responsible for the accident. A person whose vehicle is hit by another vehicle could be charged under § 346.74(5)(d) if the at-fault driver dies at the scene and the "innocent" driver leaves the scene. The "innocent" driver obviously would not be charged with homicide.

Additionally, if § 346.74(5)(d) is a form of homicide, and Wis. Stat. § 939.66(2) would bar conviction under § 346.74(5)(d) and another type of criminal homicide that is not equally serious, then a person could not be

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[5] The "two clear purposes" of § 346.67 are:

> (1) to ensure that injured persons may have medical or other attention with the least possible delay; and (2) to require the disclosure of information so that responsibility for the accident may be placed.

State v. Wuteska, 2007 WI App 157, ¶ 15, 303 Wis. 2d 646, 735 N.W.2d 574 (citation omitted).

convicted of both homicide by intoxicated use of a vehicle and leaving the scene of the accident involving death, if the person had one or more prior OWI-related offenses. The violation of Wis. Stat. § 940.09(1c)(b) would be a Class C felony. The violation of § 346.74(5)(d) would be a Class D felony. The legislature could not have intended a person convicted of homicide by intoxicated use of a vehicle, would escape punishment for also leaving the scene of the accident.

For the same reasons that leaving the scene of an accident involving death is not a type of criminal homicide, contributing to the delinquency of a child with death as a consequence is not a type of criminal homicide. Like § 346.74(5)(d), § 948.40(4)(a) merely provides for a greater penalty if there is a death. It does not require causing death.

Patterson argues that the legislative history indicates that Wis. Stat. § 939.66(2) is not limited to statutes in Chapter 940 (Patterson Br. at 25-26 n.4).

However, the legislative history strongly indicates the opposite. When the legislature enacted Wis. Stat. § 339.45, the predecessor to § 939.66, the homicide statutes were all in Chapter 340, the predecessor to Chapter 940. Chapter 340 (1953) was titled "Offenses against lives and persons." The first statute in the chapter, § 340.01, "Homicide," stated: "The killing of a human being, without the authority of law, by poison, shooting, stabbing, or any other means or in any other manner is either murder, manslaughter, negligent homicide, or excusable or justifiable homicide, according to the facts and circumstances of each case."

Chapter 340 (1953) contained statutes including: Murder, first degree; Murder, second degree; Murder third degree; Manslaughter, first degree; Manslaughter second degree; Manslaughter third degree; Manslaughter fourth degree; Negligent homicide; and Causing death by injury

to railroad. The 1953 Statutes did not contain any homicide statutes other than those in Chapter 340.

The criminal code was enacted in 1953. An introductory comment to the bill creating the code states that one objective of the criminal code was "Systematically organizing the substantive criminal law." 1953 A.B. 100, at ii. The legislature placed the "general principles" into Chapter 339, and other statutes into chapters by category. *Id.* "The other chapters of the code define specific crimes and group the crimes according to the social interest or interests which they are designed to protect." *Id.*

Chapter 340 of the 1953 criminal code, "Crimes against life and bodily security," contained nine statutes: First-degree murder; Second-degree murder; Manslaughter; Homicide by reckless conduct; Homicide by negligent use of vehicle or weapon; Homicide by intoxicated user of vehicle or firearm; Assisting suicide; Abortion; and Self-abortion.

The criminal code was renumbered in 1955. Chapter 696, Laws of 1955. Chapter 340 became Chapter 940, which was titled "Crimes against life and bodily security." The first subchapter of chapter 940, "Life," contained nine statutes: First-degree murder; Second-degree murder; Third-degree murder; Abortion; Manslaughter; Homicide by reckless conduct; Homicide resulting from negligent control of vicious animal; Homicide by negligent use of vehicle or weapon; and Homicide by intoxicated user of vehicle or firearm.

In the 1955 criminal code revision, the number of degrees of homicide was greatly reduced. William A. Platz, *The Criminal Code,* 1956 Wis. L. Rev. 350, 369-70. Platz explained that the criminal code retained first and second-degree murder, third-degree murder (felony murder), and manslaughter. *Id.* at 370. Platz further explained that: "Other forms of criminal homicide require either a high degree of negligence or recklessness (which

is equivalent to 'gross negligence' under the old law). Mere culpable negligence forms no basis for criminal liability except in connection with the control of a known vicious animal or operating or handling a vehicle, firearm or air-gun while intoxicated." *Id.* at 370 (footnotes omitted). The article explaining the revision of the criminal code, and specifically the homicide statutes, does not mention "contributing to the delinquency of a child" statute, or any other statute with a greater penalty if death was a consequence.

The 1989 revision of the Law of Homicide separated the homicide statutes into first- and second-degree intentional; first- and second-degree reckless; felony murder; and negligent homicide by use of a dangerous weapon, explosives, or fire; or by use of a vehicle. Section 948.40(1) and (4)(a) were not addressed.

A law review article explaining the revisions, by three members of the "Judicial Council Committee on Homicide and Lesser Included Offenses" that drafted the revision, explains that lesser included offenses for first-degree reckless homicide include second-degree reckless homicide and negligent homicide, and can include reckless injury and reckless endangering safety. *See* Walter Dickey, David Schultz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: Wisconsin Revision*, 1989 Wis. L. Rev. 1323, 1389. The article does not mention § 948.40(1) and (4)(a), or any other statute not included in Chapter 940.

In summary, contributing to the delinquency of a child with death as a consequence is not a type of criminal homicide, and Wis. Stat. § 939.66(2) does not apply to it. Patterson therefore cannot demonstrate that § 939.66(2) shows clear legislative intent not to allow conviction under both § 940.02(2) and § 948.40(1) and (4)(a).

C. Nature of the proscribed conduct.

The third factor in determining legislative intent is the nature of the proscribed conduct. Patterson was convicted of first-degree reckless homicide by delivery of a controlled substance, and contributing to the delinquency of a child with death as a consequence. The circuit court concluded that in § 948.40(1) and (4)(a), the legislature has "expressed a policy of providing the potential for an additional penalty where the victim of the homicide was a child" (143:3). The court concluded that "[s]uch a policy would be undermined if conviction of both of the homicide statutes in question was not allowed" (143:3).

