STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERNESTO E. LAZO VILLAMIL,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is Wis. Stat. § 343.44(2)(ar)4 ambiguous because it prescribes two distinct penalties for a single offense?

   The circuit court answered no.

2. Is Wis. Stat. § 343.44(2)(ar)4, unconstitutional because it prescribes a more severe penalty for "knowingly" operating after revocation, causing death, when "knowing" is already an element of the underlying offense of operating after revocation?

   The circuit court answered no.

3. Did the circuit court erroneously exercise its discretion at sentencing when it imposed the maximum penalty, but failed to identify sentence objectives, provide adequate explanation for the sentence imposed, or to consider all of the factors required under Wis. Stat. §343.44(2)(b)?

   The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication may be warranted, as the main issue in this case relates to the interpretation and constitutionality of a recently enacted statutory provision under Wis. Stat. 343.44(1)(b) and (2)(ar)4.

STATEMENT OF THE CASE

In a criminal complaint dated October 31, 2012, the state charged Mr. Lazo Villamil with one count of operating after revocation (OAR), causing great bodily harm, contrary to Wis. Stat. § 343.44(1)(b) and (2)(ar)3. (1). The probable cause section alleged that on October 30, 2012, Mr. Lazo Villamil was involved in a car accident and that he did not have a valid driver's license at the time. (1). The complaint further alleged that the driver of the other vehicle was being transported for "great bodily harm type" injuries. (1).

Following the death of the driver of the other vehicle, the state filed an amended complaint, charging Mr. Lazo Villamil with "knowing" OAR, causing death, contrary to Wis. Stats. §§ 343.44(1)(b) and (2)(ar)4(2). In exchange for his no-contest plea, the state agreed to recommend a prison sentence, with the length of time up to the court. (43:3).

The circuit court sentenced Mr. Lazo Villamil to the maximum penalty, divided into three years of initial confinement, followed by three years of extended supervision, with 461 days of sentence credit. (44:22-23).

Mr. Lazo Villamil filed a postconviction motion, arguing that the statute under which he was convicted was ambiguous and unconstitutional on its face. (26:4-11). He also argued that the circuit court failed to comply with the requirements of ***State v. Gallion***, 2004 WI 42, ¶ 2, 270 Wis. 2d 535, 678 N.W.2d 197, when it sentenced him. (26:11-13).

The circuit court issued a written decision and order denying Mr. Lazo Villamil's postconviction motion.[1] The circuit court concluded that Wis. Stat. § 343.44(2)(ar)4 is neither ambiguous, nor unconstitutional on its face. (34:10; App. 110). The circuit court also concluded that the

[1] Mr. Lazo Villamil also raised a DNA surcharge issue in his postconviction motion. The state did not object, and the circuit court vacated the surcharge. (34:12-13; App. 112-113).

sentencing court complied with the mandate of ***Gallion***, and therefore, Mr. Lazo Villamil was not entitled to resentencing. (34: 12; App. 112). This appeal follows.

STATEMENT OF THE FACTS

The single count in this case, OAR-causing death, contrary to Wis. Stats. §§ 343.44(1)(b) and (2)(ar)4, stems from a car accident. Mr. Lazo Villamil remained on the scene until police arrived. (2:2). He told the police officers that he did not have a valid driver's license and that it had been revoked in the past for an operating while intoxicated offense (OWI)(2:2).

Neither the complaint, nor anything else in the record alleged that the accident was related to impaired, reckless, or any other dangerous driving. According to the accident reconstruction analysis, the victim's vehicle had slowed down in anticipation of turning left off of the highway. (11:2). The report indicated that Mr. Lazo Villamil was decelerating and braking prior to impact. (11:2). The report further indicated that even if impact had occurred at a slower speed, the victim would have likely suffered fatal injuries. (11:2). The report also concluded that there was "no evidence to suggest Mr. Lazo Villamil had diminished driving abilities." (11:3).

Mr. Lazo Villamil pled no contest to the single offense as charged. During the plea colloquy the circuit court discussed the factual basis and elements of the offense. (43:12-13). Specifically, it questioned Mr. Lazo Villamil as to whether he had a valid driver's license on the day of the accident, whether his license had been revoked due to an alcohol-related offense, and whether he was aware that it had been revoked. (43: 13). Mr. Lazo Villamil told the court that he was aware that his license had been revoked and that it had been revoked for an alcohol-related offense. (43:13).

The court ordered a presentence investigation report, and it recommended one to two years of initial confinement, followed by one year of extended supervision. (14). The family of the victim asked the court to impose the maximum penalty followed by deportation. (44:10-11).

