STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2012AP2782-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent,

vs.

ANDRE M. CHAMBLIS, Defendant-Respondent-Cross-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE ELLIOTT M. LEVINE PRESIDING.

COMBINED BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-CROSS-APPELLANT

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The trial court did not consider this issue.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will be warranted as this appeal will clarify when, in the context of a plea of no contest or guilty, the State must establish prior convictions under Wis. Stat. Sec. 343.307(1) for purposes of establishing the specific level of offense under Wis. Stat. Sec. 346.65. This appeal will also clarify the procedure for a State's appeal of a trial court's decision with respect to prior convictions under Wis. Stat. Sec. 343.307(1).

ARGUMENT

I. State's appeal is not proper under Wis. Stat. Sec. 974.05(1)(a) because the appeal is actually an untimely appeal of the trial court's order denying a motion to amend the information rather than an appeal of the judgment of conviction.

A. State's appeal is governed by Wisconsin Rule of Appellate Procedure 809.50 and Wis. Stat. Sec. 808.03(2) rather than Wis. Stat. Sec. 974.05.

Chamblis maintains that the State's appeal of the judgment of conviction in this case is actually an untimely appeal of the trial court's decision denying the State's request to amend the information to increase the charges against Chamblis from OWI/PAC 5th or 6th, a Class H Felony, to OWI/PAC 7th, 8th or 9th, a Class G Felony. Before discussing the specific statutes and rules that apply to and determine the nature of the appeal, it is first necessary to consider the procedural posture of the case.

In this case, the Criminal Complaint filed on November 3, 2011, (6), and the Information, filed on December 7, 2011, Appendix, "App.," 100-101, charged Operating While Intoxicated as a 5th or 6th offense, and Operating With A Prohibited Alcohol Concentration as a 5th or 6th offense, with habitual criminality enhancers. On January 17, 2012, after arraignment, the

State filed a "Motion To Amend Information," which sought to amend the Information under Wis. Stat. Sec. 971.29(2) to charge Operating While Intoxicated as a 7th, 8th or 9th offense. App.102. The State additionally filed an Amended Information which charged OWI as a 7th, 8th or 9th offense, PAC as a 7th, 8th or 9th offense as well as obstructing, with all charges including repeater allegations. App.103-105.. The difference in penalty between the charges is significant. An OWI/PAC as a Class H felony carries a maximum of 6 years imprisonment consisting of 3 years confinement and 3 years extended supervision, with a mandatory minimum 6 months imprisonment, plus a $10,000 fine. Wis. Stat. Sec. 346.65(2)(am)(5); Wis. Stat. Sec. 973.01(2)(b)(8) and (d)(5). An OWI/PAC as a Class G felony carries a maximum of 10 years imprisonment consisting of 5 years confinement and 5 years extended supervision, with a mandatory minimum 3 years confinement, plus a $25,000 fine. Wis. Stat. Sec. 346.65(2)(am)(6); Wis. Stat. Sec. 973.01(2)(b)(7) and (d)(4). The basis for the amendment and the motion to amend was the two alleged "convictions" from Illinois. App.102. As proof of the alleged Illinois "convictions," the State attached to the Amended Information a certified Illinois Department of Transportation

record. (47:17). Wis. Stat. Sec. 971.29 governs the procedure for amending the charge and provides as follows:

> 971.29 Amending the charge.
> (1)A complaint or information may be amended at any time prior to arraignment without leave of the court.
>
> (2)At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.
>
> (3)Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

Since the State had already sought and received a bindover of Chamblis on the charges of OWI/PAC 5th or 6th, the State, under Wis. Stat. Sec. 971.29, needed the trial court's permission to increase the charges against Chamblis to OWI/PAC 7th, 8th or 9th, based on the alleged Illinois "convictions." The State never received such permission. Prior to trial, which was set for September 24, 2012, 62:5, Chamblis, on August 6, 2012, filed a document entitled "Notice Of Motion And Motion For Order To Amend The Amended Complaint And For Jury Instruction," App.108-114, which challenged the State's use of the two alleged "convictions" out of Illinois to