The court of appeals agreed, concluding that the nature of the proscribed conduct is different under the two statutes. The court noted that Wis. Stat. § 940.02(2)(a) is "a special category of first-degree reckless homicide that targets a particular situation, that is, death caused by manufacturing, distributing, or delivering a controlled substance," and that it "applies regardless whether a child is involved." The court further noted that Wis. Stat. § 948.40(1) and (4)(a) "need not involve controlled substances and applies only when there is a child involved." *Patterson*, 321 Wis. 2d 752, ¶ 18.

In his brief to this court, Patterson argues that "the nature of the proscribed conduct is the same for both the reckless homicide and the contributing homicide – in each case, conduct causing death to the victim" (Patterson Br. at 36). He adds that "the offensive conduct for each crime was the same, that is, administering Oxycodone to the victim, causing her to die" (Patterson Br. at 36).

However, the nature of the proscribed conduct is different. Patterson was convicted of first-degree reckless homicide for knowingly giving the victim a controlled substance, which she used, causing her death. Patterson was also convicted of contributing to the delinquency of a

child for causing the child to violate a criminal law prohibiting possession of a controlled substance, with death as a consequence.

The reckless homicide charge was for causing the death of the victim by giving her drugs. The contributing to the delinquency of a child charge was for causing the victim to violate a criminal law. The penalty for the contributing to the delinquency of a child was increased because a death was a consequence.

As the court of appeals concluded, the nature of the proscribed conduct differs because § 940.02(2)(a) concerns reckless homicides involving drug manufacturing, distribution or delivery. Conversely, § 948.40(1) and (4)(a), in the chapter titled "Crimes against children," applies solely to contributing to the delinquency of a child. Therefore, as the circuit court and court of appeals concluded, the nature of the proscribed conduct shows that the legislature intended to allow multiple punishments.

D. Appropriateness of multiple punishments.

The final factor concerns the appropriateness of multiple punishments. The circuit court concluded that multiple punishments are appropriate because the victim was a child (143:3-4).

The court of appeals concluded that multiple punishments were appropriate for the same reasons that the nature of the proscribed conduct was different. *Patterson*, 321 Wis. 2d 752, ¶ 20.

Patterson asserts in his brief that multiple punishments are inappropriate "because the harm caused by reckless homicide and the harm caused by contributing to the delinquency of a child homicide are not significantly different to the extent that the state is

justified to charge them as separate offenses." The "act generating the harm is the same" (Patterson Br. at 36). He argues that "the evil that each statute targeted was identical," and that "The main interest in these statutes is protection of human life" (Patterson Br. at 36).

However, as discussed above, the two offenses and two convictions were separate. Patterson was charged and convicted for: (1) causing Tanya S.'s death by giving her drugs, and (2) causing her to violate a criminal law by possessing controlled substances, with death as a consequence. The reckless homicide statute applies to a person who recklessly kills another person. Under subsection (2)(a) of § 940.02, the recklessness is the manufacturing, distribution, or delivery of controlled substances. The contributing to a delinquency of a child statute applies to a person who contributes to the delinquency of a child, and the penalty is increased if death is a consequence. Punishment for both charges is therefore appropriate.

When charged offenses are different in law or fact, it is presumed that the legislature intended to permit cumulative punishments. *Davison*, 263 Wis. 2d 145, ¶ 44 (citations omitted). Patterson has failed to show a clear legislative intent to overcome that presumption. The circuit court and court of appeals properly concluded that Patterson could be convicted under both § 940.02(2)(a) and § 948.40(1) and (4)(a), and that decision should be affirmed.

II. PATTERSON WAS PROPERLY CONVICTED OF CONTRIBUTING TO THE DELINQUENCY OF A CHILD WITH DEATH AS A CONSEQUENCE EVEN THOUGH THE CHILD WAS SEVENTEEN YEARS OLD.

A. Introduction.

Patterson asserted in his motion for postconviction relief that he could not properly be convicted of contributing to the delinquency of a child with death as a consequence, under Wis. Stat. § 948.40(1) and (4)(a), because the victim, Tanya S., was seventeen years old. Patterson argued that Tanya S. could not have been prosecuted as a juvenile, and therefore he could not have contributed to her delinquency (134:1-4; 140:13-16).

The circuit court denied Patterson's claim, concluding that Tanya S. was a child for the purposes of § 948.40 because she is not being prosecuted, but rather was the victim of the crime (143:5).

The court of appeals agreed, concluding that Tanya was a "juvenile" under Wis. Stat. § 938.02(10m) because the statute defines a juvenile as a person under the age of seventeen except for "the 'purpose[] of investigating or prosecuting' the 'person who is less than 18 years of age.'" *Patterson*, 321 Wis. 2d 752, ¶ 29. The court stated that the issue is not whether Tanya S. was a "'juvenile' for purposes of prosecuting her, but instead for the purposes of prosecuting Patterson." *Id.* The court concluded that for purposes of Patterson's prosecution for contributing to the delinquency of a child, Tanya S. was a "juvenile" and a "child." *Id.* ¶ 29, & n.12.

This court should affirm the decisions of the circuit court and court of appeals because the legislature intended in enacting §§ 948.01(1) and 948.40, that for the purposes of protecting children and prosecuting persons who

intentionally cause them to violate criminal laws, a child is a person under eighteen years of age.

B. Tanya S. was a child for the purposes of Wis. Stat. § 948.40.

Patterson was convicted of contributing to the delinquency of a child with death as a consequence under Wis. Stat. § 948.40, which states, in relevant part, that: "No person may intentionally encourage or contribute to the delinquency of a child." Subsection (4)(a) provides that "If death is a consequence, the person is guilty of a Class D felony."

The statute refers to contributing to the delinquency of a child. "Child" is defined in Wis. Stat. § 948.01(1) as "a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, 'child' does not include a person who has attained the age of 17 years."

"Delinquency" is not defined in Chapter 948 or in Chapter 938. "Delinquent" is defined in Wis. Stat. § 938.02(3m) as "a juvenile who is 10 years of age or older who has violated any state or federal criminal law."