Pursuant to the plea agreement, the state recommended an unspecified term of imprisonment based on the fact that Mr. Lazo Villamil had previous driving convictions, that he was the sole cause of the accident, and contrary to what was in the accident report, argued that it "seem[ed] to suggest that the defendant didn't even put on his brakes…" (44:11). The state also noted that the driver of another vehicle was injured. (44: 11).

Defense counsel argued for a term of probation with an imposed and stayed sentence, given that at the time of sentencing Mr. Lazo Villamil had already been in the county jail for over fifteen months. (44:19). Defense counsel argued that Mr. Lazo Villamil's record was not a significant one in that his only convictions were for an operating while intoxicated-second offense in 2009, and an operating while revoked in 2010. (44:19). Prior to the conviction for the second operating while intoxicated, Mr. Lazo Villamil had a valid driver's license. (44:13). He had completed treatment and all of the requirements of Project Impact to reinstate his license, but was unable to do so due to a change in the law regarding driver's licenses for non-citizens. (44:13).

Defense counsel also provided evidence that while in pretrial custody, Mr. Lazo Villmail availed himself of programming available in the jail and that he: 1) obtained his GED; 2) took employability and English as a second language classes through Waukesha County Technical College (WCTC); 3) took an alcohol and other drug (AODA) class; and 4) took an anger management course (44:14-15). Finally, defense counsel discussed the accident report, the fact that Mr. Lazo Villamil had not been cited for any type of reckless

driving, the fact that the car was insured, and that Mr. Lazo Villamil was remorseful. (44:16-19).

The circuit court began its remarks by noting the three sentencing factors: the seriousness of the offense, the need to protect the public, and the rehabilitative needs of the defendant. (44:21; App. 115). The circuit court noted that the offense of conviction was new and that its purpose was to public protection from people whose licenses had been revoked. (44:21; App. 115). The sentencing court stated that it could not understand why Mr. Lazo Villamil was driving that day and that matters were made worse because he "had been convicted of drunk driving twice and subsequent to that [he was] convicted for operating after revocation for which [he] did jail time." (44:21-22; App. 115-116).

The sentencing court commented on the continued problem of people driving without a license, and concluded that all it could do "to respond to the needs of the community as it best can under facility of the law" was to impose the maximum term of imprisonment. (44:22; App. 116). It concluded "this is a serious operating after revocation. The maximum period of confinement is three years. The maximum term of the extended supervision is three years. That is the sentence of the Court." (44:22; App. 116).

Mr. Lazo Villamil filed a postconviction motion arguing that the statute under which he was convicted was ambiguous and facially unconstitutional. (26:4-11). He also argued that the sentencing court had not provided an adequate explanation of why it imposed the maximum penalty, and therefore, he was entitled to resentencing. (26:11-13). The circuit court held a postconviction motion hearing, at which time it requested additional briefing to address specific questions. (49:19-20).

The circuit court's written decision and order rejected the constitutional challenges that Mr. Lazo Villamil raised. (34:10; App. 110). It found that "there is noting vague or

indefinite about sub.(2)(ar)4. The section makes clear that a person knowingly operating a vehicle while revoked faces the penalties applicable for a Class H felony if, in the course of the violation, he or she causes the death of another." (34:6; App. 106). It concluded that the legislative history demonstrates that "knowledge" was meant to be repealed from the base offense of OAR, and the oversight does not render the statute vague. (34:7; App. 107). Finally, it relied on ***State v. Cissell***, 127 Wis. 2d 205, 378 N.W.2d 691 (1985), to conclude that the statute does not violate due process or equal protection.

The circuit court also rejected Mr. Lazo Villamil's argument regarding sentencing, concluding that the it properly exercised its discretion when imposing the maximum penalty by identifying the required sentencing factors, and identifying Mr. Lazo Villamil's driving record and the victim's death as a result of the crash as aggravating. (34:11-12; App. 111- 112).

ARGUMENT

Introduction and Standards of Review

Mr. Lazo Villamil was convicted of violating Wis. Stats. §§ 343.44(1)(b) and (2)(ar)4. The former subsection of the statute is the underlying crime of OAR, while the latter subsection is the penalty portion of the statute. The penalty portion of the statute increases the penalty for harm caused, which in this case is the death of another motorist. The statute purports to further increase the penalty for causing the death of another from a misdemeanor to a felony when the driver *knew* that his or her license was revoked. Wis. Stat. § (2)(ar)4.

The first issue presented in this case, argued in section I, is whether the statute is ambiguous, thereby requiring application of the rule of lenity. Statutory interpretation

presents a question of law that this Court reviews de novo. ***State v. Longcore***, 2001 WI App 15, ¶ 5, 240 Wis. 2d 429, 623 N.W.2d 201.

