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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012AP2782-CR

STATE OF WISCONSIN,
Plaintiff-Appellant-Cross-Respondent,
vs.

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

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Defendant-Respondent-Cross-Appellant-Petitioner

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ISSUES PRESENTED

Where a defendant seeks to plead guilty or no contest to a charge of operating a motor vehicle while under the influence of an intoxicant (OWI), or with a prohibited alcohol concentration (PAC), does **State v. Bangert,** 131 Wis.2d 246, 389 N.W.2d 12 (1986) and due process principles require that the number of prior offenses that count for sentence enhancement be determined *prior* to entry of the defendant's plea?

Is Court of Appeals decision ordering remand to circuit court with instructions to: (1) issue an amended judgment of conviction reflecting a conviction for operating with a PAC as a seventh offense, and (2) hold a resentencing hearing, and impose a sentence consistent with the penalty ranges for a seventh offense, constitutionally impermissible under **Bangert** and due process principles, where Chamblis specifically entered a plea of guilty to PAC as a sixth offense, where the circuit court sentenced Chamblis in accordance to proper penalties for PAC as a sixth offense, and where Chamblis has already served the confinement portion of such sentence?

POSITION ON ORAL ARGUMENT AND PUBLICATION

Chamblis understands that the Court will schedule oral argument in this case and that this Court's opinion will be published.

STATEMENT OF CASE

The above issues arise from the State's appeal of the trial court's ruling prohibiting the State from introducing additional evidence of a prior conviction under Wis. Stat. Sec. 343.307 which would have made Chamblis's offense a PAC 7th as opposed to a PAC 6th. In responding to the appeal, Chamblis initially filed a motion to dismiss which the Court of Appeals denied. Chamblis then filed a motion for reconsideration which the Court of Appeals also denied. Finally, Chamblis briefed the matter. In Chamblis's brief, Chamblis argued that because he specifically entered his plea of guilty to the PAC as a sixth offense, with the understanding that the maximum penalties were those commensurate with a sixth offense, the remedy sought by the State, remand with instructions to sentence Chamblis for a PAC seventh offense, was prohibited by **Bangert** and due process principles. Chamblis's Court of Appeals brief at pp.13-15. The Court of

Appeals rejected Chamblis's argument under **Bangert** and due process principles on the theory that irrespective of the fact that Chamblis only entered a plea of guilty to a PAC 6th, ["Chamblis was aware both of the "specific penalty" he faced if convicted of operating with a PAC as a seventh offense, and that he faced the possible punishment if the State succeeded in proving the purported Illinois conviction."] A-Ap.112-113.

STATEMENT OF FACTS

On November 22, 2011, a City of LaCrosse police officer made a traffic stop of Chamblis's car on the basis that the car had a cracked windshield. 57:11. The officer ultimately arrested Chamblis and the State charged him with OWI and PAC as a 5th or 6th offense, a Class H felony, based on five previous convictions from the State of Minnesota. 6:1-5. After arraignment, the State amended the information to allege OWI and PAC as a 7th, 8th or 9th offense, a Class G felony. 14:1-3. The basis of the amended information was an alleged additional conviction from the State of Illinois. 14:3.

On February 13, 2012, Chamblis filed a "Demand For Discovery And Inspection," which requested among other items the following:

(Item 4) A copy of the defendant's criminal record, if any…

(Item 11c) Any evidence and/or other information that would tend to mitigate, extenuate, or affect the degree of the offense charged, or the disposition (including sentencing) of the charge against the defendant…24:2-3.

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," 30:1-7, which challenged the State's use of the Illinois "conviction" 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's motion. 62:7. The State filed an untimely response to Chamblis's motion on September 5, 2012. (32). On September 12, 2012, the trial court held a "motion hearing" regarding the Amended Information and Chamblis's objection to it. At such hearing trial counsel argued that a certified record from the Illinois Department of

[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.

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 728 (1996), agreed and concluded that it "will not consider that as a prior conviction unless there's other evidence." 47:28. The State presented no other evidence. 47:28.

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 greater." 49:4.[2] The plea questionnaire/waiver of rights form stated the "charge/statute" as "346.63(1)(b), PAC (4th Off. or greater)." A-Ap.124. The form listed the maximum penalty as "$25,000.00 fine and 10 years imprisonment," and the mandatory minimum penalty as "$600.00 fine and 6 months jail." A-Ap.124. Trial counsel told the trial court that Chamblis admitted the five prior charges from Minnesota but that he challenged the alleged Illinois conviction. 49:4. Trial counsel and the prosecutor told the trial court that the offense would be considered either a Class H felony as a

[2] As part of the agreement, the State agreed to dismiss a habitual criminality enhancer, and to dismiss and read-in a companion obstructing charge, as well as a battery to prisoner charge pending in a different case.

PAC 6th or a Class G felony as a PAC 7th depending upon the trial court's finding as to the prior offenses. 49:4-5. The parties explained the possible penalty structure as follows:

MR. DYER (trial counsel): And so what I've done is, as a range of penalty, I've indicated, and I'm not sure if this is right now just looking at—oh, okay. The minimum fine would be a Six Hundred Dollar fine, the maximum—the minimum jail will be six months jail. The maximum fine will be 25 Thousand Dollars, that being for a seventh or greater offense and the maximum term—or the maximum imprisonment would be ten years.

In terms of initial confinement, based on a confession of five prior convictions, we would be looking at a Class I felony, which would be a maximum term of initial confinement of 18 months, total three and a half years with a—if it turns out to be a Class H felony, then we are looking at initial confinement of five years, total ten years imprisonment.

MR. XIONG (prosecutor): And just to interject, just to clarify I think what Mr. Dyer meant was a Class H felony which is a fifth or sixth and then a Class G felony, which is a seventh and it's a minimum initial confinement in prison of three years.

MR: DYER: That's with the Class G felony?

MR. XIONG: Correct.

MR. DYER: That's what it would be, as the statute calls for, if there is a bi-furcated sentence, in other words, if the person is sentenced to the Wisconsin State prison system, then it is a minimum initial confinement of three years. That's our understanding, and the State would be recommending, assuming that this is a seventh offense, would be recommending a four year period of initial confinement. 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 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 additional information regarding the Illinois "conviction" beyond what it had provided at the September 12, 2012 hearing. 49:10-11. However, the State had not provided the information to trial counsel or to the trial court.