"Juvenile" is not defined in Chapter 948. It is defined in Wis. Stat. § 938.02(10m) as "a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, 'juvenile' does not include a person who has attained 17 years of age."

Patterson argues that Tanya S. could not be a victim of the crime of contributing to the delinquency of a child because she was seventeen years old. Therefore, Tanya S. could not be investigated or prosecuted under Chapter 938.

However, section 948.01(1), which defines "child" for the purposes of Chapter 948, differentiates between prosecution of the child and all other purposes. The statute provides that a child is a person under the age of eighteen, except that for purposes of prosecuting the child, a child is a person under the age of seventeen.

The State acknowledges that Tanya S. could not have been prosecuted under Chapter 938 for violating a state or federal criminal law. However, that does not mean that she was not a child under § 948.01(1).

At issue in this case is *not* whether Tanya S. was a child for purposes of prosecuting her. Tanya S., who was the victim of Patterson's crime of contributing to the delinquency of a child, is not being prosecuted for violating a criminal law. Therefore, under § 948.01(1), she was a child. For the same reason, Tanya S. was a juvenile, and not an adult under §§ 938.02(3m) and (10m).

The pattern jury instruction for § 948.40(1) and (4)(a), Wis. JI-Criminal 2170A, supports this reading of the statute. The instruction states that to find Patterson guilty under § 948.40, the State had to prove that: (1) Tanya S. was under the age of eighteen years; (2) Patterson intentionally encouraged or contributed to the delinquency of Tanya S.; and (3) death was a consequence. *See* Wis. JI-Criminal 2170A. The instruction specifically provides that the statute applies to a child under the age of 18 years, and that "delinquency," for the purposes of § 948.40, means "any violation of state criminal law by a child." Wis. JI-Criminal 2170A at 2.

The legislative history confirms that the legislature has not limited the reach of the "contributing to the delinquency of a child" statute to victims under seventeen years old. Instead, the legislature intended that for the purposes of protecting children in § 948.40, a child is a person under the age of eighteen.

Wisconsin Stat. § 947.15, the predecessor to § 948.40, criminalized contributing to the delinquency of a child. "Child" was not defined in § 947.15, or in Chapter 947, titled "Crimes against public peace, order and other interests." "Child" was defined in § 48.02(2), which stated "Child" means a person under eighteen years of age. *Jung v. State*, 55 Wis. 2d 714, 720, 201 N.W.2d 58 (1972); *State ex rel. Schulter v. Roraff*, 39 Wis. 2d 342, 353, 159 N.W.2d 25 (1968).

Section 947.15 was repealed by 1987 Wis. Act 332, and § 948.40, "Contributing to the delinquency of a child" was enacted. The new statute was part of Chapter 948, titled "Crimes against children." It stated in relevant part that: "No person may intentionally encourage or contribute to the delinquency of a child as defined in s. 48.02 (3m)." Wis. Stat. § 948.40(1) (1987-88). "Child" was defined for purposes of Chapter 948 as "a person who has not attained the age of 18 years." Wis. Stat. § 948.01(1) (1987-88). Section 948.40 referenced § 48.02(3m), which provided that: "'Delinquent' means a child who is less than 18 years of age and 12 years of age or older who has violated any state or federal criminal law, except as provided in ss. 48.17 and 48.18." Wis. Stat. § 48.02(3m) (1987-88).

The "contributing to the delinquency of a child" statute remained virtually unchanged until the legislature created the Juvenile Justice Code, Chapter 938, in 1995 Wis. Act 77. The legislature repealed § 48.02(3m), and removed the definition of "delinquency" from Chapter 48, the Children's Code. In the Juvenile Justice Code, it created § 938.02(3m), which defined "Delinquent" in relevant part as "a juvenile who is 10 years of age or older who has violated any state or federal criminal law." It defined "Juvenile" as "a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, 'juvenile' does not include a person who has

attained 17 years of age." Wis. Stat. § 938.02(10m) (1995-96).

In 1995 Wis. Act 77, the legislature also amended Wis. Stat. § 948.40, "Contributing to the delinquency of a child," removing any reference to the definition of "delinquency." The legislature did not amend § 948.40 to refer to "the delinquency of a child as defined in s. 938.02(3m)." Instead, it removed any statutory reference to the meaning of "delinquent" or "delinquency."

The removal of this reference indicates that when the legislature enacted a law treating seventeen-year-olds as adults for the purpose of prosecution under the Juvenile Justice Code, it did not intend to limit the reach of the "contributing to the delinquency of a child" statute, § 948.40, by defining a victim under § 948.40 as a person under seventeen years of age. If the legislature had intended to do so, it could have defined "child" in § 948.01(1) as a person under seventeen years of age.

Instead, the legislature defined "child" in § 948.01(1), for the purposes of Chapter 948, as "a person who has not attained the age of 18 years." In so doing, the legislature distinguished between statutes and chapters of the statutes that are intended to protect children (Chapter 48 and Wis. Stat. § 948.40), and those that are intended to prosecute children (Chapter 938).

The legislature later amended the definition of "child" in § 948.01(1). In the 1995-96 statutes, the definition was amended to "a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, 'child' does not include a person who has attained the age of 17 years." The legislature offered no hint of an intent to limit the reach of § 948.40 to victims under the age of seventeen.

Finally, if a person can only contribute to the delinquency of a person under seventeen, then "child" in

§ 948.01(1) really means "a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, *or for the purposes of § 948.40*, 'child' does not include a person who has attained the age of 17 years." Of course, this is not what the statute says.

Patterson asserts that two Opinions of the Attorney General support his reading of the statute (Patterson Br. at 44-46). However, one addressed whether contributing to the delinquency of a child can include contributing to a child's truancy, a violation that was removed from the definition of delinquency. The opinion concludes that "only if an adult encourages or contributes to the child's violation of such a criminal law or ordinance may that adult be charged under sec. 947.15 as contributing to the delinquency of a minor." 66 Wis. Op. Att'y Gen. 19, 20 (1977).