The next issue presented, argued in section II, is whether the redundancy of the knowledge element in Wis. Stat. § 343.44(2)(ar)4 renders the statute unconstitutional. Legislative enactments are presumed constitutional and the party challenging the constitutionality must prove the statute unconstitutional beyond a reasonable doubt***. State v. McManus,*** 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989). Like statutory construction, the constitutionality of a statute presents a question of law that this Court reviews de novo. ***State v. Cole***, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328.

The final issue presented in this case, argued in section III, is whether the sentencing court erroneously exercised its discretion when it imposed the maximum sentence. This Court "will find an erroneous exercise of discretion if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or this court finds that the trial court applied the wrong legal standard." ***State v. Black***, 2001 WI 31, ¶ 9, 242 Wis.2d 126, 624 N.W.2d 363. Here, the sentencing court failed to properly exercise its discretion at sentencing, which requires a court to provide a "rational and explainable basis" for the particular sentence it imposed. ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The circuit court also failed to consider the factors enumerated in Wis. Stat. § 343.44(2)(b).

I. A Statute that Contains Both Misdemeanor and Felony Punishment for a Single Offense Renders the Statute Ambiguous; Accordingly, Mr. Lazo Villamil Should Only Be Punished Under the Misdemeanor Penalty.

A. Principles of Statutory Interpretation

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 682 N.W.2d 110. Statutory interpretation " 'begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry.'" ***Id***., ¶45 (citation omitted). There is no ambiguity when the process of statutory interpretation produces a plain meaning. ***Kalal***, 271 Wis. 2d 633, ¶ 46. However, "[a] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Kalal,*** 271 Wis. 2d 633, ¶ 47. When a statute is ambiguous, courts can consider outside sources, such as legislative history, to determine the meaning. ***Id***. ¶ 46.

In discerning the intent of the legislature, courts give deference to the policy decisions of the legislature, and also consider the "scope, context and structure of the statute itself." ***Kalal***, 271 Wis. 2d 633, ¶¶¶ 44, 46, 48. The language of a statute is interpreted within the context in which it is used and as part of a whole so as to "avoid absurd or unreasonable results." ***Id***., ¶ 46.

Reviewing courts presume that the legislature knows the law and the legal effect of its actions, ***In re Commitment of West***, 2011 WI 83, ¶ 61, 336 Wis. 2d 578, 800 N.W.2d 929, (*citing* ***Shill v. Wis. Rapids Sch. Dist.***, 2010 WI 86, P 103, 327 Wis. 2d 572, 786 N.W.2d 177); and are not permitted to rewrite statutes to meet a preferred construction or to remedy drafting errors. *See e.g.*, ***State v. Reagles***, 177 Wis. 2d 168, 176, 501 N.W.2d 861 (Ct. App. 1993) (holding that the remedy for a statute's failure to cover a particular situation lies with the legislature); ***State v. Richards***, 123 Wis. 2d 1, 12-13, 365 N.W.2d 7, 12 (1985) ("Simply because the legislature could, and arguably should, have delineated the statutory elements differently does not permit this court to rewrite the elements of the crime by judicial fiat.").

B. The rule of lenity applies because Wis. Stat. § 343.44(2)(ar)4 is ambiguous, and neither its plain language, or extrinsic sources resolve the ambiguity.

The circuit court found that the statute was not ambiguous because the plain language makes clear that when the prohibited conduct is done knowingly, it will be punished as a class H felony. (34:7; App. 107). It concluded that it would be inconsistent to punish OAR causing death as a misdemeanor because causing the death of another operating after suspension and operating without a license, knowingly, are class H felonies. (34:8; App. 108)

It does not, however, defy logic, that one charged with OAR causing death would believe that he would be guilty of a misdemeanor, given that is the express language of the statute. *See* Wis. Stat. 343.44(2)(ar)4. While the way in which the statute is drafted creates problems in its application, it is not the role of reviewing courts to "rescue [the Legislature] from its drafting errors and to provide for what [it] might think . . . . is the preferred result" ***Lamie v. United States Trustee***, 540 U.S. 526, 542 (2004), *quoting* ***United States v. Granderson***, 511 U.S. 39, 68 (1994). Instead, Mr. Lazo Villamil should be held liable for a misdemeanor offense because he committed an OAR causing death, and no additional fact would need to be proven for him to be liable for an H felony.

"When there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused." ***Cole***, ¶ 13.; citing ***State v. Morris,*** 108 Wis.2d 282, 289, 322 N.W.2d 264 (1982); ***State v. Wilson,*** 77 Wis.2d 15, 28, 252 N.W.2d 64 (1977)). "More specifically, the rule of lenity comes into play after two conditions are met: (1) the penal statute is ambiguous; and (2) we are unable to clarify the intent of the legislature by resort to legislative history." ***Id***. ¶67. Even if one believes that the arguments for each position are equal, the court "must favor a

milder penalty over a harsher penalty when there is doubt concerning the severity of the penalty prescribed by statute. ***Id***.