enhance the charges to 7th, 8th or 9th offense status. [1] At a hearing on August 8, 2012, the trial court gave the State a deadline of August 22, 2012 to respond to Chamblis' motion. 62:7. The State filed an untimely response to Chamblis' motion on September 5, 2012. (32). On September 12, 2012, the trial court held a "motion hearing" regarding the Amended Information and Chamblis' objection to it. At such hearing trial counsel argued that the certified record from the Illinois Department of Transportation was not competent proof of a "conviction." 47:9-10. The trial court, relying on **State v. Spaeth**, 206 Wis.2d 135, 556 N.W.2d 727 (1996), agreed and concluded that it "will not consider that as a prior conviction unless there's other evidence." 47:28. With such ruling, the State was effectively left with its Original Information, App.100-101, which charged OWI/PAC 5th and 6th.

On September 19, 2012, the parties appeared before the trial court for a "plea hearing" at which time they indicated that an agreement had been reached wherein Chamblis would plead guilty or no contest to the charge of operating with a prohibited alcohol concentration "of a fourth degree or

[1] At the September 12, 2012 hearing of the motion, trial counsel clarified that the motion was actually a challenge to the Amended Information rather than the Complaint, and the State and trial court treated the motion as such. 47:4.

greater." 49:4.[2] Chamblis agreed to admit to the five prior charges from Minnesota but would contest the "alleged " Illinois convictions. 49:4. The agreement essentially contemplated that the offense would either be considered a Class H felony as a 6th offense or a Class G felony as a 7th offense depending upon what level the State could establish at sentencing. 49:4-5. Trial counsel, although clearly a participant in the agreement, expressed his confusion in presenting such an ambiguous agreement to the trial court:

So, I've gone over all of this with Mr. Chamblis and it's confusing to me because I've never been through a plea hearing where I don't know what class of felony my client is pleading to. 49:5.

The trial court followed up on trial counsel's expression of uncertainty and rejected the proposal for Chamblis to enter a plea to a felony offense without knowing exactly what level or classification that felony offense would be:

I understand Mr. Chamblis wants to enter a plea, and I understand what he's willing to plead to. But I think it's fundamentally—I think the Court needs to make a determination of what level of felony it is, and the question is, do we, if this is all the evidence you have right now, this is it, this is it. It's not getting more today.

And actually, Mr. Dyer is absolutely right. This was set for trial, you're done with discovery. I mean, we're done. It's supposed to be done. You know, this is as if this was

[2] The State filed a proposed Second Amended Information which alleged OWI 7th,8th or 9th , PAC 7th, 8th or 9th, and obstructing, along with repeater allegations on the OWI 7th, 8th or 9th and obstructing charges. App.106-107.

going to go to trial next week. It's not going to go to trial next week, because there is a plea agreement. If we were setting it for trial, you would have had to have had that evidence by now, and if you would have had this discovery handed over to Mr. Dyer today, I would have probably said no, it's suppressed because it's so late, doesn't give an opportunity to respond to it.

As some point, you have to as the cliché, cut and fish bait, you know, either cut bait or fish. That's the whole thing. What are we doing? Are we going to hassle over this one? I know it makes a difference between a G and an H, but they're both felonies and they both have substantial prison time over them. Do we want to continue on with this process or not, and I guess I'm asking the State to seriously think because right now I'm going to take the evidence as it is presented and I think the State probably knows what my position is, because I believe I made it very clear. I mean, of the case law that I read into the record last time we had a hearing what the Court thinks.

Unless there was something new that came up like a judgment of conviction, like a sentencing transcript, like some type of evidence indicating that Mr. Chamblis is the individual that, has convictions in Illinois on that day, I'm going to stick probably with my original ruling. 49:7-9.

At this point in the proceedings, the State offered that it indeed had some additional information regarding the Illinois "convictions." 49:10-11. The State however had not turned over such material to Chamblis. 49:9-10. As such, Chamblis objected to the trial court's consideration of such material on the basis that it had not been timely disclosed. 49:12. The trial court agreed with Chamblis and ruled that it would only accept a plea to the "lesser charge:"

This is—this case has been set for trial for a long time. The motion that Mr. Dyer brought actually was scheduled with appropriate time, an appropriate amount of time. The issue was flagged a long time ago to the Court and I'm sure it was flagged, I trust Mr. Dyer is saying that he told the District Attorney's office about this six months ago---- 49:12

I don't think it's fair to him, I don't think it's fair to Mr. Chamblis, specifically to have this information given to them so last second.