The second opinion addressed whether contributing to the delinquency of a child can include contributing to a child's violation of a civil offense. The opinion concludes that "it clearly appears that the definition of 'delinquent' presently is intended to apply only to children who violate criminal laws." 70 Wis. Op. Att'y Gen. 276, 279 (1981).

Both opinions support the conclusions of the circuit court and court of appeals that because Tanya S. was a child when Patterson delivered a controlled substance to her, and thus contributed to her violation of a criminal law, § 948.40 applies to him. The decisions of the circuit court and court of appeals were correct, and should be affirmed.

III. THE JURY WAS PROPERLY INSTRUCTED ON FIRST-DEGREE RECKLESS HOMICIDE.

Patterson asserted in his postconviction motion that the jury was improperly instructed on first-degree reckless homicide (134:11-13). The court instructed the jury 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 four elements are present: First, that the defendant delivered a substance; second, that the substance was Oxycodone; third, that the defendant thought or believed that the substance was Oxycodone, a controlled substance; and fourth, that [Tanya S.] used the substance alleged to have been delivered by the defendant and died as a result of that use.

(126:254.)

Patterson argued that the instruction relieved the State of proving the fourth element, by allowing conviction if the jury found that the victim used the substance *alleged* to have been delivered by the defendant. Patterson argued that the term permits conviction on allegation, rather than proof (134:11-13).

The circuit court denied Patterson's claim, because the jury was instructed that to find Patterson guilty, it must find four elements, including that Patterson delivered a substance which was Oxycodone (143:6).

The court of appeals agreed, concluding that when viewed as a whole, the jury instruction required the jury to find four elements, including that the substance was Oxycodone. *Patterson*, 321 Wis. 2d 752, ¶¶ 31-32.

On appeal, Patterson argues that: "There is at least a reasonable likelihood that the jury understood the instruction to allow for conviction on less than proof

beyond a reasonable doubt, that is, based merely on whether an allegation was made" (Patterson Br. at 46).

The State maintains that the circuit court and court of appeals were correct. As instructed by the court, the jury could find Patterson guilty of first-degree reckless homicide only if it found that he delivered Oxycodone to Tanya S.

The pattern instruction for first-degree reckless homicide, Wis. JI-Criminal 1021 (2006), states:

> First degree reckless homicide, as defined in § 940.02(2) of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by delivery of a controlled substance in violation of § 961.41 which another human being uses and dies as a result of that use.

The instruction then sets forth four elements:

> **Elements of the Crime that the State Must Prove**
>
> 1. The defendant delivered a substance.
>
> 2. The substance was (name controlled substance).
>
> 3. The defendant knew or believed that the substance was [(name controlled substance)]
>
> 4. (Name of victim) used the substance alleged to have been delivered by the defendant and died as a result of that use.

Wis. JI-Criminal 1021 at 1 (footnotes omitted).

The instruction read by the court "directly tracks the pattern instruction." *Patterson*, 321 Wis. 2d 752, ¶ 30, n.13. The jury was instructed that to find Patterson guilty, it had to find that *he delivered a substance*, that *the substance was Oxycodone*, and that Patterson knew or believed the substance was Oxycodone. In then saying that the jury had to find that Tanya S. used the substance *alleged* to have been delivered by Patterson, the court did

not tell the jury that, contrary to what it had just heard, it could find Patterson guilty *without* finding that he delivered Oxycodone. As the court of appeals recognized, "The 'alleged' language in element four is plainly a reference to the substance Patterson was alleged to have delivered to Tanya S. in elements one and two of the crime. Those elements, in turn, require proof that Patterson actually delivered the Oxycodone." *Patterson*, 321 Wis. 2d 752, ¶ 32.

If the jury had reasonable doubt about whether Patterson delivered a substance, or whether the substance was Oxycodone, it never would have reached the fourth element—it would already have determined that one or both of the first two elements were not met.

The instruction told the jury that to find Patterson guilty it had to find that he delivered Oxycodone, that he knew or believed it was Oxycodone, and that Tanya S. used the substance referred to in the first three elements and died as a result. As the circuit court and court of appeals concluded, the jury was properly instructed, and their decisions denying Patterson's claim should be affirmed.

IV. PATTERSON IS NOT ENTITLED TO A NEW TRIAL ON THE GROUND OF PROSECUTORIAL MISCONDUCT.

Patterson argues that this court should grant a new trial on the ground of prosecutorial misconduct (Patterson Br. at 49-55). He points out that the trial court denied his motion for a mistrial (Patterson Br. at 52; 126:121-23). Patterson asserts that this court should now order a new trial.

Patterson claims that four questions by the prosecutor were improper. However, as the court of appeals concluded, only one of the questions was even

arguably improper, and any error was harmless. *Patterson*, 321 Wis. 2d 752, ¶ 36-37.

The prosecutor asked Janice Tappa about the number of Tylenol pills Tanya S. had said she took on a prior occasion when she became unresponsive (Patterson Br. at 50-51). Apparently, shortly after Tanya S.'s death Tappa said that Tanya S. said she had taken one pill on the prior occasion (121:102-03). Tappa testified that she did not remember how many pills Tanya S. said she had taken (121:103). The prosecutor asked whether it would refresh her memory to know that her son said Tanya S. told him she had taken two pills. Tappa answered: "That would be Calvin's statement; and I'm sorry, but I can't remember" (121:102-03).

The prosecutor asked Patterson's brother, Daniel Perez, about what time he saw the victim the night before she died (Patterson Br. at 51). The prosecutor asked: "So if all other witnesses said that at 11:00 your mom was already home . . . that would be wrong" (118:237). Trial counsel objected, and the court told the prosecutor to "Restate the question" (118:238). The prosecutor asked if Perez was sure about the times, or, if his testimony was different than statements from other people, his memory was incorrect (118:238).

The prosecutor asked an investigator, after the investigator said Patterson had not told him he kept his Oxycodone in his pants pocket, "So if Loretta Patterson had testified that he kept his most recent Oxycontin 40-milligram prescription in his pants pocket, would this be the first time you heard that?" (122:64). The court sustained trial counsel's objection (122:64) (Patterson Br. at 51-52).