1. The plain language of the statute is ambiguous.

The statute is ambiguous because it provides distinct penalties for one offense. The ambiguity produces an absurd result in that a prosecutor would only need to prove the base offense and in instances that a death is caused in the course of a violation, the penalty would automatically be enhanced, without requiring the state to prove any additional fact. Indeed, the state indicated that "the misdemeanor penalty will never be charged by any prosecutor." (49:28).

The offense applicable to this case, OAR, contrary to Wis. Stat. § 343.44(1)(b), in relevant part states:

> No person whose operating privilege has been duly revoked under the laws of this state may knowingly operate a motor vehicle upon any highway in this state during the period of revocation or in violation of any restriction on an occupational license issued to the person during the period of revocation.

Wis. Stat. § 343.44(2)(ar), prescribes the following penalties for violating Wis. Stat. § 343.44(1)(b):

> 1. Except as provided in subds. 2. to 4., any person who violates sub. (1)(b) shall forfeit not more than $2,500 dollars.
>
> 2. Except as provided in subds. 3. and 4., any person who violates sub. (1)(b) shall be fined not more than $2,500 or imprisoned for not more than one year in the county jail or both if the revocation identified under sub. (1)(b) resulted from an offense that may be counted under s. 343.307(2).
>
> 3. Any person who violates sub. (1)(b) and, in the course of the violation, causes great bodily harm to another

> person shall be fined not less than $5,000 nor more $7,500 or imprisoned for not more than one year in the county jail or both, except that if the person knows at the time of the violation that his or her operating privilege has been revoked, the person is guilty of a Class I felony.
>
> 4. Any person who violates sub. (1) (b) and, in the course of the violation, causes the death of another person shall be fined not less than $7,500 nor more than $10,000 or imprisoned for not more than one year in the county jail or both, except that, if the person knows at the time of the violation that his or her operating privilege has been revoked, the person is guilty of a Class H felony.

The first step is to look at the text of the statute. ***Kalal***, 271 Wis. 2d 633, ¶ 44. Here, under subsection (2), the penalty increases from a forfeiture to a criminal offense with a maximum one-year jail term, if the underlying cause of the revocation was alcohol or drug-related.[2] Next, in both subsections (3) and (4), if either great bodily harm or death results in the course of an OAR violation, there is a larger fine and a maximum jail term of one year.[3] Interestingly, the maximum jail time in those subsections is the same as in subsection (2), where there is no harm or injury to another person. The minimum fines are what distinguish the type of harm caused.

Subsections (3) and (4) purport to further increase the penalties to felonies when an OAR causing injury or death is committed "knowingly." The specific provision at issue here, subsection (2)(ar)4, identifies two penalties for violation of OAR that results in the death of another. The first penalty that the statute prescribes is a misdemeanor, *See* Wis. Stat. § 973.01, carrying a maximum term in jail of one year, and a

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[2] Currently, Assembly Bill 128 proposes re-classifying subsection (2) as a class A misdemeanor.

[3] Assembly Bill 128 also proposes re-classifying the penalties in subsections (3) and (4) class A misdemeanors.

fine between $7,500 and $10,000. The second penalty in the subsection enhances the makes it a class H felony, punishable by up to six years of imprisonment, upon proving an additional fact: knowledge. *See* Wis. Stat. § 939.50(h). The enhancement, however, is flawed because "knowledge", which is supposed to be an additional element that increases the punishment, *is already an element of the underlying offense of operating after revocation*.

Wis. JI Criminal 2621 provides the following elements for OAR in violation of Wis. Stat. § 343.44(1)(b):

> 1) The defendant operated a motor vehicle on a highway.
>
> A motor vehicle is operated when it is set in motion.
>
> 2) The defendant's operating privilege was duly revoked at the time the defendant operated a motor vehicle.
>
> [A person's operating privileges remains revoked until it is reinstated.].
>
> 3) ***The defendant knew (his) (her) operating privilege had been revoked***.
>
> 4) The revocation resulted from an offense that may be counted under section 343.307(2)[4]

Wis. JI Criminal 2621 (App.121-122) (emphasis added).

The jury instruction regarding violation of Wis. Stat. § 343.44(1)(b), with the additional elements listed under subsections (2)(ar)3 or 4, contains identical elements for the base offense. It provides:

> 1) The defendant operated a motor vehicle on a highway.

[4] This element is only added when moving from a civil to a criminal OAR.