49:9. The State told the trial court that it wanted to "pu[t] together everything I can get from Illinois" and "put it in a memo" for sentencing. 49:6,10. The State took the position that it had up until sentencing to prove up the prior conviction and requested to proceed as such. 49:9,10,18. Trial counsel objected to the trial court's consideration of such material on the basis that he had not received it and that it had not been timely disclosed. 49:11-12. Trial counsel stated that "[t]here should be some stopping point of information coming in, and …there shouldn't be any more information turned over to us at this late date." 49:6. Trial counsel stated "I was told that this is all they have, and now we have more today…" 49:11-12. The trial court agreed with Chamblis, concluded that the State had violated discovery rules by not submitting the additional evidence to trial counsel sooner, and ruled that it would only accept a plea to the "lesser charge." 49:12, 14-15, 19-21.

The trial court specifically stated as follows:

> 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
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> ----------
>
> 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.

Chamblis entered a plea of guilty to the charge of PAC 6th. 49:27. During the plea colloquy, the trial court specifically advised Chamblis as to the penalties, including the maximum penalty, carried by a PAC 6th, a Class H felony: 6 years imprisonment consisting of 3 years confinement and 3 years extended supervision with a mandatory minimum 6 months imprisonment and a $10,000.00 fine. 49:27. The trial court asked Chamblis if he understood the charge and the penalties. 49:27. Chamblis said "yes." 49:27. The trial court asked Chamblis what his plea was and

Chamblis said, "guilty." 49:27. The trial court asked Chamblis, "Okay. Mr. Chamblis, did you understand what the plea agreement is at this point in time?" 49:25. Chamblis responded, "Yes, I do *now*." 49:25. Italics added. The trial court further asked Chamblis, "Is there anything about your case that you don't understand at this point?" 49:30. Chamblis responded, "I didn't at *first*, but *now*, no sir." 49:30. Italics added. The trial court accepted Chamblis's plea and convicted Chamblis of "operating with a prohibited alcohol concentration fifth or sixth offense, in violation of 346.63(1)(b), a Class H felony." 49:37. Italics added. At sentencing on November 5, 2012, the circuit court imposed a 4 year term of imprisonment consisting of 2 years confinement and 2 years extended supervision. A-Ap.128-129.

The clerk entered a judgment of conviction on November 12, 2012 which specifically referenced "Operating w/PAC (5^{th} or 6^{th}) as a "Felony H." A-Ap.128-129.

ARGUMENT

I. Where a defendant seeks to plead guilty or no contest to a charge of OWI or PAC, due process principles and **State v. Bangert,** 131 Wis.2d 246, 389 N.W.2d 12 (1986) require that the number of prior offenses that count for sentence enhancement be determined prior to the entry of a defendant's plea of guilty or no contest.

A. Since the determination of the number of prior offenses dictates the actual penalties to be imposed, such determination must be made prior to the entry of the plea of guilty or no contest in order for such plea to be voluntarily, knowingly and intelligently made.

1. Standard of review

This Court reviews constitutional issues independently of the determinations rendered by the circuit court and the court of appeals. **State v. Harvey**, 139 Wis. 2d 353,382, 407 N.W.2d 235 (1987).

2. Due process principles

The constitutional basis for a due process claim is found in the Fifth and Fourteenth Amendments to the United States Constitution and in Article I, Section 8 of the Wisconsin Constitution. The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The Wisconsin Constitution provides in relevant part: "No person may be

held to answer for a criminal offense without due process of law." Wis. Const. Art. I, Sec.8. In **State v. Thompson**, 2012 WI 90,¶¶44-46, 342 Wis.2d 674, 818 N.W.2d 904, this Court stated that "Courts have had difficulty pinpointing the meaning of due process," and considered various definitions:

> "'[d]ue process' is an elusive concept. It's exact boundries are undefinable, and its content various according to specific factual contexts." **Id**. citing **Hannah v. Larche**, 363 U.S. 420,442 (1960);
>
> "[i]t varies with the subject-matter and the necessities of the situation." **Id**., citing **Moyer v. Peabody**, 212 U.S. 78,84 (1909);
>
> "[i]t is, simply, that which must be followed in depriving any one of anything which is his to enjoy until he shall have been divested thereof by and according to the law of his country." **Id**. citing **Ekern v. McGovern**, 154 Wis. 157,240, 142 N.W. 595 (1913);
>
> "[p]rocedural due process means that persons whose rights may be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified; correlatively, this right to notice and opportunity to be heard must be extended at a meaningful time and in a meaningful manner. The elements of procedural due process are notice and an opportunity to be heard, or to defend or respond, in an orderly proceeding, adapted to the nature of the case in accord with established rules. **Id**. citing 16C C.J.S. Constitutional Law, Sec. 1444, at 188 (2005).

It is fundamental that a plea of guilty or no contest to a criminal charge implicates constitutional considerations:

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being

> compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. **Brady v. U.S.**, 397 U.S. 742,749, 90 Sup. Ct. 1463, 25 L.Ed. 2d 747 (1970).

The entry of a plea of guilty or no contest to a particular criminal charge thus implicates due process principles in two related ways. First, due process requires that the defendant's plea of guilty or no contest be voluntarily, knowingly, and intelligently made; a plea of no contest or guilty that is not voluntarily, knowingly, and intelligently entered violates fundamental due process. See **State v. Van Camp**, 213 Wis.2d 131,139, 569 N.W.2d 577 (1997) citing **Bangert**, 131 Wis.2d at 257 and **Boykin v. Alabama**, 395 U.S. 238,242, 89 Sup. Ct. 1709, 23 L.Ed.2d 274 (1969). Second, in furtherance of the constitutional requirement that a plea be voluntarily, knowingly and intelligently made, due process requires notice. Courts are therefore constitutionally required to notify defendants of the "direct consequences" of their pleas. See **Brady v. United States**, 397 U.S. at 755; **State v. James**, 176 Wis.2d 230,238, 500 N.W.2d 345 (Ct. App. 1993). A direct consequence represents one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment. **State ex rel. Warren v. Schwarz**, 219 Wis.2d 615,636, 579 N.W.2d 698 (1998). Quite simply, at the time of the entry of plea, a defendant is entitled to know what might or could