The court of appeals concluded that none of these questions were improper under *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), "because the prosecutor was not asking a witness to opine as to whether another witness was telling the truth."

Patterson, 321 Wis. 2d 752, ¶ 35. In his brief to this court, Patterson does not argue that the court was incorrect.

Patterson also points to the prosecutor asking the investigator about his interview of Misty Hale (Patterson Br. at 54). The investigator testified that during the interview he stopped the recorder and told Hale about obstruction, because she thought that by being truthful she would betray her boyfriend, Daniel Perez (122:53). The prosecutor asked the investigator whether he thought Hale was truthful when questioning continued after he restarted the tape, and the witness answered "I believe she was being truthful" (122:55). Trial counsel objected, and the court sustained the objection (122:55).

The court of appeals concluded that this instance "does appear to have involved a **Haseltine** violation." *Patterson*, 321 Wis. 2d 752, ¶ 36. However, the court concluded that "this single instance in the context of a seven-day trial does not persuade us that the trial was '"so infected . . . with unfairness as to make the resulting conviction a denial of due process."'" *Patterson*, 321 Wis. 2d 752, ¶ 37, citing *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).

The court of appeals' decision was correct. As the court recognized, "Patterson suggests no reason why this portion of the testimony was particularly important." *Id.* ¶ 37.

The prosecutor's questioning had no conceivable impact on this case. The State is unable to find any mention in the record of what Hale told the investigator before or after the tape was stopped. The jury therefore heard that the investigator believed Hale was truthful after he restarted the tape, but it did not hear what she said.

In summary, Patterson points to a number of instances in which the prosecutor asked proper questions,

and one arguably improper question that had no impact on the case.

The circuit court denied Patterson's motion for a mistrial (126:121-23). In deciding a motion for mistrial, a trial court "'must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.'" *State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted). The trial court properly exercised its discretion in denying the motion for a mistrial. Similarly, the court of appeals properly denied Patterson's prosecutorial misconduct claim. The decisions should be affirmed.

CONCLUSION

For the foregoing reasons, this court should affirm the decision of the court of appeals which affirmed the judgment of conviction and the circuit court order denying Patterson's motion for postconviction relief.

Dated this 20th day of May, 2010.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 10,990 words.

_____

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of May, 2010.

_____

MICHAEL C. SANDERS
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2008AP1968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

PATRICK R. PATTERSON,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ALL ENTERED IN THE CIRCUIT COURT FOR JUNEAU COUNTY, HONORABLE CHARLES A. POLLEX PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. Convictions of Contributing to the Delinquency of a Child Resulting in Death and First Degree Reckless Homicide are Multiplicitous.

A. The state's charging decision does not settle all questions regarding multiplicity of convictions.

The state repetitively argues that the state's charging decision in homicides is always dispositive as to questions of multiplicity under Wis. Stat. § 939.66(2). *See, e.g.,* State Br. at 15: "[T]he comment to § 339.65 does not indicate legislative intent to prohibit multiple convictions if the prosecution brings multiple charges;" State Br. at 12: "[Section] 939.66(2) does not prohibit convictions of both offenses if both offenses are charged ...Section 939.66 says nothing about barring conviction for multiple crimes if multiple crimes are charged;" State Br. at 11: "[Section 939.66](2) can reasonably be read as barring multiple convictions only when the defendant is charged under one statute, not when the defendant is charged under multiple statutes."

While the state may exercise a fair amount of discretion

in the charging decision, this power is not plenary and is subject to limitation. *See, e.g. Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974); *State v. Thums*, 2006 WI App 173, ¶13, 295 Wis.2d 664, 721 N.W.2d 719 ("[P]enalties are prescribed by the legislature. Prosecutorial discretion only allows the State to choose among available penalty schemes.").

The fact that the state brought the charges does not determine that multiple convictions are appropriate, and *State v. Davison*, 2003 WI 89, 263 Wis.2d 145, 666 N.W.2d 1, does not support that the charging decision settles all questions regarding multiplicity of convictions. The state portrays Patterson as urging the Court to overrule *Davison*, but that is false: on the contrary, Patterson's position is totally consistent with the ongoing vitality of *Davison*. *Davison* is distinguished because *Davison* focuses on the special problems of the battery statute.

Patterson's position is that *State v. Lechner*, 217 Wis.2d 392, 576 N.W.2d 912 (1998), still controls regarding multiple homicide convictions for killing one person. *Lechner* analyzed the plain language of Wis. Stat. § 939.66(2), and found that it prohibits multiple convictions only when one of the homicide

convictions is for a "less serious type" of homicide. *Lechner*, 217 Wis.2d at 408. "Noticeably absent from the prohibitions of Wis. Stat. §939.66(2) is a bar against multiple homicide convictions when the homicides are 'equally serious.'" *Lechner*, 217 Wis.2d at 408.

Lechner says that principles forbidding multiplicity do not prohibit convictions of the *same* offense level, but it certainly implies that such principles do prohibit convictions of different offense levels. Thus, the state errs in saying that in *Lechner*, "the arguments in the case focused on whether Wis. Stat. § 939.66 barred two counts of homicide when they were not equally serious." State Br. at 14. In fact, *Lechner* focused on two convictions that were of the same level of severity.

For battery convictions, on the other hand, the offense level is simply irrelevant for multiplicity analysis because Wis. Stat. § 939.66(2m) specifically allows the submission to the jury of different forms of battery, regardless of offense level.

To summarize, both the Court and the legislature treat battery differently than they treat homicide, as well they should.