> A motor vehicle is operated when it is set in motion.
>
> 2) The defendant's operating privilege was duly revoked at the time the defendant operated a motor vehicle.
>
> [A person's operating privileges remains revoked until it is reinstated.].
>
> 3) ***The defendant knew (his) (her) operating privilege had been revoked***.
>
> 4) The defendant's operation of the vehicle caused (great bodily harm) (death) to (name of the victim).

See Wis. JI Criminal 2623B. (App. 126) (emphasis added). Because Mr. Lazo Villamil's conduct met all of the elements of the base offense of OAR, and the accident resulted in a death, the misdemeanor penalty was applicable to him.

The anomaly in the statutory language creates ambiguity about what the penalty is for committing OAR-causing death. The statute is ambiguous for two reasons. First, a plain reading of subsection (2)(ar)4 could be interpreted in more than one way, as there are two distinct penalties within the same subsection, without any meaningful way to distinguish application of one over another. Second, the statute is internally inconsistent in how what codifies as more serious conduct and how the penalties are increased. For example, the base offense first graduates to a criminal offense when underlying cause of revocation is related to alcohol or a controlled substance. Subsequent sections of the statute then increase the penalty when in the course of committing an OAR injury or death occurs, without regard to the cause of the revocation. The maximum jail time prescribed OAR offense causing injury or death is the same as committing OAR when the cause of revocation was alcohol or drug related. Thus, the context of the OAR statute does not provide guidance as there is no consistent penalty structure or consistent additional fact used to increase OAR penalties.

Unlike OAR, a violation of OAS does not require knowledge. OAS causing death is punishable as a misdemeanor, unless the person driving knew that his or her operating privileges were suspended. *See* Wis. Stat. § 343.44(1)(ag)3. The circuit court pointed out that OAS causing death would be punished more harshly than OAR causing death. (34:8; App. 108). However, ignoring the misdemeanor provision as both the circuit court, and state suggested (46:28), creates a result in which the role of the legislature is usurped, and defendants like Mr. Lazo Villamil who commit the base offense of OAR and in the course cause a death, have the penalty automatically enhanced without requiring proof of an additional element as the statute contemplated. This Court cannot strike language from a statute, or rewrite the statute to drafting errors, where perhaps the legislature should have delineated elements differently. ***State v. Richards***, 123 Wis. 2d 1, 12-13, 365 N.W.2d 7, 12 (1985)

2. The plain language creates is a redundant enhancer, thus rendering the statute ambiguous.

Multiple penalty enhancers must relate to a separate and distinct prior conviction. *See* ***State v. Delaney***, 2003 WI 9, ¶36, 259 Wis. 2d 77, 658 N.W.2d 416. For instance, prosecutors are prohibited from charging "use of a dangerous weapon" as a penalty enhancer pursuant to Wis. Stat. § 939.62(1) when possessing, using, or threatening to use a dangerous weapon is an essential element of the underlying offense. Wis. Stat. § 939.62(2). Accordingly, a prosecutor could not charge armed robbery, under Wis. Stat. § 943.32(2), and then enhance or increase the penalty by adding the "use of a dangerous weapon" statute since use of a dangerous weapon is already an essential element of armed robbery. *See* Wis. Stat. § 939.63(2) (where the penalty enhancer does not apply when possession of a dangerous weapon is an essential element of the underlying offense.

Likewise, prosecutors cannot add a habitual offender penalty enhancement, pursuant to Wis. Stat. § 939.62, for a person charged with an operating while intoxicated (OWI), based upon a prior conviction for OWI because evidence of the prior OWI is already included in the graduated penalty scheme. *See* ***State v. Ray***, 166 Wis. 2d 855, 873, 481 N.W.2d 288 (Ct. App. 1992) (where the trial court erred by applying both a specific and general repeater penalty enhancer when the base for doing so was the same prior conviction).

The instant case is analogous to the situations described above. By entering a plea, Mr. Lazo Villamil admitted to the essential elements of the base offense: 1) operating a motor vehicle on a highway, 2) his operating privileges were revoked at the time, and 3) he knew that his operating privileges were revoked, as well as the additional fact of causing the death of another, which resulted in an increase from the penalties prescribed in subsection (2) to a mandatory minimum fine of $7,500 and up to a year in jail.

However, the prosecution sought the next graduated punishment, an H felony, due to his knowledge that his driving privileges were revoked. In doing so, did not need to prove any additional fact, as knowledge was already required for a finding a guilty of the underlying OAR. Accordingly, it enhanced a penalty without an additional finding of fact. Therefore. Mr Lazo Villamil should only be liable for a misdemeanor.

