STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP791-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross Petitioner,

v.

ERNESTO E. LAZO VILLAMIL,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT AND ORDER ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE DONALD J. HASSIN, JR., AND MICHAEL J. APRAHAMIAN, PRESIDING

OPENING BRIEF OF PLAINTIFF-RESPONDENT-CROSS PETITIONER

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ISSUES PRESENTED

1. Should Wis. Stat. § 343.44(1)(b) be construed as though the word "knowingly" did not appear there, to correct an obvious oversight by the Legislature in failing to delete this word when it revised the statute, to clarify the statutory scheme for punishing drivers who cause a death while operating in violation of licensing requirements, and to fully effectuate the Legislature's actual intent?

The court of appeals did not expressly address this issue, but considered various issues relating to the statute with the word "knowingly" as a part of it.

2. Should Wis. Stat. § 343.44(2)(b) be construed to be directory rather than mandatory, so as to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other proper sentencing factors?

The court of appeals held that the provisions of this section are mandatory so that circuit courts are required to consider all the enumerated factors on the record in every case involving operation after revocation of a driver's license.

ORAL ARGUMENT AND PUBLICATION

The Supreme Court ordinarily hears oral argument and publishes its decisions.

STATEMENT OF THE CASE

This is a review of a decision of the Court of Appeals, District II, affirming in part and reversing in part a judgment

and order of the Circuit Court for Waukesha County, Donald J. Hassin, Jr., and Michael J. Aprahamian, Judges.

The defendant-appellant-petitioner, Ernesto Lazo Villamil, was convicted of a Class H felony for causing a death while operating a vehicle after revocation of his operator's license, knowing that his license had been revoked, in violation of Wis. Stat. § 343.44(1)(b) & (2)(ar)4. (22.)

Lazo Villamil crashed into the rear of a vehicle that was slowing to turn into a driveway. (36:6; 37:14–15.) The driver of the vehicle he hit died as a result of the collision. (37:7–8.) Lazo Villamil told the investigating officer that he knew his operator's license was revoked at the time of the accident because of a previous conviction for operating while intoxicated. (36:6–7.)

Lazo Villamil pleaded no contest to the charge of causing a death while knowingly operating after revocation. (43:11–13.) Lazo Villamil admitted in court that he knew his operator's license was revoked when he hit another car, killing the driver. (43:12–13.)

Lazo Villamil filed a postconviction motion, alleging that the statute he was convicted of violating was ambiguous and unconstitutionally vague because it provided two different penalties, one a felony and the other a misdemeanor, for exactly the same conduct. (26:4–11.) Lazo Villamil also questioned the circuit court's exercise of discretion in imposing his sentence. (26:11–13.)

The circuit court acknowledged that the legislative history of the recent revisions to the statutes addressing operating after revocation showed that the Legislature intended to delete the element of knowledge from the base

offense but failed to actually do so. (34:7.) The court nevertheless rejected Lazo Villamil's vagueness challenge, ruling that the Legislature clearly intended to make it a Class H felony to cause a death while operating a vehicle, when the operator knew that their operator's license had been revoked. (34:5, 8.) The court said that the statutory scheme did not violate a defendant's rights to due process or equal protection even though the same offense with the same elements could also be a misdemeanor. (34:8–9.) The court also rejected Lazo Villamil's sentencing challenge, saying that it had referenced all the required sentencing factors. (34:11–12.)

In a published opinion, the court of appeals affirmed Lazo Villamil's conviction, but vacated his sentence and remanded the case for resentencing. *State v. Lazo Villamil*, 2016 WI App 61, 371 Wis. 2d 519, 885 N.W.2d 381.

The court recognized that under the statutory scheme, as presently written, the same conduct, i.e., causing a death while operating a vehicle, knowing that the person's operator's license has been revoked, can be either a felony or a misdemeanor. *Lazo Villamil*, 371 Wis. 2d 519, ¶ 6.

The court acknowledged that this is not what the Legislature intended. *Id.* ¶ 12. The Legislature intended to treat an OAR offense causing death as a misdemeanor if the defendant did not know that his operator's license had been revoked, and as a felony if the defendant knew about the revocation. *Id.* ¶ 12. But the Legislature failed to draft a statute reflecting its actual intent because it failed to remove the knowledge element from the base offense. *Id.* ¶ 12.