happen to him or her. See **State v. Erickson**, 53 Wis. 2d 474,480, 192 N.W.2d 872 (1972). This is why notice of the maximum sentence must be given. See **State v. Bartelt**, 112 Wis.2d 467,475, 334 N.W.2d 91 (1983). This is also why notice of any presumptive minimum must also be given. See **State v. Mohr**, 201 Wis.2d 693,700-701, 549 N.W.2d 497 (Ct. App. 1996). Of course, beyond the basic minimum and maximum penalties carried by a particular charge, "sentence enhancers" and "repeater allegations" similarly affect "what might or could happen" to a defendant upon entry of his or her plea of guilty or no contest. In **State v. Martin/State v. Robles**, 162 Wis.2d 883, 470 N.W.2d 900 (1991), this Court considered due process principles in interpreting Wis. Stat. Sec. 973.12, the statute which requires that a "repeater or persistent repeater allegation" under Wis. Stat. 939.62 be alleged by the State "before or at arraignment, and before acceptance of any plea." Such statute in relevant part provides as follows:

> Whenever a person charged with a crime will be a repeater or a persistent repeater under s. 939.62 if convicted, any applicable prior convictions may be alleged in the complaint, indictment or information or amendments so alleging at any time before or at arraignment, and before acceptance of any plea. Wis. Stat. Sec. 973.12(1).

This Court declared that the policy behind Sec. 973.12(1), is to satisfy due process by assuring that a defendant meaningfully understands the extent of potential punishment at the time of the plea:

> Being a repeater is not a crime but may enhance the punishment of the crime for which the repeater is convicted. The allegation of recidivism is put in the information in order to meet the due-process requirements of a fair trial. When the defendant is asked to plead, he is entitled to know the extent of his punishment of the alleged crime, which he cannot know if he is not then informed that his prior convictions may be used to enhance the punishment. **State v. Martin/State v. Robles**, 162 Wis.2d at 900-901.

If this principle is at work when a defendant pleads not guilty as in **Martin/ Robles**, it certainly applies with equal if not greater force when a defendant pleads guilty. See **State v. Wilks**, 165 Wis.2d 102,109, 477 N.W.2d 632 (Ct. App. 1991). Chamblis is aware of course that the statutory framework provided by Sec. 973.12 does not apply repeat OWI/PAC offenders under Wis. Sec. 346.65(2). See **State v. Wiedeman**, 206 Wis.2d 91,103, 556 N.W.2d 737 (1996). Chamblis is not arguing that it should. Chamblis simply cites to **Martin/Robles** and **Wilks** for the proposition that due process principles require that upon entering a plea, especially a guilty plea, "a defendant is entitled to know the extent of his punishment of the alleged crime, which he cannot know if he is not then informed that his prior convictions may be used to enhance the punishment." See **State v. Martin/State v. Robles**, 162 Wis.2d at 900-901. Of course, even if Sec. 973.12 does not apply to cases under Sec. 346.65(2), Wis. Stat. Sec. 971.08 does apply. Section 971.08 represents the statutory codification of the constitutional mandate that a plea be knowing, voluntary, and intelligent, and requires that a defendant be aware before

entering a plea of the potential punishment upon conviction. See **State v. Bollig**, 2000 WI 6,¶16, 232 Wis.2d 561, 605 N.W.2d 199. Sec. 971.08 in relevant part provides as follows:

> (1)Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a)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(1)(a). Italics added.

In the context of a repeat offender OWI/PAC case, a defendant cannot know and understand the extent of the penalty he actually faces upon entering his or her plea of guilty or no contest without a determination of the specific number of offenses that will actually be used against him or her at sentencing. The reason for this is because the OWI/PAC penalty structure provides for graduated penalties based on a determination of prior offenses.[3] The penalties are diverse and vastly different in their severity:

> A person convicted of OWI or PAC as a **second offense** is guilty of a misdemeanor, and "shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months." See Wis. Stat. Sec.346.65(2)(am)2.
>
> A person convicted of OWI or PAC as a **third offense** is guilty of a misdemeanor, and "shall be fined not less than $600 nor more than $2000 and imprisoned for not less than 45 days nor more than one year in the county jail." See Wis. Stat. Sec.346.65(2)(am)3.

[3] Wis. Stat. Sec. 343.307 specifies the "Prior convictions, suspensions or revocations to be counted as offenses."

A person convicted of OWI or PAC as a **fourth offense** is guilty of a misdemeanor, and "shall be fined not less than $600 nor more than $2000 and imprisoned for not less than 60 days nor more than one year in the county jail." See Wis. Stat. Sec.346.65(2)(am)4.

A person convicted of OWI or PAC as a **fourth offense** is guilty of a Class H felony and "shall be fined not less than $600 and imprisoned for not less than 6 months" if the person committed an offense that resulted in a suspension, revocation, or other conviction counted under s.343.307(1) within 5 years prior to the day of current offense; the maximum fine is $10,000. See Wis. Stat. Sec.346.65(2)(am)4m and 939.50(3)(h).

A person convicted of OWI or PAC as a **fifth or sixth offense** is guilty of a Class H felony and "shall be fined not less than $600 and imprisoned for not less than 6 months" See Wis. Stat. Sec.346.65(2)(am)5. Unless a penalty enhancement statute applies, the total length of a bifurcated sentence for a Class H felony may not exceed six years; the maximum fine is $10,000. See Wis. Stat. Secs. 973.01(2) and 939.50(3)(h). The term of confinement in prison may not exceed 3 years and the term of extended supervision may not exceed 3 years. See Wis. Stat. Secs. 973.01(2)(b)(8) and 973.01(2)(d)(5).

A person convicted of OWI or PAC as a **seventh, eighth or ninth offense** is guilty of a Class G felony and "the confinement portion of the bifurcated sentence imposed on the person shall be not less than 3 years." See Wis. Stat. Sec.346.65(2)(am)6. Unless a penalty enhancement statute applies, the total length of a bifurcated sentence for a Class G felony may not exceed 10 years; the maximum fine is $25,000. See Wis. Stat. Secs. 973.01(2) and 939.50(3)(g). The term of confinement in prison may not exceed 5 years and the term of extended supervision may not exceed 5 years. See Wis. Stat. Secs. 973.01(2)(b)(7) and 973.01(2)(d)(4).