Just so it's clear, this is the Tuesday or the Wednesday before trial, which was jury selection next—next Monday. The final pre-trial was last week, the hearing was the last week too, and I can go back and look. The filing of the motion which was heard by the Court, you know, we had a hearing on it. In fact, I recall because the State then had to—wanted time to file a motion in response, filed it late, on September 5th. In the process of that motion to respond nobody does any more further discovery on whether they can show that prior conviction, which is the specific issue before the Court—the briefing had hearing on August 8th.

The Court gave the State until August 22nd to respond and Defendant's response by August 27th. Of course, the State didn't respond, didn't file a motion until September 5th. It was only a day or so before the actual hearing—yeah, originally it was for September 4th, the hearing was supposed to be September 4th at 3:45, and the actual filing may have been on the same day, but it got marked by the Clerk's office on September 5th.

You know, as I stated earlier, the evidence that was before the Court was that which was presented. Discovery requires discovery to be done in a timely fashion, to have this done last second like this, just prolongs, continues to prolong the process, and I don't know how to make a point to the State other than to say to the fact that if that's the position we are in, the Court's not going to consider the new evidence only the evidence before us. It's not clear and as I stated before, it's not clear that it's a prior conviction. If Mr. Chamblis is going to plead, he's going to plead guilty today to the lesser offense. I just can't –I can't justify extending things more. You had plenty of time, Mr. Xiong. It's too late, it's just too late, and I'm going—if I accept the plea today, it will be set for pre-sentence investigation, but it will be specifically to the lower charge. 49:14-15.

It is clear that, under Wis. Stat. Sec. 971.29, after the filing of an information, the state must obtain the court's permission to modify the charges. See **State v. Conger**, 2010 WI 56,¶16, 325 Wis. 2d 664, 797N.W.2d 341; **Wagner v. State**, 60 Wis. 2d 722,727, 211 N.W.2d 449 (1973). It is similarly clear that a trial court has discretion under Section 971.29 as to whether or not to allow the State to amend the information.

Indeed, the statute expressly uses the term "may" in discussing a trial court's authority to allow an amendment. Of course, the statute also expressly contemplates whether such an amendment would be "prejudical" to a defendant. In this case, the trial court, as noted from the trial court's comments above, exercised its discretion to deny the State's effort to amend the information. Chamblis maintains that such discretion was proper. As will be more fully discussed below, Chamblis would additionally note that the trial court was required under Wis. Stat. Sec. 971.23(7m)(a) "Sanctions For Failure To Comply," to exclude the belated material offered by the State in support of the amended information. Chamblis maintains that the trial court's ruling was proper on this basis as well. If however, the State took issue with the trial court's ruling with respect to the proposed Amended Information and the admission of the supporting material for it, its remedy existed in a discretionary appeal under Rule 809.50 and Section 808.03(2), not an appeal of right under Section 974.05.

Wisconsin Stat. Sec. 974.05 governs State's Appeals and provides in relevant part:

(1)Within the time period specified by s. 808.04 (4) and in the manner provided for civil appeals under chs. 808 and 809, an appeal may be taken by the state from any:

(a) Final order or judgment adverse to the state, whether following a trial or a plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy.

In this case, the State is putting forth the theory that this appeal is an appeal of the judgment of conviction which is arguably a "final judgment" under Section 974.05(1)(a) as set forth above. What the State actually complains of though and seeks relief from is the trial court's order denying the State's Motion To Amend Information. (17). Such order, at the time it was made by the trial court, was not a final order or judgment. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties. See Wis. Stat. Sec. 808.03(1). Since the trial court's ruling with respect to the Amended Information did not "dispose of the entire matter in litigation" it was obviously not a "final judgment" or "final order." As such, the appeal of such decision was governed by the discretionary review process set forth in Wis. Stat. Sec. 808.03(2) and Wisconsin Rule of Appellate Procedure 809.50. See **State v. Knapp**, 2007 WI APP 273,¶7, 306 Wis.2d 843, 743 N.W.2d 481.