Nevertheless, the court ruled that the statute the Legislature did draft, creating different penalties for the same offense and giving the prosecutor discretion as to which level

of offense to charge, does not violate either due process or equal protection. *Id.* ¶ 18.

The court also rejected Lazo Villamil's claim of vagueness, adopting the circuit court's reasoning that persons who cause a death while operating a vehicle, knowing that their operator's license has been revoked, have adequate notice that they can be charged with a felony. *Id.* ¶ 20.

On the question of sentencing, the court of appeals noted that Wis. Stat. § 343.44(2)(b) provides that in imposing a sentence for violating § 343.44(2)(ar) or (br), the circuit court "'*shall* review the record and *consider*'" five enumerated factors. *Id.* ¶ 23. Applying the general rule that the word "shall" is presumed to be mandatory, the court of appeals assumed that the word was intentionally chosen to require sentencing courts to consider the enumerated factors. *Id.* ¶¶ 26–27.

The court of appeals said that when a statute requires a circuit court to consider certain sentencing factors, that obligation is satisfied when the record of the sentencing hearing demonstrates that the circuit court actually considered those factors on the record. *Lazo Villamil*, 371 Wis. 2d 519, ¶ 25. The parties agreed that the circuit court did not expressly consider all the enumerated factors on the record in this case. *Lazo Villamil*, 371 Wis. 2d 519, ¶ 25.

So although the court of appeals affirmed Lazo Villamil's conviction, it remanded the case for a new sentencing because the circuit court erroneously exercised its discretion by failing to consider factors it is required by law to consider. *Id.* ¶¶ 22, 29.

Both parties have sought review in this Court.

INTRODUCTION TO THE ARGUMENT

Prior to 2012, the law made it a forfeiture offense for a person to operate a vehicle if the person knew that their operator's license had been revoked. The grade of this offense was enhanced to a misdemeanor if a person caused a death while operating with knowledge of the revocation.

In 2012 the Legislature changed this statutory scheme.

The base forfeiture offense remains the same. It still prohibits a person from operating a vehicle if the person knows that their operator's license has been revoked.

But the Legislature created two penalty enhancers. The first enhancer increases the grade of the offense to a misdemeanor if a person causes a death while committing the base forfeiture offense. The second enhancer increases the grade of the offense to a felony if a person causes a death while committing the base forfeiture offense and the person knows that their operator's license has been revoked.

Because the base forfeiture offense is committed only if a person knows that their driver's license has been revoked, both penalty enhancers have exactly the same elements. Both enhancers apply if a person operates a vehicle with knowledge that their operating privilege has been revoked, and the person causes a death while knowingly operating a vehicle. Thus, exactly the same conduct can be either a misdemeanor or a felony.

Both courts below acknowledged that this is not what the Legislature actually intended when it revised the statute. It is clear from the legislative history of the revision that the Legislature intended to make the base offense a strict liability offense, requiring only operation of a vehicle after revocation

of an operator's license, with no requirement that the driver know that their license was revoked. This offense would be enhanced to a misdemeanor when a person caused a death while operating with a revoked license, and additionally enhanced to a felony when a person caused a death while operating with a revoked license, knowing that their license had been revoked.

The problem is that the Legislature did not delete the word "knowingly" from the description of the base offense when it revised the statute. So despite acknowledging that the statute does not say what the Legislature plainly intended it to say, the courts responded to the defendant's challenges to the statute as it is written with the word "knowingly" included. The courts found that the unintended version of the statute was constitutional.

The State asks this Court to construe the statute to effectuate what was unequivocally the intent of the Legislature despite what is essentially a proofing error. The State is asking the Court to ignore the word "knowingly" in the description of the base offense of operating after revocation so that the statutory scheme will make sense and resolve the problems raised by the defendant.

The State also asks the Court to construe the penalty provision to be directory rather than mandatory, so as to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other relevant sentencing factors.

ARGUMENT

I. Wisconsin Stat. § 343.44(1)(b) should be construed as though the word "knowingly" did not appear there, to correct an obvious oversight by the Legislature in failing to delete this word when it revised the statute, to clarify the statutory scheme for punishing drivers who cause a death while operating in violation of licensing requirements, and to fully effectuate the Legislature's unequivocal actual intent.

A. The problem: As currently worded, the statutory scheme raises several questions about its meaning and application, making it ambiguous.