3. Review of extrinsic sources does not resolve the ambiguity in the statute.

Because the plain language of the statute is ambiguous the court may consult extrinsic sources. ***Kalal***, 271 Wis. 2d 633, ¶ 46. "Extrinsic sources are sources outside of the statute itself, including the legislative history of the statute." ***In re Helen E.F.***, 2011 WI App 72, ¶3, 333 Wis. 2d 740, 798 N.W.2d 707, *rev. granted*, 2011 WI 89, 336 Wis. 2d 640, 804 N.W.2d 82. (citations omitted).

2011 Wisconsin Act 113[5] (Act 113) amended Wisconsin Stat. § 343.44. As relevant to this case, Act 113 created Wis. Stat. § 343.44(2)(ar)4. As previously discussed, this subsection identifies two penalties for a single offense. 2011 Assembly Bill 80,[6] (Bill 80) repealed "knowingly" operating after suspension as a separate and distinct violation. The legislative counsel act memo related to Act 113 and Bill 80 indicate that Act 113 "repeals all existing penalties for knowingly committing an OWS, OAR, or OWL violation and creates new penalties[.]" (26: Attachment B). However, the element of knowledge was never removed from Wis. Stat. § 343.44(1)(b).

The penalty structure that the legislature contemplated failed to recognize that unlike OAS, which had an enhanced penalty scheme for the additional knowledge element, OAR always required knowledge as an element before one could be found guilty. Likewise, the legislative reference bureau analysis also failed to recognize that inherent in the operating after revocation statute was a knowledge requirement, which, unlike OAS, never provided a distinct violation for "unknowingly" operating after revocation (26: Attachment C).

Although the legislative counsel act memo, (26:Attachment B), indicates an intention to repeal all knowledge elements, it is presumed that because it ultimately did not do so, that it intended to maintain that element as a component of the base offense. *See* ***Ball***, 117 Wis. 2d 529 (1984); ***In re Commitment of West***, 2011 WI 83, ¶ 61, *citing* ***Shill v. Wis. Rapids Sch. Dist.***, 2010 WI 86, ¶ 103. Perhaps the legislature would have enacted different criteria for which to increase the penalty for operating while revoked causing death in light of its decision to retain the knowledge element

[5] Act 113 is available at http://docs.legis.wisconsin.gov/2011/related/acts/113

[6] Assembly Bill 80 is available at http://docs.legis.wisconsin.gov/2011/related/proposals/ab80

of the underlying offense, or perhaps the misdemeanor penalties would have been stricken from subsection (2)(ar) 3 and 4.

One could speculate as to a myriad of ways to construct this statute and account for increasing penalties. However, it is not for the courts to rescue the legislature from its drafting errors, or to provide for what they think is the preferable result. ***Lamie*** 540 U.S. 526, 542 (2004). Here the legislature intended to enhance a penalty, but did not actually create a new element under which to enhance it. The poor legislative drafting left the penalties and their application ambiguous. Accordingly, the rule of lenity should apply and Mr. Lazo Villmail should be convicted of the misdemeanor.

II. Because the Purported Penalty Enhancer Is For An Element that is Already Essential to a Finding of Guilt for the Underlying Offense of Operating After Revocation, the Statute Cannot Be Applied Constitutionally.

Even if this Court concludes that the statute is not ambiguous and that the legislature created a separate crime of knowingly committing an OAR, the redundant elements violate the Due Process and Equal Protection Clauses of the United States and Wisconsin Constitutions.

A. Increasing the penalty for committing OAR "knowingly," when knowledge is required for the underlying offense, violates procedural due process.

It is a fundamental tenet of due process that "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." ***United States v. Batchelder***, 442 U.S. 114, 123 (1979). (***quoting Lanzetta v. New Jersey***, 306 U.S. 451, 453 (1939).). "A criminal statute violates due process if it fails to give fair notice of the proscribed conduct and the consequences of violating a given

criminal statute." ***State v. Cissell***, 127 Wis. 2d 205, 216-217, 378 N.W.2d 691 (1985). (internal citation omitted).

The principle of the void for vagueness doctrine "rests upon the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. ***State v. Lopez***, 207 Wis. 2d 412, 434-435, 559 N.W.2d 264. (internal citation omitted). The "'void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a matter that does not encourage arbitrary and discriminatory enforcement.' " ***Cissell,*** 127 Wis. 2d. at 224, (quoting ***Kolender v. Lawson***, 461 U.S. 352, 357 (1983)).

A void-for-vagueness analysis requires a determination as to whether the statute is sufficiently definite so as to give a person of ordinary intelligence notice, and whether the statute provides standards to those who enforce laws and adjudicate guilt. ***Cissell***, 127 Wis. 2d 205, 224-225. The defendant in ***Cissell*** argued that two statutes with substantively identical elements, but different penalty schemes, violate both due process and equal protection. ***Id***. The Court rejected that argument because the two statutes gave sufficient notice of the conduct prohibited and its penalties, and because the prosecutor may choose which crime to charge. ***Id***. at 223 (*citing* ***United States v. Batchelder***, 442 U.S. 114 (1979)).