Wis. Stat. Sec. 808.03(2) provides in relevant part:

(2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
(b) Protect the petitioner from substantial or irreparable injury; or
(c) Clarify an issue of general importance in the administration of justice.

In turn, Wisconsin Rule of Appellate Procedure 809.50 provides in relevant part as follows:

(1)A person shall seek leave of the court to appeal a judgment or order not appealable as of right under s. 808.03 (1) by filing within 14 days after the entry of the judgment or order a petition and supporting memorandum, if any.

The dispute before the trial court as to the Illinois "convictions" and their application to the proposed Amended Information was a dispute that was well suited for discretionary review under Sec. 808.03(2). An appeal under such section would have "materially advance(d) the termination of the litigation or clarif(ied) further proceedings in the litigation." See Section 808.03(2)(a). Simply put, it would have clarified with certainty whether the State was entitled to amend the information based on the Illinois "convictions" or whether the trial acted properly in refusing the State's

effort to do so. To the extent the State believed it had suffered "substantial " or "irreparable" injury in not being able to charge Chamblis with an OWI 7th, 8th or 9th, Section 808.03(2)(b) similarly provided redress. To the extent that an answer from this Court clarified a murky procedural aspect of the law involving the charging and sentencing process in serial OWI/PAC offenses, some of the most common offenses in the state, it would have "clarif(ied) an issue of general importance in the administration of justice." See Section 808.03(2)(c). The State's remedy was clear. The proper mechanism was to seek leave to appeal under Sec. 808.03(2) and Rule 809.50 within 14 days of the trial court's order denying the State's Motion to Amend the Information. The State failed to do so and abandoned its proper remedy. Issues not raised on appeal are deemed abandoned. See **Ansul, Inc., v. Employers Ins. Co. of Wausau**, 2012 WI APP 135,¶20 note 5, 345 Wis.2d 373, 826 N.W.2d 110. The State cannot now gain redress by recasting its complaint as an appeal of the judgment of conviction under Section 974.05(1)(a). Appeal from matter which is not specifically appealable confers no jurisdiction upon appellate court. See **Walford v. Bartsch**, 65 Wis.2d 254,260-262, 222 N.W.2d 633 (1974). Similarly, the Supreme Court lacks jurisdiction to entertain appeal which is

not properly taken. See **Smith v. Plankinton de Pulaski**, 71 Wis.2d 251,256, 238 N.W.2d 94 (1976). The State's appeal is indeed not properly taken and this Court should deny it.

B. State's appeal is prohibited by **State v. Bangert,** 131 Wis.2d 246, 389 N.W.2d 12 (1986) and constitutional protections against double jeopardy.

The State requests that this Court remand this case to the trial court for the imposition of an enhanced sentence. See State's brief at p.22. The problem with the State's request and its appeal its entirety is that it ignores the fact that the Chamblis was convicted upon a plea of guilty rather than by way of trial. As such, at the time Chamblis entered his plea of guilty, Wis. Stat. Sec. 971.08 required the trial court to "Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. Sec. 971.08. An understanding of the "potential punishment" required that the trial court inform Chamblis of the maximum penalty that he faced upon being convicted. In this case, at the plea hearing on September 19, 2012, the trial court advised Chamblis that the offense he was pleading to was a Class H felony which carried a maximum penalty of

$10,000.00 and imprisonment of not more than 6 years or both. 49:26. With this understanding, Chamblis entered a plea of guilty which the trial court accepted and used as a basis to convict Chamblis. The matter then proceeded to sentencing on November 5, 2012 at which time the trial court imposed a sentence of 2 years confinement and 2 years extended supervision. 50:20. Despite the fact that Chamblis entered his plea with the knowledge and understanding that the offense was a Class H felony which carried a maximum penalty of 6 years imprisonment, the State requests that this Court remand the case to the trial court so that the Chamblis could be re-sentenced for a Class G felony, which carries a maximum sentence of 10 years, and initial confinement of at least 3 years. The Court cannot do this because it would compromise the knowing and intelligent nature of Chamblis' plea. It would be unlawful to re-sentence Chamblis for a Class G felony, with higher penalties, when he entered a plea with the understanding that the offense would be a Class H felony with a different, lesser set of penalties. A plea is not knowingly or voluntarily entered when it is made without knowledge of the penalties the court could impose. **State v. Merten**, 2003 WI App 171, ¶6, 266 N.W.2d 588, 668 N.W.2d 750. What the State suggests doing would cause a violation of

Section 971.08 as well Chamblis' right to due process under both Wisconsin and United States Constitutions.