B. Contributing to the delinquency of a child resulting in death is a "type of criminal homicide."

The state presents various scenarios under which it claims individuals may be convicted of contributing to the delinquency of a child resulting in death. State Br. at 19. The state cites no cases in which there were actually convictions under such circumstances, but in fact the state should have cited *State ex rel. Schulter v. Roraff*, 39 Wis.2d 342, 354, 159 N.W.2d 25 (1968), because that case contained a real-life third party liability issue. Under *Schulter*, there is no question but that the contribution to the delinquency has to be substantial factor in causing the death. *Schulter,* 39 Wis.2d at 354-5 (term "proximate cause" sufficiently expressed causation necessary for contributing to the delinquency of a child causing death statute). In that way, contributing to the delinquency of a child causing death is no different than any other homicide statute. In *Schulter*, the Court permitted prosecution under the contributing to the delinquency of a child causing death statute where the accused permitted an intoxicated minor to operate the accused's car. Perhaps the state does not discuss *Schulter* because

language in *Schulter* tends to weaken the state's position that contributing to the delinquency of a child causing death is not a homicide statute:

> Foreseeability or intent that the specific consequences occur are not necessary to due process of law or to a crime. Acts which occur in death frequently carry increased penalties over the same act which does not result in death, i.e., § 940.03, felony murder. We think there is sufficient connection even if it is only causation between the proscribed act of contributing to the delinquency of a child and death resulting from such delinquency to make an increased penalty reasonable and not arbitrary even though death is unintended or unforeseen.

Schulter, 39 Wis.2d at 355.

Likewise, the state's kvetch about the "contributing to the delinquency of a child causing death" statute using the language "if death is a consequence" does not exempt "contributing to the delinquency of a child causing death" from being a homicide statute. State Br. at 19-20. It is well-established that where criminal statutes use "as a result" or "results in," these phrases mean the same thing as "cause" and should be defined in terms of "substantial factor." *See* Wisconsin Jury Instruction — Criminal 901, *citing State v. Bartlett*, 149 Wis.2d 557, 439

N.W.2d 595 (Ct. App. 1989) (causality is implicit in "fleeing an officer resulting in death" Wis. Stat. §§ 346.04, 346.17(3)(d) — the language "if the violation results in the death of another" is a causative term). "If death is a consequence" is likewise a causative term — "consequence" is the correlative of "cause." *See Board of Trustees of Fireman's Relief and Pension Funds for City of Tulsa v. Miller*, 258 P.2d 146 (Okla. 1953).

Finally, the legislative history of Wis. Stat. §948.40(2)(a) indicates both (a) that it is a homicide statute, and (b) that permitting it to become law (despite Judicial Council Reporter Jim Fullin's strongly-worded objection that it should be eliminated) set the stage for the exact multiplicity problem that the case at bar presents. *See* May 17, 1989 letter to Shaun Haas from Jim Fullin: Supp. App. at 3 (Document #28 in Wisconsin Judicial Council archives at the Wisconsin State Law Library):[1]

> FELONY MURDER: A final thread of the 1989 Criminal Code Revision was organizing the law of homicide so that the punishment depends on the actor's mental state regarding the risk of death.

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[1] *See* http://wilawlibrary.gov/judcoun/jc2homicide.html

> Although felony murder was retained, it was restricted in scope to five inherently dangerous felonies [currently thirteen felonies: Wis. Stat. §§ 940.19, 940.195, 940.20, 940.201, 940.203, 940.225(1), (2), 940.30, 940.31, 943.02, 943.10(2), 943.23(1g) and 943.32, *see* Wis. Stat. § 940.03] where a penalty equivalent to that for aggravated reckless homicide would almost always be appropriate. Deaths caused in the commission of other crimes must be prosecuted under the general homicide statutes, requiring determination of whether the actor acted intentionally, recklessly, negligently, etc., with respect to the death. [Sections] 948.21(1) and 948.40(4)(a) unravel this scheme by reintroducing specialized forms of homicide, whereby misdemeanors become Class C felonies "if death is a consequence."
>
> One problem is that the statute isn't clear whether death must be a "consequence" merely of the child's neglect or delinquency. Most other homicide statutes use "cause"... More fundamentally, the Class C felonies are unnecessary. One who causes death by contributing to a child's neglect or delinquency will usually be criminally reckless, allowing punishment under s. 940.02 or 940.06.

The addition of Wis. Stat. § 948.40(4)(a) to the code, per 1987 Act 332 (the Crimes Against Children Trailer Bill) was part of the re-organizing plan of the criminal code in 1989. The late Mr. Fullin saw correctly that Wis. Stat. § 948.40(4)(a) was a homicide statute, and he correctly foresaw that one of the

problems of having Wis. Stat. § 948.40(4)(a) in the code was a potential multiplicity problem ("One who causes death by contributing to a child's ... delinquency will usually be criminally reckless, allowing punishment under s. 940.02 ..."). Mr. Fullin was also prophetic about the state's concern with causation being stated as "consequence," but Mr. Fullin did not think that was a reason to believe that contributing to the delinquency of a child causing death was other than a homicide statute. Id. ("Most other homicide statutes ...).

II. Since a 17-year-old Cannot Be Either Investigated or Prosecuted as a Delinquent, a Defendant Cannot "Contribute" to the "Delinquency" of a 17 Year Old "Child."

The state correctly points out that Patterson relies in his main brief on the definition of "juvenile" in Wis. Stat. §938.02(10m), and not on the definition of "child" in Wis. Stat. § 948.01(1). There is one interesting difference between these two definitions:

"Juvenile" is defined under Wis. Stat. § 938.02(10m) as a person under the age of 18 *except* "juvenile" does not include a person over 17 for the purpose of *investigating or prosecuting*

a person who is alleged to have violated a state or federal criminal law.

"Child," as defined by Wis. Stat. § 948.01(1), is "a person who has not attained the age of 18 years, *except* that for purposes of *prosecuting* a person[2] who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the age of 17 years."

Thus, it appears that 17-year-olds can be "juveniles" except for investigative and prosecutive purposes, and they can be "children" except for prosecutive purposes. So, possibly a 17-year-old could be a "child" for investigative purposes. Resolution of this question, however, is not required in this case because even if a 17-year-old is still a child for purposes of being "investigated," she is nonetheless immune from any

---

[2]There might be a little ambiguity in the language, "for the purposes of prosecuting a *person* who is alleged to have violated a state or federal criminal law" in § 948.01(1). Subsection (1) uses the word "person" three times: "person" certainly means the putative "child" the first and last time, but possibly the "person" in the middle could be a defendant charged with a Chapter 948 crime. This analysis could get complicated if a child were charged in a delinquency petition with contributing to the delinquency of a different child.

petition for delinquency.