The case at hand is distinguishable. In ***Cissell***, the legislature created two different offenses that courts interpreted as having substantively identical elements. But here, there is one offense with two very distinct punishments, both contained within the same statutory provision. Moreover, the misplaced penalty enhancer suggests that the legislature did not in fact intend to give prosecutors discretion when charging the prohibited conduct. Rather, it seems that the intention was to create an additional element that distinguished the underlying offense, a misdemeanor, from the enhanced felony.

However, the "knowledge" element is already contained within the underlying offense of OAR, and the harm, causing death is accounted for in the first penalty listed within the statute. There is no other guidance as to how a distinction may be drawn between the misdemeanor and felony. The statute is vague and does not provide definite notice to defendants, or to those enforcing the law as to how, or under what circumstance, one may be liable for a felony or misdemeanor. Due process and equal protection rights are violated when a defendant cannot determine the potential penalty and nature of a conviction he faces as a result of the committing prohibited conduct.

B. Allowing prosecutors to determine which penalty applies to a particular case gives them discretion that the legislature did not intend and violates equal protection

To satisfy equal protection, the legislature must provide reasonable and practical grounds for drawing classifications. ***State v. McManus***, 152 Wis. 2d 113, 131, 447 N.W. 2d 654 (1989). "When considering an equal protection challenge that does not involve a suspect or quasi-suspect classification, the fundamental determination to be made . . . is whether there is an arbitrary discrimination in the statute . . . and thus whether there is a rational basis which justifies a difference in rights afforded." ***Joseph E.G.***, 2001 WI App 29 ¶ 8, 240 Wis. 2d 481, 623 N.W.2d 137 (internal citations omitted); *See also* ***McManus***, 152 Wis. 2d at 130-31.

Here, there is no rational basis for the distinction between the misdemeanor and felony penalties provided for OAR-causing death. The legislature purported to draw a classification between those who committed the offense knowing that their operating privileges were revoked and those who did not. However, as discussed in the sections above, that distinction does not actually exist because the underlying offense already requires knowledge. Thus, the

apparent intent of the legislature to create a distinction in penalty scheme based on "knowledge" is illusory. Without a legitimate and rational distinction, applying misdemeanor or felony penalties would be arbitrary and serve no rational purpose.

Moreover, although the distinction in the penalty scheme is illusory, it is evident that the legislature intended to draw some distinction and to provide a specific circumstance under which a prosecutor could charge a felony OAR causing death. Allowing prosecutors to determine whether to charge subsection (2)(ar)4 as a misdemeanor or felony would give them unfettered discretion that the legislature never intended. Likewise, allowing prosecutors to only charge felonies as the prosecutor here suggested (46:28), permits them to ignore part of the statute. Therefore, as written, the statute violates equal protection and the conviction should be vacated.

III. Mr. Lazo Villamil Is Entitled to Re-sentencing Because the Circuit Court Failed to Adequately Explain Its Reasons For Imposing the Maximum Penalty.

In this case, the circuit court failed to provide an adequate explanation for its sentence. While the circuit court indicated that it was considering Mr. Lazo Villamil's character, the protection of the public, and the seriousness of the offense (44:21), it imposed the maximum six-year sentence without using the sentencing guidelines required under Wis. Stat. § 343.44(2)(b), without identifying a specific sentencing objective, and without explaining why the maximum period of incarceration was the least amount of custody time necessary to further its goals. Accordingly, the sentencing court erroneously exercised its discretion and Mr. Lazo Villamil is entitled to resentencing.

A. The circuit court is required to explain the reasons for its sentence, and the objectives of the sentence on the record.

Like all defendants, Mr. Lazo Villamil has "a constitutional right to have the relevant and material factors which influence sentencing explained on the record by the trial court." ***State v. Hall***, 2002 WI App 108, ¶ 21, 255 Wis.2d 662, 648 N.W.2d 13. As part of that rational and explainable basis that must be put forth on the record, the court must consider the gravity of the offense, the rehabilitative needs of the defendant, and the need to protect the public. Wis. Stat. § 973.017(2); ***State v. Taylor,*** 2006 WI 22, ¶ 20, 289 Wis. 2d 34, 710 N.W.2d 466. Motor vehicle operating offenses present a unique situation at sentencing. In addition to a court's obligation to satisfy the requirements of ***Gallion*** and ***McCleary***, the court here was required to consider a guideline to determine whether the nature of the offense was low, moderate or high. pursuant to Wis. Stat. § 343.44(2)(b), (31:8-9).