A person convicted of OWI or PAC as a **10th offense or greater** is guilty of a Class F felony and "the confinement portion of the bifurcated sentence imposed on the person shall be not less than 4 years." See Wis. Stat. Sec.346.65(2)(am)7. Unless a penalty enhancement statute applies, the total length of a bifurcated sentence for a Class F felony may not exceed 12 years and 6 months; the maximum fine is $25,000. See Wis. Stat. Secs. 973.01(2) and 939.50(3)(f). The term of confinement in prison may not exceed 7 years and 6 months and the term of extended supervision may not exceed 5 years. See Wis. Stat. Secs. 973.01(2)(b)(6m) and 973.01(2)(d)(4).

Clearly, a determination of a defendant's prior offenses has significant, direct consequences as to penalty and punishment. Depending on the

determination, the charge could be a misdemeanor or a felony. If it is a felony, it could be Class F felony, a Class G felony or a Class H felony. The maximum penalty could be 6 months in jail, 1 year in jail, 6 years imprisonment, 10 years imprisonment, or 12 and one half years imprisonment. The mandatory minimum period of confinement could be 5 days, 45 days, 60 days, 6 months, 3 years, or 4 years. If there is a mandatory minimum period of confinement, it could be in the "county jail," or it could be in prison. Of course, the fine could be anywhere from $350 to $25,000. It is only reasonable that a defendant who is about to enter a plea of guilty or no contest would want to know and understand which of those penalties he *actually* faced. It is an obvious understatement to say that such knowledge and understanding would reasonably affect his or her decision to enter a plea of guilty or no contest. For all the reasons discussed above, due process principles require that he or she have such knowledge and understanding before entering a plea of guilty or no contest.

Nonetheless, in the State's brief to the Court of Appeals and in its Response To Petition For Review, the State argues that "it is well established that the time for counting offenses for sentence enhancement purposes is at sentencing." See State's Court of Appeals brief, p.14 and State's Response

To Petition For Review, p.8. In support of its position, the State cites **State v. McAllister**, 107 Wis.2d 532, 319 N.W.2d 865 (1982), **State v. Wiedman**, 206 Wis.2d 91, 556 N.W.2d 737 (1996) and **State v. Matke**, 2005 WI App 4, 278 Wis.2d 403, 692 N.W.2d 265. Of course, the Court of Appeals, relying specifically on **McAllister** and **Wiedman**, accepted the State's argument. A-Ap.109-110. The State's and lower court's reliance on such cases is misplaced. First of all, in neither **McAllister** nor **Wiedman** did this Court hold that "the time for counting offenses for sentence enhancement purposes is at sentencing." In **McAllister**, the Court simply stated, "The defendant does have an opportunity to challenge the existence of the previous penalty-enhancing convictions before the judge *prior to sentencing*. However, the convictions may be proven by certified copies of conviction or other competent proof offered by the state *before sentencing*." **McAllister**, 107 Wis.2d at 539. Italics added. In **Wiedman**, the Court re-stated what it had previously stated in **McAllister**: […the State must establish the prior offense for the imposition of the enhanced penalties of § 346.65(2) by presenting "certified copies of conviction or other competent proof. . .before sentencing."] **State v. Wiedman**, 206 Wis.2d at 95.

To be sure, the Court, at the end of the opinion and in dicta, gave guidance in those cases where, as in a trial case like **Wiedman** and **McAllister**, the determination of prior offenses happens to be made at sentencing:

> The State should be prepared at sentencing to establish the prior offenses by appropriate official records or other competent proof. Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior offenses. The State and defense counsel should, whenever appropriate, stipulate to the prior offenses. If the State and defense counsel follow these suggestions there should be no need for either party to request a continuance of a sentencing proceeding to obtain proof of prior offenses. **State v. Wiedman,** 206 Wis.2d at 108.

Such statements simply countenance situations where it may be appropriate for the determination of prior offenses to be made at or right before sentencing. Such statements do not function to fix the sentencing hearing itself as the specific procedural point where the challenge to or a determination of the prior convictions must occur. The phrases "[p]rior to sentencing" and "before sentencing" are entirely consistent with the challenge and determination being made prior the entry of a plea of guilty or no contest. After all, the entry of a guilty or no contest plea plainly occurs "prior to" or "before sentencing." More important however is the distinction that **McAllister**, **Wiedman** and **Matke** do not involve the entry of a guilty or no contest plea but rather an adjudication of guilt via a trial.

Wiedman expressly states that it deals with "issues of law involving a not guilty plea." See **Wiedman**, 206 Wis.2d at 94. As such, in **McAllister**, **Wiedman**, and **Matke**, the determination of prior offenses subsequent to the finding of guilt and conviction do not implicate the due process considerations that are at stake with the entry of a guilty or no contest 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 before 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 actually be counted against him.[4] But such situation is simply different from the situation where the mechanism for the adjudication of guilt is a plea of no contest or guilty. This is why the State's argument fails and why the Court of Appeals erred in accepting it. The State proposes 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 Court of Appeals

[4] Of course, as discussed later in this brief, even the defendant whose guilt is adjudicated through trial has a statutory and constitutional right to notice of the charge.

brief at p.15. Italics added. The State offers no specific authority for this proposition. 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 basic due process principles as well as the requirements of **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. Due process principles require that a defendant know and understand the actual penalties he faces prior to entering the plea of guilty or no contest. As such, it is incumbent on the State to establish the prior number of convictions prior to entry of the plea of guilty or no contest since such determination dictates the extent of the penalty.

Finally, Chamblis is aware of **State v. Carter**, 2010 WI 132, 330 Wis.2d 1, 794 N.W.2d 213 and **State v. Krause**, 2006 WI App 43, 289 Wis.2d 573, 712 N.W.2d 67, cases cited by the State in its Response To Petition For Review at page 9. The State believes that such cases support its argument that "a defendant convicted of an OWI or PAC after a trial or a guilty or no contest plea would not know for certain how many prior convictions the court would count at sentencing, or the maximum sentence." See State's Response To Petition For Review, p.10. In **Carter**, the State charged the defendant with OWI 4th and the defendant pleaded guilty to OWI 4th.