At several points in its brief, the State takes the position that the OWI statute allows for a situation where a defendant may be convicted of an OWI/PAC offense only to learn at sentencing how many prior offenses will be counted against him. See State's brief at p.14,15, and 17. This may be true where the defendant is convicted at trial rather than upon a plea. In the trial situation, yes, the fact-finder, whether it is a court or jury, determines only whether the defendant is guilty or not guilty of the basic OWI/PAC offense, and then the court at sentencing determines the specific number of prior convictions for purposes of sentencing. Yes, in that situation, the defendant may not know until sentencing how many prior convictions will be counted against him. But such situation is different from the situation where a defendant is convicted upon a plea of no contest or guilty. This is where the State's arguments fail. The State argues that "a defendant who enters a guilty or no contest plea to OWI or PAC, and who is not sentenced immediately, *will not know for certain how many prior convictions the court will count at sentencing, and what range of sentences he or she faces."* See State's brief at p.15. Italics added. The State offers no

specific authority for this proposition. The State attempts to rely on **State v. Wideman**, 206 Wis.2d 91, 556 N.W.2d 737 (1996) and **State v. McAllister**, 107 Wis.2d 539, 319 N.W.2d 865 (1982) but such reliance is misplaced as such cases involve convictions after a jury trial. Indeed, **Wideman** expressly states that it deals with "issues of law involving a *not guilty plea*." See **Wideman**, 206 Wis.2d 91 at p.94. Italics added. In this case, we have a guilty plea. The State similarly offers no argument as to how a plea in such situation, one where the defendant will not know the range of sentence he faces, meets constitutional standards under **Bangert** and Sec. 971.08. Chamblis maintains that there is no way it would. This is why the trial court was so insistent on pinning down the precise number of prior convictions *prior* to the entry of the plea.

MR.DYER:….it's confusing to me because I've never been through a plea hearing where I don't know what class of felony my client is pleading to.

COURT: Right. This is what I prefer to do.…..49:5-6.

COURT: --I think the Court needs to make a determination of what level of felony it is…..49:7.

COURT: …..I mean, but I want the determination of what, how many prior convictions are (sic) before we actually enter into the plea, so Mr. Chamblis knows what he's pleading guilty to. 49:11.

COURT:....and the problem I see is this, is that in order for a plea, a Defendant or any individual to make a knowingly—knowing plea, they must understand, my requirement is to ask Mr. Chamblis, do you understand what the charge is and what the potential penalties are?

For me to ask that question, he cannot answer the second part of that question. It's too variable. He doesn't know if he's going to have a mandatory minimum or (sic) three years or six months. He doesn't know what the mandatory maximum may be, because we are in a position where there's no agreement as to what that issue is. And for there to be a plea agreement in this type of case, there has to be also be an agreement as to what the charges, exactly what the charge is. I cannot do a variable charge plea. 49:19.

Court: It is not a trial with a sentencing at a later date. This is a plea. It's a different type of procedure. 49:20.

The trial court was absolutely right. **Bangert** and due process principles required that Chamblis know and understand the specific penalty he faced prior to entering the plea. As such, it was incumbent on the State to establish the prior number of convictions prior to entry of the plea. The State tried to do so via its motion to amend the information. But the State's efforts, as examined earlier in this brief, were untimely and deficient. The trial court was therefore within its discretion under both Wis. Stat. Sec. 971.29 and Wis. Stat. Sec. 971.23 to deny the State's motion to amend the information based on the untimely additional material. The State's remedy, as discussed earlier, was to seek discretionary review under Section 808.03(2) and Rule 809.50. By failing to do so, the State

abandoned its remedy. In search of a secondary avenue for relief, the State now seeks redress under Section 974.05(1)(a). But this Court cannot provide the redress requested without running afoul of **Bangert** and due process principles.