Circuit courts may not dispense with discretion by citing facts, "magic words," or limiting sentences to the statutory maximum. ***Gallion***, 270 Wis. 2d 535, ¶ 37. Instead, courts "are required to specify the objective of the sentence on the record." ***Id*** at ¶ 40; Wis. Stat. § 973.017(10m Accordingly, a sentencing court must tailor the sentence to the individual case "by identifying the most relevant factors and explaining how the sentence imposed furthers the sentencing objectives" ***State v. Harris***, 2010 WI 79, ¶ 29, 326 Wis. 2d 685, 786 N.W.2d 409.

Furthermore, in each case, the court should impose the "minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶ 23, (quoting ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

When a defendant brings a postconviction motion challenging a court's sentence, the court has an opportunity to clarify its sentencing decision and rationale. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994 (emphasis added); ***State v. Stenzel***, 2004 WI App 181, ¶ 9, 276 Wis. 2d 224, 688 N.W.2d 20. Here, the postconviction court did not attempt to elaborate on the sentencing court's rationale. Rather, it concluded that the court properly exercised its discretion based on the sentencing record. (34:12; App. 112).

B. The court failed to provide a rational and explainable basis for imposing the maximum sentence, and failed to consider the required guidelines.

Here, the circuit court confused discretion with decision-making. It failed to specify the objective of the sentence and to provide a reasoned explanation of how it viewed and weighed the facts in relation to the sentencing factors and objectives. This approach directly contradicts the mandate of ***McCleary*** and ***Gallion***. Moreover, in failing to adequately explain its sentence, the circuit court failed to consider the required circumstances, both aggravating and mitigating, required by the sentencing guidelines. Wis. Stat. §343.44(2)(b) provides:

> In imposing a sentence under par. (ar) or (br), the court *shall* review the record and consider the following:
>
> 1. The aggravating *and mitigating* circumstances in the matter, using the guidelines described in par. (d).
>
> 2. The class of vehicle operated by the person.
>
> 3. The number of convictions of the person for violations of this section within the five years preceding the person's arrest.
>
> 4. The reason that the person's operating privilege was revoked, or the person was disqualified or ordered out of

> service, including whether the person's operating privilege was revoked for an offense that may be counted under s. 343.307(2).
>
> 5. Any convictions for moving violations arising out of the incident or occurrence giving rise to sentencing under this section.

(emphasis added). A state-wide guideline is available for operating after revocation, and must be considered at sentencing for the offense in this case. (31:8-9).

Here, however, the sentencing court made no mention of the guidelines, and only considered Mr. Lazo Villamil's single conviction for operating after revocation; his conviction for a second operating while intoxicated from 2009, and the fact that the incident involved an accident resulting in another driver's death. (44:21-22; App. 115-116). While the sentencing court properly considered these factors, it failed to consider the remaining factors Wis. Stat. § 343.44(2)(b) requires.

For example, the statute requires courts to consider the class of vehicle and whether any moving violations arose out of the incident. Here, the sentencing court gave no consideration to the fact that there were no moving violations arising from this incident. Likewise, the guideline directs sentencing courts to consider whether the defendant has a record of unsafe driving, separate from prior convictions for operating while intoxicated. (31:8). Here, there is nothing in the record to suggest that Mr. Lazo Villamil had a record for unsafe driving, and at sentencing, the circuit court made no mention of this fact.

Other considerations courts must make are whether there was the presence of alcohol or controlled substances, and whether there was cooperation. (31:8). Here, Mr. Lazo Villamil would have fallen into the mitigated category for both of those factors, as there was no indication that any alcohol or controlled substances were present, nor any other

indication that he had a diminished ability to drive. (11:2), Moreover, he remained on scene and cooperated with the police, telling them that his license had been revoked. (2:2). Finally, the court did not take into consideration the remedial actions that Mr. Lazo Villmil took after the event as well as since losing his license such as completing the an alcohol assessment and treatment, driver's safety plan, and all of the requirements necessary to re-obtain a license. (44:13).

In short, the sentencing court skipped the mitigating circumstances that it was required to consider per Wis. Stat. § 343.44(2)(b), and instead focused on Mr. Lazo Villmail's two prior convictions and the death in this case. In doing so, the circuit court erroneously exercised its sentencing discretion. Accordingly, Mr. Lazo Villamil is entitled to re-sentencing.

CONCLUSION

Mr. Lazo Villamil respectfully requests that for the reasons stated above that this Court reverse the decision of the circuit court denying him postconviction relief, vacate the judgment of conviction and apply the rule of lenity, thereby commuting the conviction to a misdemeanor. Additionally he respectfully requests that this Court order resentencing.

Dated this 31st day of August, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,943 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 31st day of August, 2015.

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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 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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