Carter, 2010 WI 132 at ¶¶7-8. Carter then filed a motion, which the trial court denied, challenging two prior offenses alleged by the State. **Id**. at ¶8. In this situation, Carter entered a plea of guilty with the knowledge that the maximum penalties that he would face at sentencing would be those commensurate with OWI 4th. If his post-plea challenge prevailed, which it did not, the penalties he would have faced on an OWI 2nd would have been less. In **Krause**, the situation was similar. At the plea hearing, Krause acknowledged 4 prior offenses alleged by the State, and the trial court convicted him of OWI 5th. **Krause**, 2006 WI App 43 at ¶3. After sentencing, Krause brought a postconviction motion challenging one of the prior offenses. **Id**. at ¶5. Again, like in **Carter**, if Krause's subsequent challenge to a prior offense worked, which it did not, his situation would have gotten better not worse. As such, the cases do not present the due process issue created where a defendant enters a plea of guilty to, for example a misdemeanor OWI 2nd with a penalty range of 5 days to 6 months in jail, only to have the State at sentencing try to prove up, for example, an OWI 7th, a Class G felony, which provides for 5 years confinement and 5 years extended supervision, and requires a mandatory minimum 3 years confinement. For this reason, **Carter** and **Krause** are

not applicable. Neither is **State v. Machgan**, 2007 WI App 263, 306 Wis.2d 752, 743 N.W.2d 832 (overruled on other grounds by **State v. Carter**, supra.) also cited in the State's Response To Petition For Review. In **Machgan**, the defendant, facing an OWI 4th, successfully challenged a prior offense asserted by the State, and entered a plea of guilty to an OWI 3rd. After sentencing on the OWI 3rd, the State appealed. The Court of Appeals affirmed. While **Machgan** may have some superficial similarity to the case before this Court, it is irrelevant to the legal issues as the defendant in **Machgan** did not raise the same constitutional challenges to the State's appeal as those asserted by Chamblis, and the Court of Appeals therefore did not consider them.

3. Statutory interpretation

Statutory interpretation begins with the language of the statute, and if the meaning of the statute is plain, we ordinarily stop there. **State ex rel. Kalal v. Circuit Court for Dane County**, 2004 WI 58,¶45, 271 Wis. 2d 633, 681 N.W.2d 110. At the same time, however, courts "may construe a clear and unambiguous statute 'if a literal application would lead to an absurd or unreasonable result.'" **State v. Delaney**, 2003 WI 9, ¶15, 259 Wis. 2d 77,

658 N.W.2d 416 (quoting **Coca-Cola Bottling Co. v. La Follette**, 106 Wis.2d 162, 170, 316 N.W.2d 129 (Ct. App. 1982)). It is a "fundamental" rule of statutory interpretation that courts must avoid interpreting statutes in a way that produces absurd or unreasonable results. **Lake City Corp. v. City of Mequon**, 207 Wis.2d 155,162, 558 N.W.2d 100 (1997); see also **Kalal**, 2004 WI 58 at ¶46.

In its Court of Appeals brief, the State argues, "The workings of the statutes governing the counting of prior offenses mean 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 Court of Appeals brief at p.15. The State acknowledges that "[t]he circuit court seemed troubled by the idea that if it allowed the State to present evidence of the Illinois offense after Chamblis pled guilty, but before sentencing, *Chamblis would not know at the time of his plea what level felony he would be sentence for, and what the range of penalties would be*." See State's Court of Appeals brief at p.17. Italics added. The State maintains, "However, this is exactly what the graduated penalty structure for OWI-related offenses contemplates." See State's Court of

Appeals brief at p.17. To the contrary, such interpretation of the statute leads to "absurd" and "unreasonable" results and therefore should be avoided. The due process problems discussed above are perhaps the most prominent illustration of the "absurd" and "unreasonable" consequences of the State's interpretation of the statute. For reasons discussed earlier in this brief, the State's interpretation requires an abdication of basic notice, due process, and **Bangert** principles. The State's interpretation additionally yields equally "absurd" or "unreasonable" results in terms of its application with other relevant statutes irrespective of whether the case is resolved by way of trial or plea. For example, Wis. Stat. Sec. 970.03, "Preliminary examination," provides in relevant part that

> [a] preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant. Wis. Stat. Sec. 970.03(1);
>
> that
>
> [t]he preliminary examination *shall* be commenced within 20 days after the initial appearance if the defendant has been released from custody or within 10 days if the defendant is in custody….Wis. Stat. Sec. 970.03(2); italics added;
>
> that
>
> [i]f the court finds probable cause to believe that a felony has been committed by the defendant, it shall bind the defendant over for trial; Wis. Stat. Sec. 970.03(7);
>
> that

[i]f the court finds that it is probable that only a misdemeanor has been committed by the defendant…The action shall proceed as though it had originated as a misdemeanor action. Wis. Stat. Sec. 970.03(8);

and that

[a] plea *shall* not be accepted in any case in which a preliminary examination is required until the defendant has been bound over following preliminary examination or waiver thereof. Wis. Stat. Sec. 970.03(3).