To the extent the State's appeal would require to this Court vacate the judgment of conviction and sentence, such action would indeed be prohibited by the double jeopardy clause. As the State no doubt recognizes, "The double jeopardy clauses embod(y) three protections; 'protection against a prosecution for a second prosecution for the same offense after acquittal; *protection against a second prosecution for the same offense after conviction*; and protection against multiple punishments for the same offense. **State v. Lechner**, 217 Wis.2d 392,401, 576 N.W.2d 912 (1998). Italics added. Clearly, if this Court vacated the judgment of conviction and remanded the case back to the trial court, Chamblis would face a second prosecution for the same basic offense, operating a motor vehicle with a prohibited alcohol concentration, after conviction. The double jeopardy clause would prohibit such a course of action.

In summary, this Court cannot simply remand the case for re-sentencing because of due process considerations as they relate to the voluntary and

knowing nature of Chamblis' plea. This Court additionally cannot vacate the judgment of conviction and sentence and remand the entire case for a new trial because of double jeopardy issues. As such, the State's appeal under Section 974.05 must be denied.

II. The trial court properly concluded that the State did not prove the fact of Chamblis' Illinois OWI-related offense.

In support of the proposed Amended Information charging Chamblis with OWI/PAC 7th, 8th or 9th, the State attached a certified Illinois Department of Transportation record for Chamblis. 47:17. The trial court concluded that such material did not constitute competent evidence of the alleged prior "conviction." 47:28. In ruling as such, the trial court relied on **State v. Spaeth**, 206 Wis.2d 135, 556 N.W.2d 728 (1996). Under **Spaeth**, "competent proof" of a conviction means a defendant's admission or "reliable documentary proof of each conviction." **Id**. at p.148. "Reliable documentary proof" means copies of prior judgments of conviction or a teletype of a defendant's Department of Transportation driving record. **Id**. at p.153. In **Spaeth**, the Supreme Court rejected the State's use of a sworn and subscribed complaint which referenced the defendant's past revocation history according to a "record check" with the Wisconsin Department of

Transportation. **Id**. at p.141 and 154. The Court reasoned that the complaint was not reliable documentary evidence for two reasons: first, the Court recognized "the potential for error when, as here, information from a source document must pass through two layers of interpretation and transcription;" second, the Court recognized that "without supplemental corroborating documentation, a sentencing court has no means of verifying the assertions in the complaint." **Id**. at p.154. Like the complaint rejected in **Spaeth**, the Illinois "driving record" offered by the State presented both of these risk factors. First, the Illinois DOT record was not the "source document," that is, the Illinois judgment of conviction, and therefore it contained only information interpreted and transcribed from the "source document." Second, the driving record was not accompanied by any supplemental corroborating documentation which would allow the sentencing court to verify the information in it. As such, by the express terms of **Spaeth**, the Illinois record was of "diminished reliability." The trial court was therefore correct in rejecting it under **Spaeth**. Additionally, as the trial court noted, **Spaeth** and **State v. Van Riper**, 2003 WI App 237, 267 Wis.2d 759, 672 N.W.2d 156, when read together, stand for the proposition that the "driving record" has to be a State of Wisconsin

Department of Transportation driving record. 47:26-28. As such, the mere fact that the driving record offered by the State was not a Wisconsin DOT record prevented it from being "competent evidence" under **Spaeth**.

The State refers this Court to **State v. Devries**, 2011 WI App 78, 334 Wis.2d 430, 801 N.W.2d 336 in regards to what types of out-of-state documentary proof has been deemed to be reliable evidence of out-of-state "convictions." **Devries** is easily distinguishable from the case before this Court. In **Devries**, the documentary proof included actual documents from the judicial proceedings in both Arizona and California. The Arizona documentation included two different "Phoenix Municipal Court 'Record of Proceedings," and a "decision" by an Administrative law judge. **Id**. at ¶5. The California documents included a document titled "Case Print" from the Riverside courts which set forth the procedural history of the litigation. **Id**. at ¶6. The documents as such were original "source documents" from the judicial proceedings. They were not documents from a secondary source like a department of transportation or some other administrative agency which merely interpreted and transcribed information from the "source document." As such, the documentation did not present

the "diminished reliability" factor emphasized in **Spaeth**. Additionally, there were multiple documents which allowed for corroboration. The documentary proof in **Devries** was thus plainly different from the sole Illinois DOT record presented in this case.