Assuming *arguendo* that the state is correct that the definition of "juvenile" (Wis. Stat. § 938.02(10m)) has no bearing on the appeal, the state still has the problem in that Tanya was not potentially a juvenile delinquent due to her age under the definition of "child" in Wis. Stat. § 948.01(1).

III. A Criminal Jury Instruction Asking the Jury to Determine That an Allegation Was Made is Inherently Misleading.

The jury instruction uses the language "alleged to have been delivered" without specifying who makes the allegation. The state's position is that since the jury had to find that Patterson delivered a substance, and that Tanya S. died as a result of using a substance "alleged to have been delivered" by Patterson, that the instruction is clear of error.

The Court must examine jury instructions as a whole to determine if there is a reasonable likelihood that the jury understood the instruction to allow for conviction on less than proof beyond a reasonable doubt. *See State v. Avila,* 192 Wis.2d 870, 888, 532 N.W.2d 423 (1995) and *Victor v. Nebraska,* 511

U.S. 1, 5 (1994). In this case, it is reasonably likely that the jury understood the instruction to permit conviction based merely on whether an allegation was made.

The state claims, "[i]f the jury had a reasonable doubt about whether Patterson delivered a substance, or whether the substance was Oxycodone, it would have never reached the fourth element ..." State Br. at 36. That might be true, but the state ignores a scenario wherein the jury believes that Patterson delivered a batch of Oxycodone to one recipient, but yet another person, who obtained Oxycodone from someone other than Patterson, supplied Tanya S. and caused her to die. At trial, the defense was that there had been a different source for the drugs that killed Tanya, focusing particularly on Tanya's mother, Robbie M. Rec. 121:132. Robbie M. testified at trial, and admitted that she had sold Oxycodone to a third party, not Patterson, although she denied giving it to her daughter. Rec. 122:123. There were obviously a lot of narcotics floating around in this community. Patterson did not have a monopoly. The jurors could have convicted under the instruction even if they had a reasonable doubt about the source of the drug that killed Tanya.

IV. In Light of the Whole Proceeding, the Prosecutor's Conduct Was Sufficiently Prejudicial to Warrant a New Trial.

All parties agree that one part of the prosecutor's conduct violated *State v. Haseltine,* 120 Wis.2d 92, 95-96, 352 N.W.2d 673 (Ct. App. 1984). S*ee State v. Patterson,* 2009 WI App 161, ¶37, 321 Wis.2d 752, 776 N.W.2d 602. Why was the *Haseltine* violation so bad? Because it showed that the detective in charge of the case personally believed the second version of events that Misty Hale gave, the incriminating version. This occurred after the detective had been talking to Ms. Hale with the tape recorder on, and she gave an exculpatory version of events. Rec 122:53. The detective turned the recorder off, and chatted with Ms Hale off the record, all but accusing her of obstructing by lying, and then he turned the reorder on again and she gave a version that hurt Patterson. Id. This is the version the detective expressed he believed over the pro-defense version.

The trial prosecutor's repeated attempts to impeach witnesses by juxtaposition of their testimony with other witnesses' statements were not *Haseltine* violations. But they were improper, and may have influenced the jury improperly,

causing the jurors, for example, to disbelieve a witness who was helpful to the defense because his or her statements did not correspond to a statement that the prosecutor endorsed.

The cumulative error was sufficiently prejudicial to warrant a new trial, and as such, the circuit court should have exercised its discretion to grant a mistrial in this matter. *See State v. Doss*, 2008 WI 93, ¶69, 312 Wis.2d 570, 754 N.W.2d 150.

CONCLUSION

For the reasons set forth above, as well as the reasons stated in his main brief, Patterson respectfully requests that the Court reverse the decisions below.

Respectfully submitted this 9th day of June, 2010.

/s/ David R. Karpe

David R. Karpe
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448 West Washington Avenue
Madison, Wisconsin 53703
608-255-2773

ATTORNEY FOR DEFENDANT-APPELLANT-PETITIONER

RULE 809.19(8) CERTIFICATE

I certify that this reply brief conforms to the rules contained in s. 809.19(8)(b) and (c), Stats., for a reply brief produced with a proportional serif font. The brief is 2,844 words long.

Signed,

/s/ David R. Karpe

David R. Karpe

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

/s/ David R. Karpe

David R. Karpe

SECTION 809.19 (2) CERTIFICATE

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Signed,

/s/ David R. Karpe

David R. Karpe

SUPPLEMENTAL APPENDIX

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*referenced at
http://wilawlibrary.gov/judcoun/jc2homicide.html

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EXECUTIVE SECRETARY
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MADISON, WISCONSIN 53702
(608) 266-1319

DATE: May 17, 1989

TO: Shaun Haas

FROM: Jim Fullin

RE: Crimes Against Children Trailer Bill

Professor Schultz sent me a copy of his May 10 memo to you, which reminded me that there are several other aspects of ch. 948 which concern the group which developed the new Homicide Law (1987 Act 399). As you know, that bill strove to complete some of the unfinished work of Wisconsin's 1955 Criminal Code Committee.

UNIFORM DEFINITIONS. One hallmark of a modern criminal code is its consistent use of carefully defined terms. 1987 Act 332 violates that principle by defining the same term or phrase in different ways for different purposes, and by specially defining and using several terms already defined in s. 939.22 for Criminal Code purposes generally.

The most important of these is "criminal recklessness," for which Professor Schultz has suggested a solution, which I endorse (except that his proposed s. 939.24(3) should also refer to s. 940.23, Reckless Injury).

Another example is "child," whose s. 948.01(1) definition, if renumbered 939.22(5), would apply to s. 939.45 without the need for a special (and inaccurately cross-referenced) definition there.

The definition of "great bodily harm" in s. 939.45(5)(a)2 references the wrong statute. If it were repealed, s. 939.22(14) would control, as I believe it should.

1987 Act 332 contains two definitions of "person responsible for the child's welfare." The first, in s. 939.45(5) relating to the in loco parentis disciplinary privilege, is very similar to the second, in s. 948.01(3), which is used to define the elements of, or enhance the penalty for, certain ch. 948 offenses. The second definition is slightly broader, in that it includes foster parents; employes of public or private homes, institutions or agencies which do not provide residential or other services to the child; and persons employed to exercise temporary control or care for the child by one legally responsible for the child's welfare.