Wisconsin Stat. § 343.44(1)(b) presently provides that a person whose operating privilege has been revoked may not "knowingly" operate a vehicle on the highways of this state. This base offense is punishable as a forfeiture. Wis. Stat. § 343.44(2)(ar)1.

A driver who violates § 343.44(1)(b) by knowingly operating a vehicle after revocation and in the course of the violation causes the death of another person is guilty of a misdemeanor. Wis. Stat. § 343.44(2)(ar)4.

A driver who violates § 343.44(1)(b) by knowingly operating a vehicle after revocation and in the course of the violation causes the death of another person is guilty of a Class H felony if the driver knows that his operating privilege has been revoked. Wis. Stat. § 343.44(2)(ar)4.

The penalty scheme in Wis. Stat. § 343.44(1)(b) is ambiguous. A statute is ambiguous when reasonable people could disagree about its meaning, *State v. Delaney*, 2003 WI 9, ¶ 14, 259 Wis. 2d 77, 658 N.W.2d 416. Three features of the

statute show why reasonable people could disagree about what this statute means and how it should be applied.

First, the statute includes a knowledge element in the base offense that applies to both the misdemeanor penalty enhancer and the felony penalty enhancer by incorporation, and then duplicates the knowledge element in the felony enhancer. This appears to create a statutory scheme that can make the same conduct, causing a death while knowingly operating after revocation, either a misdemeanor or a felony.

Second, two similar statutory provisions with parallel penalty schemes do not include a knowledge element in the base offense. Both operating without a license and operating while a license is suspended are strict liability offenses. The first penalty enhancer for both offenses, which similarly incorporates the base offense but adds death as an element, is also a strict liability offense that does not require knowledge of license status. The element of knowledge is expressly added to the second penalty enhancer for both offenses, which increases the grade of the offense to a felony.

Third, reading the statute literally would lead to an unreasonable result because drivers who cause a death while operating a vehicle knowing that they do not have a license or that their license is suspended would always be guilty of a felony, while drivers who cause a death while operating a vehicle knowing that their license has been revoked could be guilty of only a misdemeanor.

1. Knowledge appears to be an element of both penalty enhancers so that the same conduct, causing a death while knowingly operating after revocation, can be either a misdemeanor or a felony.

An ambiguity can be created by the interaction of different provisions of a statute. *DOC v. Schwarz*, 2005 WI 34, ¶ 14, 279 Wis. 2d 223, 693 N.W.2d 703. The interaction of the provisions creating the base offense and the two escalating penalty enhancers creates an ambiguity in § 343.44.

Because the word "knowingly" appears in the section of the statute creating the base offense of operating after revocation, knowledge is made an element, not only of the base offense, but also of the first enhanced misdemeanor offense of causing a death while operating after revocation. The misdemeanor is committed when a driver causes the death of another person while committing the base offense by operating a vehicle knowing that their license has been revoked.

Knowledge is an element of the second enhanced felony offense of causing a death while operating after revocation, in two ways. First, because the word "knowingly" appears in the section creating the base offense of operating after revocation, knowledge is an element of the second enhanced felony offense by incorporation as well. Second, the word "knows" separately appears in the subsection applicable to the second enhanced felony offense, which specifies that a felony is committed where the person "knows at the time of the violation that his or her operating privilege has been revoked."

Thus, on the face of the provisions, the elements of the enhanced misdemeanor offense are exactly the same as the elements of the enhanced felony offense. Both require: (1) causing a death, (2) while operating a vehicle, (3) after revocation of an operator's license, (4) knowing that the license has been revoked.

So the question is, did the Legislature really intend to create two enhanced offenses, one a misdemeanor, the other a felony, both having exactly the same elements, both punishing exactly the same conduct–only differently? Or did the Legislature intend that there should be a difference between the elements of the misdemeanor and the elements of the felony, but just fail to adequately articulate what that difference is?

2. Two related statutes regarding operating without a license and operating while suspended have parallel penalty schemes but do not include knowledge as an element of the base offense.

An ambiguity also can be, and in this case is, created by the interaction between different statutes. *Schwarz*, 279 Wis. 2d 223, ¶ 14. Two related statutes—one involving operating without a valid operator's license, and the other involving operating with a suspended license—shed light on the penalty structure the Legislature intended to create.