In the context of a repeat OWI/PAC case, the charge against the defendant may be a misdemeanor or felony depending on the number of prior offenses. For example, an OWI 3rd is a misdemeanor. An OWI 4th may be a misdemeanor or a felony. If the charge is a felony, then the defendant is entitled to a preliminary examination under Sec. 970.03 and must receive such hearing with the mandatory time frame. [5] If the charge is a felony, then the court cannot accept the defendant's plea until he or she is bound over following the preliminary examination or has waived it. The State's interpretation clearly conflicts with the mandatory procedure set forth by 970.03. Under the State's interpretation, the misdemeanor or felony determination may not be made until the time of sentencing when the trial court counts the number of prior offenses. Such interpretation allows for the possibility that the defendant may be sentenced on a felony charge

[5] The determination of whether a charge constitutes a misdemeanor or felony is also relevant to whether a defendant must personally appear at various court proceedings. Wis. Stat. Sec. 971.04 allows a defendant charged with a misdemeanor "to authorize his or her attorney… to act on his or her behalf in any matter."

without first receiving a preliminary examination and being bound over on such charge. Equally troubling, the defendant in this situation would be sentenced without the filing of an information as required under Wis. Stat. Sec. 971.05. The interpretation allows for further "absurd" or "unreasonable" results with respect to Wis. Stat. Sec. 971.29, "Amending the charge." Under the State's interpretation, a defendant charged with and found guilty at trial of an OWI 6th, a Class H felony, could be sentenced for an OWI 7th, a Class G felony, if the State at sentencing could prove up 6 rather than 5 prior offenses. Ostensibly, according to the State's interpretation, the State, after verdict and before or at sentencing, could seek to amend the information to allege OWI 7th. This situation however runs counter to Sec. 971.29 which provides that an information may only be amended up until arraignment without leave of court:

> [a] complaint or information may be amended at any time prior to arraignment without leave of court. Wis. Stat. Sec. 971.29(1).

The situation additionally runs counter to Sec. 971.29(2) which limits the State's ability to amend the information at trial and after verdict:

> [a]t the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial do 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 trial. Wis. Stat. Sec. 971.29(2).

In construing the last part of Sec. 971.29(2), which pertains to amendments after verdict, this Court has held that such amendments are intended to deal with "technical variances" such as "names and dates" as opposed substantive amendments to the charge:

> [w]e are of the opinion that the sentence regarding amendment after verdict was intended to deal with technical variances in the complaint such as names and dates. The case law in Wisconsin considering this section concerns such technical amendments. **State v. Lincoln** (1863), 17 Wis. 597 (*579), (variance in spelling surnames deemed amended); **Baker v. State** (1894), 88 Wis. 140, 59 N.W. 570 (variance as to ownership and amount of money deemed amended in complaint charging larceny where penalty not affected); **Golonbieski v. State** (1898), 101 Wis. 333, 77 N.W. 189 (variance in corporate name deemed amended); **Meehan v. State** (1903), 119 Wis. 621, 97 N.W. 173 (larceny of watch deemed amended to larceny of gold watch); **Hess v. State** (1921), 174 Wis. 96, 181 N.W. 725 (allowing amendment of information before trial not prejudicial where offense originally alleged to have been committed on August 24, 1918, but amended to August 31, 1918). **State v. Duda**, 60 Wis.2d 431,440, 210 N.W.2d 763 (1973).

As discussed earlier in this brief, the difference between an OWI/PAC 6th, a Class H felony, and an OWI/PAC 7th, a Class G felony, is significant. The former carries a maximum penalty of 6 years imprisonment with a minimum 6 months period of confinement. The latter carries a maximum 10 years imprisonment with a mandatory minimum 3 years confinement in prison. A post-verdict amendment by the State to allege a prior conviction for sentence enhancement purposes would plainly go beyond merely making a "technical variance" such as a "name" or "date" change, and would constitute a modification of an essential element of the charge:

"[a][p]rior conviction is an essential element of the charge in the information in order to secure the punishment provided for in case of a second offense *and must be alleged in the information* under the statute, sec. 4763, but it is not an essential element of the substantive offense charged." **Dahlgren v. State**, 163 Wis. 141,144, 157 N.W. 531 (1916). Italics added.

To the extent that the amendment alters an essential element of the charge, it would not be permitted under Sec. 971.29 and the applicable case law. Nevertheless, the State's stated interpretation allows for it. Curiously, the State's interpretation also suggests that as long as the State could establish at or before sentencing the existence of the six prior offenses, the trial court could impose a sentence upon the defendant for OWI 7th even without an amendment of the charging instrument. In this regard, the interpretation runs counter to Wis. Stat. Sec. 970.02, "Duty of a judge at the initial appearance," which provides in relevant part that at the initial appearance, the judge shall inform the defendant,

[o]f the *charge* against the defendant and shall furnish the defendant with a copy of the complaint which shall contain the *possible penalties* for the offenses set forth therein. In the case of a felony, the judge shall also inform the defendant of the *penalties* for the felony with which the defendant is charged. Wis. Stat. Sec. 970.02(1)(a). Italics added.

The basic due process principle of notice as well as Sec. 970.02 affords a defendant a right to notice of the charge against him including the substantive offense and the penalties. The defendant, for example, charged with and convicted of the OWI 6th but sentenced for an OWI 7th, does not

receive the notice to which he is entitled as a matter of both constitutional and statutory law.

Clearly, the State's position that the "time for counting prior offenses is at sentencing" and that a defendant "will not know for certain how many prior convictions the court will count at sentencing, and what range of sentences he or she faces," indeed allows for "absurd" and "unreasonable results." For this reason, such interpretation should be avoided.

II. Court of appeals decision ordering remand to circuit court with instructions to: (1) issue an amended judgment of conviction reflecting a conviction for operating with a PAC as a seventh offense, and (2) hold a resentencing hearing, and impose a sentence consistent with the penalty ranges for a seventh offense, violates due process principles and **Bangert**.

A. Chamblis's plea of guilty was only knowingly, intelligently, and voluntarily made as to the charge of PAC 6th.

As discussed earlier in this brief, at the plea hearing, the trial court specifically advised the parties that it would only accept a plea to the "lower charge" of operating with a PAC as a sixth offense. 49:15. In the same regard, the trial court communicated that it would not accept a plea to a charge of operating with a PAC as a seventh offense. 49:15. The trial court's statements emphasized to both parties and to Chamblis in particular,

that the available penalties at sentencing were only those commensurate with a PAC 6th charge. The trial court's comments in this regard are relevant as they support the subjective belief and understanding on Chamblis's part that he faced only those penalties commensurate with a PAC 6th charge. Such comments similarly support the objective perspective that an ordinary person entering a guilty plea to a PAC 6th charge would reasonably expect that he only faced those penalties commensurate with such a charge. After all, if the sentencing court itself informs both parties that it could not and would not accept a plea on a PAC 7th, there is no reason for the defendant to believe that he faced penalties for a PAC 7th. The plea colloquy between Chamblis and the trial court further underscores that Chamblis's plea was only knowingly, intelligently, and voluntarily made as to the charge of PAC 6th. During the colloquy, the trial court specifically 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. The trial court advised Chamblis that the maximum sentence that could be imposed was 3 years confinement and 3 years extended supervision with a mandatory minimum 6 months confinement. 49:26. With this understanding,