III. The circuit court did not error in refusing to accept the additional evidence submitted by the State.

Chamblis has already argued in this brief that the trial court had authority under Wis. Stat. Sec. 971.29 to prevent the State from using the Illinois "convictions" to increase the charges against him. Chamblis will not repeat such arguments here. Chamblis will however argue that in addition to Section 971.29, Wis. Stat. Sec. 971.23(7m)(a) gave the trial court express authority to reject the additional material offered by the State.

971.23 Discovery and inspection.

Wis. Stat. Sec. 971.23, "Discovery and inspection," requires a district attorney, upon demand, to produce a copy of the defendant's criminal record. Wis. Stat. Sec. 971.23(1)(c). In this case, Chamblis indeed made a proper discovery demand on February 13, 2012. (24). The State had an

obligation therefore to produce his criminal record which would obviously include documentation involving the alleged Illinois offenses. Section 971.23 required the State to produce this information within a "reasonable time prior to trial." Wis. Stat. Sec. 971.23(1). In this case, the State never really produced the additional information. As noted earlier in this brief, even at the September 12, 2012 hearing, the hearing specifically set for the trial court to consider the proposed Amended Information and Chamblis' objection to it, the State did not have the additional material pertaining to Chamblis' alleged Illinois record. Even as late as the plea hearing on September 19, 2012, the State had not turned over the additional to Chamblis or the trial court. 49:9. Such failure obviously prevented the trial court from making a timely examination and determination of Chamblis' criminal record prior to the plea hearing. The trial court was thus quite reasonable in concluding, "The discovery is done. I'm still not—this is not going to be admissible before the Court because it came too late, it came too late." 49:20. Indeed, the trial court was required to make such conclusion. Wis. Stat. Sec. 971.23(7m)(a), "Sanctions for failure to comply" provides in relevant part:

(a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply.

The court may in appropriate cases grant the opposing party a recess or a continuance. Wis. Stat. Sec. 971.23(7m)(a).

Section 971.23(7m)(a) uses mandatory language. It states the trial court "shall exclude any…evidence….". Given the express mandate contained in Section 971.23(7m)(a), and Chamblis' objection to the timeliness of the State's offer to produce the material (49:12), the trial court was correct in refusing to accept the additional material. Moreover, at no point did the State argue that there was "good cause" for its failure to timely produce the material. Perhaps this is because the State knew there was no just reason for its untimely offer to disclose. As the trial court emphatically noted in rebuking the State's conduct,

THE COURT: Well, I don't know how to make this clearer to your office Mr. Xiong, or to you specifically about this case. This is—this case has been set for trial for a long time. The motion that Mr. Dyer brought actually was scheduled with appropriate time, an appropriate amount of time. The issue was flagged a long time ago to the Court and I'm sure it was flagged, I trust Mr. Dyer is saying that he told the District Attorney's office about this six months ago. He's told—I remember at the hearing I believe it was told to me that the only, the only document that was recoverable was the document that was submitted.

And how is it that after we have this hearing your office is able to or you are able to track down even more detailed everything and clarify? The only thing that tells me is that the District Attorney's office and specifically you, did not take this seriously enough when if first happened, and thought, okay, I don't have to really do much until we get trial. 49:12

For the above reasons, the trial court's order excluding the additional material was a proper exercise of authority under Section 971.23(7m)(a) as well as Section 971.29.

CONCLUSION

For all of the above reasons, the State's appeal should be denied.

Dated this _____day of September 2013.

Respectfully submitted,
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CERTIFICATION 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 filed as of this date.

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

Dated this ____day of September 2013.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 5908 words.

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CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the 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.

Dated this _____day of September 2013.

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