Couldn't these definitions be combined as s. 939.22(23)? Doesn't a foster parent, or a babysitter, enjoy the privilege of reasonable discipline?

The definitions of "sexual contact" and "sexual intercourse" in s. 948.01(5) and (6) are excellent. If these were renumbered s. 939.22(34) and (36), those in s. 940.225(5) could be repealed, and each term would have one definition, not three.

EFFECT ON OTHER STATUTES. Proposed s. 948.015 is apparently created to avoid the implication that all offenses against children must be prosecuted under ch. 948. But, since the listed offenses are only examples, it would be more forthright to say that ch. 948 does not preclude prosecution under other statutes for crimes committed against children, and leave it at that.

CLARITY ABOUT SUBJECTIVE MENTAL ELEMENT. Another goal of 1987 Act 399 was to clarify that criminal recklessness has a subjective mental element, namely, awareness of the risk created by one's conduct. The old statutes talked about conduct "demonstrating" or "evincing" a conscious disregard, rather than the actor's actual awareness of the risk, as required by new s. 939.24.

Obviously, the trier may infer the actor's subjective mental state from his/her conduct, but it is the subjective mental state itself which makes the behavior reckless rather than negligent.

New s. 948.04 violates this principle by making it a Class C felony for a person exercising control of a child to cause it mental harm by "conduct which demonstrates substantial disregard for the mental well-being of the child."

Must the person consciously disregard a risk of mental harm to the child? If so, this is a recklessness offense and, if Professor Schultz's proposed definition is adopted, could be stated "No person in control of a child shall recklessly cause that child mental harm."

Is it enough that the conduct is so dangerous that a reasonable person should have realized the risk, even though this defendant didn't? If so, this is a negligence offense and could be stated as above, with "negligently" substituted for recklessly, and s. 939.25 modified as per Professor Schultz's suggestion.

DEFINITION OF MENTAL HARM. Another example of defining something by evidence rather than the thing itself is the definition of "mental harm" in s. 948.01(2):

> "Mental harm" means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. "Mental harm" may be evidenced by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development. (emphasis added)

It is not difficult to imagine facts in which mental harm is caused, but there is no evidence of the kind listed in this statute. Can a prosecution be brought? Literally, the definition is complete before the first underlined clause. "May be evidenced by" implies that other proofs are relevant to showing substantial harm to the child's psychological or intellectual functioning.

But obviously this statute, entitled "Definitions," admits of an argument that only the evidence specified is relevant, let alone sufficient for conviction. Prosecutors, leery of appeals and retrials, won't charge unless the evidence fits the statutory specs.

That portion of the definition beginning with and including the first underlined clause should be repealed. If that is not politically feasible, it should at least be moved to a separate statute entitled "Evidence Relevant to Mental Harm," which specifically permits admission of any other relevant evidence.

ATTEMPTS. The child enticement statute, s. 948.07, defines the offense to include attempts. This violates the general rule of Wisconsin's Criminal Code that attempts are punished less severely than completed offenses. What is the rationale for this special exception? Did the committee feel 5 years wasn't sufficient for attempted child enticement, but 20 years was too severe for the completed crime?

FELONY MURDER. A final thread of the 1989 Criminal Code revision was organizing the law of homicide so that the punishment depends on the actor's mental state regarding the risk of death.

Although felony murder was retained, it was restricted in scope to five inherently dangerous felonies where a penalty equivalent to that for aggravated reckless homicide would almost always be appropriate. Deaths caused in the commission of other crimes must be prosecuted under the general homicide statutes, requiring determination of whether the actor acted intentionally, recklessly, negligently, etc., with respect to the death. Ss. 948.21(1) and 948.40(4)(a) unravel this scheme by reintroducing specialized forms of homicide, whereby misdemeanors become Class C felonies "if death is a consequence."

One problem is that the statute isn't clear whether death must be a "consequence" merely of the child's neglect or delinquency, or more specifically of the defendant's contribution to that neglect or delinquency. Most other homicide statutes use "cause," which is broadly defined as being a "substantial contributing factor" if there are several causes.

More fundamentally, these Class C felonies are unnecessary. One who causes death by contributing to a child's neglect or delinquency will usually be criminally reckless, allowing punishment under s. 940.02 or 940.06.

If the defendant was not aware of the risk, but should have realized it, and the instrumentality of death was a vehicle, explosives, fire or a dangerous weapon, negligent homicide under s. 940.08 and 940.10 is committed. Ss. 948.21(1) and 948.40(4)(a) fill no "gap" in the homicide statutes, assuming the defendant is at last negligent with respect to the death. Their creation only complicates the process of instructing the jury on lesser offenses included within that charged. I strongly recommend repeal of both statutes.

CONCLUSION. Please don't hesitate to call if you would like me to clarify or elaborate further on any of the points raised herein.

JLF:dk

cc: Frank Remington
Walter Dickey
Dave Schultz

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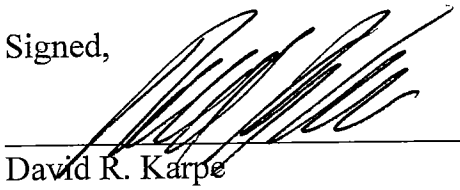

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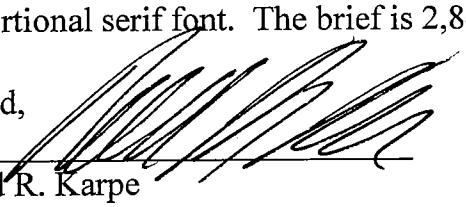

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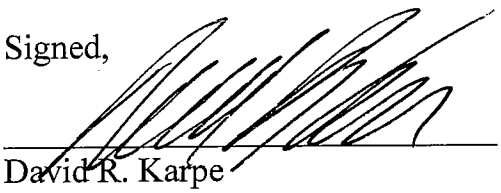

David R. Karpe