Chamblis entered a plea of guilty which the trial court accepted and used as a basis to convict Chamblis. 49:26. The colloquy specifically explored a charge of PAC 6th and the commensurate penalties. The plea of guilty specifically admitted guilt only to the charge of PAC 6th. Chamblis entered such plea not only with the specific belief and understanding that he faced only Class H penalties but with the specific belief and understanding that he *did not* face Class G penalties. Chamblis as such volunteered to face only one set of penalties, the Class H penalties pertaining to a PAC 6th charge. 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 and minimum 6 months imprisonment, the Court of Appeals has now remanded the case to the trial court with orders to sentence Chamblis in accordance with the Class G penalties of 5 years confinement and 5 years extended supervision, with a mandatory minimum 3 years confinement. Chamblis, as evidenced by the colloquy, believed and had reason to believe, that he actually faced only those penalties pertaining to a PAC 6th charge. Similarly, Chamblis, as evidenced by the colloquy, volunteered only to face those limited penalties. For all of the above reasons, Chamblis's plea of guilty was only knowingly,

intelligently, and voluntarily made as to a PAC 6th charge.[6] The trial court cannot now on remand, resentence Chamblis for a PAC 7th without violating due process principles.

Nonetheless, the Court of Appeals addresses the issue of the knowing, intelligent, and voluntary nature of the plea by finding that Chamblis, despite only entering a plea of guilty to a PAC 6th charge, [was aware both of the "specific penalty" he faced if convicted of operating with a PAC as a seventh offense, and that he faced this possible punishment if the State succeeded in proving the purported Illiniois conviction.] A-Ap.112-113. The Court of Appeals findings are erroneous in two respects. First, Chamblis's ostensible awareness of the greater penalties carried by a PAC 7th charge is irrelevant as Chamblis agreed and volunteered to face only the lesser penalties carried by the PAC 6th charge. In this regard, the circumstances surrounding Chamblis's plea do not depict a typical **Bangert** scenario. In a typical **Bangert** situation, a defendant enters a plea of guilty to a particular charge only to later assert that the trial court failed to convey

[6] The State in its reply brief to the Court of Appeals seems to concede that Chamblis's guilty plea was not knowing, intelligent and voluntary as to a PAC 7th charge:
"If this court remands this case and the circuit court imposes sentence for a seventh offense, Chamblis may seek to withdraw his guilty plea on the ground that the court failed to inform him of the potential penalties he faced pleading guilty." State's Court of Appeals Reply Brief, p.4.

required information, for example the elements of the offense or the penalties, and as a result, he lacked sufficient knowledge and understanding of the charge. In those situations, Chamblis recognizes that the trial court can find that the defendant's plea to the charge was nonetheless knowing, intelligent, and voluntary, if the record demonstrates by clear and convincing evidence that the defendant otherwise knew and understood the information he maintains should have been provided to him. In this case however, Chamblis did not enter a plea of guilty to the basic charge at issue, the PAC 7th. He pleaded guilty to a different charge, PAC 6th. As such, the lower court's reasoning is misplaced. Second, the trial court record does not support the findings that Chamblis [knew and understood the "specific penalty" he faced if convicted of operating with a PAC as a seventh offense, and that he faced this possible punishment if the State succeeded in proving the purported Illinois conviction.] Significantly, the plea questionnaire/waiver of rights form makes no mention of the mandatory minimum 3 years confinement carried by the PAC 7th charge. Further, there is no statement in the record by Chamblis acknowledging that he knew and understood the penalties associated with a PAC 7th charge, and that he knew and understood that he actually faced such penalties. To the

contrary, Chamblis's statements during the colloquy indicate that he did not understand the initial, "variable" plea offer put forth to the trial court, and that he only understood the proceedings once the trial court clarified that the plea would be on the PAC 6th charge:

THE COURT: Okay. Mr. Chamblis, did you understand what the plea agreement is at this point in time?

DEFENDANT: Yes, I do *now*, sir. 49:25. Italics added.

THE COURT: Is there anything about your case that you don't understand at this point?

DEFENDANT: I didn't *at first*, but *now*, no, sir. 49:30. Italics added.

Clearly, the colloquy reflects that Chamblis did not know and understand the "variable" plea offer and the related variable penalties. The colloquy reflects that Chamblis was plainly confused about the structure of the initial plea offer and its consequences, and that such confusion was not unfounded as the trial court itself characterized the unfolding of the proceeding as a "complicated matter." 49:30. The record as such does not lend confidence to the lower court's conclusion that Chamblis knew and understood the penalties for a PAC 7th and that he could actually face such penalties.

B. Because Chamblis did not enter a knowing, intelligent and voluntary guilty plea to a PAC 7th charge, he has not been adjudicated guilty of such charge and the trial court lacks jurisdiction to amend the judgment of conviction or sentence him in accordance with such a charge.

Wis. Stat. Sec. 972.13, "Judgment," provides in relevant part as follows:

> [a] judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest. Wis. Stat. Sec. 972.13(1).

Under Wis. Stat. Sec. 972.13(1), a judgment of conviction may not be entered if there is no guilty verdict, guilty finding, or guilty or no contest plea. See **State v. Wollenberg**, 2004 WI App 20,¶18, 268 Wis.2d 810, 674 N.W.2d 916. In this case, Chamblis clearly did not enter a plea of guilty to a charge of PAC 7th. Chamblis's only plea of guilty was to the charge of PAC 6th. As such, it follows that under Sec. 972.13(1), there is no legal basis for the entry of an amended judgment of conviction which reflects a conviction for PAC 7th. For similar reasons, there is no valid basis for the imposition of a sentence for a PAC 7th. Criminal subject matter jurisdiction is the "…power of a court to inquire into the charge of the crime, to apply the law, and to declare the punishment in the court of a judicial proceeding and is conferred by law." See **Kelley v. State**, 54 Wis.2d 475,479, 195 N.W.2d 457 (1972). While the power of a trial court to "declare punishment," and impose sentence does not require a written judgment of

conviction, it does require an adjudication or finding of guilt. See **State v. Pham,** 137 Wis.2d 31,35, 403 N.W.2d 35 (1987). "Where there has been a plea, the finding of guilty is pronounced after the judge determines that the plea was entered freely, voluntarily and knowingly. If the parties agree, the judge then proceeds to impose sentence." **Id**. As discussed above, Chamblis's plea of guilty to the charge of PAC 6th provided the basis for trial court to adjudicate him guilty of such charge. The adjudication of guilt in turn provided the legal basis or jurisdiction for the trial court to sentence Chamblis on such charge. It follows therefore that the trial court cannot sentence Chamblis on a charge of PAC 7th where there has been no adjudication of guilt for such charge either by way of plea, verdict or court finding. The trial court would simply lack the jurisdiction to impose such a sentence. Again, all roads lead back to the issue of the knowing, intelligent, and voluntary nature of Chamblis's plea of guilty. Given that Chamblis only entered such plea to the charge of PAC 6th, a Class H felony, there is no adjudicative basis for the entry of an amended judgment of conviction reflecting a PAC 7th conviction, a Class G felony, or the imposition of a sentence on such charge.

C. Given that Chamblis has already served the confinement portion of his sentence, resentencing Chamblis on a charge of operating with a PAC 7th would violate principles of fundamental fairness and due process.

Chamblis recognizes that a court has the power to correct formal or clerical errors or an illegal or a void sentence at any time. See **State v. Trujillo**, 2005 WI 45, ¶10, note 8, 279 Wis.2d 712, 694 N.W.2d 712. However, such power is limited by requirements of due process. See **State v. Pierce**, 117 Wis.2d 83,88, 342 N.W.2d. 776 (Ct. App. 1983). In addition to those due process arguments made earlier in this brief, Chamblis maintains that it would be fundamentally unfair to resentence him on a PAC 7th since he has already served the confinement portion of the originally imposed sentenced. The now well-developed principle of constitutional due process fairness should apply to the sentencing phase of a criminal trial as well as to the trial itself. See **United States v. Lundien**, 769 F.2d 981,986 (4th Cir. 1985). Due process may be denied when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them. **Id**. at 987. In considering the issue, the First Circuit Court of Appeals stated the principle as such:

> [T]he power of a sentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit. When a prisoner first commences his sentence, especially if it involves a long prison term as here, the prospect of release on parole or otherwise may seem a dimly perceived largely unreal hope. As the months and years pass, however, the date of that prospect must assume a real and psychologically critical importance. The prisoner may be aided in enduring his confinement and coping with the prison regime by the knowledge that with good behavior release on parole or release outright will be achieved on a date certain. After a substantial period of time, therefore, it might be fundamentally unfair, and thus, violative of due process for a court to alter even an illegal sentence in a way which frustrates a prisoner's expectations by postponing his parole eligibility or release date far beyond that originally set. **Breest v. Helgemore** , 579 F.2d 95,101 (1st Cir. 1978)(affirming trial court's increase of minimum sentence from eighteen years to forty years after defendant served fourteen days), cert denied, 439 U.S. 933, 99 S.Ct. 327, 58 L.Ed.2d 329 (1978).

The critical question therefore is at what point during the defendant's service of sentence do principles of due process and fundamental fairness engage to preclude the correction of a sentence? The answer hinges on how much of the sentence the defendant has actually completed. For example, see **DeWitt v. Ventetoulo**, 6 F.3d 32,37 (1st Cir. 1993) (mistake corrected eight months after defendant had been granted parole and released from prison violated due process); **United States v. Arrellano-Rios**, 799 F.2d 520, 524-525 (9th Cir. 1986)(correction almost one year after release from prison violated due process); **Warner v. U.S.,** 926 F.Supp. 1387,1396 (E.D. Ark. 1996)(correction after completion of sentence violated due process); but see **Lerner v. Gill**, 751 F.2d 450,458 (1st. Cir. 1985), cert. denied, 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed. 2d 789 (1986)(mistake corrected after three years but while defendant still in prison did not violate

due process); **U.S v. Cook**, 890 F.2d 672,675 (4th Cir. 1989)(district court's amendment of sentence three weeks after sentencing date did not violate due process); **Breest**, 579 F.2d at 101 (trial court's increase of minimum sentence from eighteen years to forty years after defendant served fourteen days did not violate due process), cert denied, 439 U.S. 933, 99 S.Ct. 327, 58 L.Ed.2d 329 (1978); **Lundien**, 769 F.2d at 987 (due process not violated where defendant served only five days of expected ten year sentence).

In this case, more than two years have passed since the trial court sentenced Chamblis on November 5, 2012. Chamblis has already served the two year confinement portion of his sentence and is presently on extended supervision. Chamblis has already received whatever rehabilitative benefits the Wisconsin state prison system has provided to him. Chamblis's sentence was lawful at the time the trial court imposed it, lawful throughout the duration of Chamblis's confinement, and lawful at the time of Chamblis's release from the Wisconsin state prison system. It was also final. A conviction becomes final when the court which has rendered it has exercised all the powers confided to it and has made an adjudication of guilt. See **State v. One 1997 Ford F-150**, 2003 WI App 128,¶19, 265

Wis.2d 264, 665 N.W.2d 411. The fact that criminal litigants have the right to appeal from a judgment of conviction does not make the judgment any less final. **Id**. at ¶20. Under these circumstances, Chamblis has served so much of his sentence, all of the confinement portion actually, that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them. Finally, this Court should consider that even on the current sentence, that for a Class H felony, Chamblis received a sentence that is much harsher, 2 years confinement, than the 6 months minimum period of confinement required for the crime. The State's appeal would perhaps make more sense if Chamblis received a "light" or minimum sentence but he did not. The State has already received a "pound of flesh" from Chamblis, and under the circumstances, principles of fundamental fairness urge against it getting more.

CONCLUSION

For all the reasons stated in this brief, Chamblis requests that this Court reverse the decision of the Court of Appeals.

Dated this _____day of December 2014.

Respectfully submitted,
BY:_____/s/_____
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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 December 2014

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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 10,997 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.

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