One related statute, Wis. Stat. § 343.05(3)(a), provides that no person may operate a motor vehicle on the highways of this state without a valid operator's license. Knowledge of the lack of a license is not an element of this offense. The penalty for this offense is a forfeiture. Wis. Stat. § 343.05(5)(b)1.

A driver who causes a death while committing the base offense by operating without a license is guilty of a more serious forfeiture offense. Wis. Stat. § 343.05(5)(b)5. Since knowledge of the lack of a license is not an element of the base offense, it is not an element of this enhanced offense.

A driver who causes a death while committing the base offense by operating without a license is guilty of a Class H felony if they know that they do not have a license. Wis. Stat. § 343.05(5)(b)5. Since knowledge of the lack of a license is not an element of the base offense, it is not an element of this enhanced offense by incorporation. Knowledge is an element because it appears in the felony subsection itself. The offense is a felony when "the person knows at the time of the violation that he or she does not possess a valid operator's license." Wis. Stat. § 343.05(5)(b)5.

Another related section, Wis. Stat. § 343.44(1)(a), provides that no person may operate a motor vehicle on the highways of this state when their operator's license has been suspended. Knowledge of the suspension is not an element of this offense. The penalty for this offense is a forfeiture. Wis. Stat. § 343.44(2)(ag)1.

A driver who causes a death while committing the base offense by operating after their license has been suspended is guilty of a more serious forfeiture offense. Wis. Stat. § 343.44(2)(ag)3. Since knowledge of the suspension is not an element of the base offense, it is not an element of this enhanced offense.

A driver who causes a death while committing the base offense by operating after their license has been suspended is guilty of a Class H felony if they know that their license has been suspended. Wis. Stat. § 343.44(2)(ag)3. Since knowledge

of the suspension is not an element of the base offense, it is not an element of this enhanced offense by incorporation. Instead, knowledge is an element because it appears in the felony subsection itself. The person is guilty of a felony if "the person knows at the time of the violation that his or her operating privilege has been suspended." Wis. Stat. § 343.44(2)(ag)3.

So under the statutory structure of two related offenses, knowledge is not an element of the base operating offense. Knowledge is not an element of the first penalty enhancer for causing a death while committing the base operating offense. Knowledge is an element of the second penalty enhancer because it has been expressly added to the offense of causing a death while committing the base operating offense.

Given the parallel structure and language in each of the three related license offenses, it seems unlikely that the Legislature really intended to create asymmetry among them by making knowledge an element of the base offense of operating after revocation but not an element of the base offenses of operating without a license or of operating while suspended, and by making knowledge an element of the first enhanced offense of causing a death while operating after revocation but not an element of the first enhanced offenses of causing a death while operating without a license and causing a death while operating while suspended. There is a question whether the Legislature actually intended to create a symmetrical scheme, but just failed to adequately articulate its true purpose.

3. Reading the section literally would lead to an absurd result.

Finally, an ambiguity can be, and in this case is, created if a literal interpretation of a statute would lead to an unreasonable result. *See Delaney*, 259 Wis. 2d 77, ¶ 15.

If these statutes are read literally, a person who causes a death while operating a vehicle with knowledge that they do not have a license is guilty of a felony. A person who causes a death while operating a vehicle with knowledge that their license has been suspended is guilty of a felony. But a person who causes a death while operating a vehicle with knowledge that their license has been revoked can be guilty of either a felony or a misdemeanor. Read this way, the provisions would penalize those who cause a death while knowingly operating after revocation much less severely than those who cause a death while knowingly operating without a license or after suspension. This would appear to be an absurd result.

This raises a question of whether the Legislature really intended to give drivers who operate after revocation of their operator's license a break they did not give to drivers who operate without a license or after suspension of their license, or whether they actually intended to provide the same penalty for all drivers who kill someone while operating in violation of licensing requirements.

B. The answer: The ambiguity can be readily resolved by resorting to the context and legislative history of the provision.

Reviewing the statute in context and referring to the legislative history reveal that the Legislature did not intend the base forfeiture offense in Wis. Stat. § 343.44(1)(b) to

require that the offender "knowingly" operated after revocation.

To determine what the Legislature really intended, the language it used in the questionable provision should be interpreted, not in isolation, but in the context in which it is used, and in relation to surrounding or closely related provisions. *State v. Schaefer*, 2008 WI 25, ¶ 55, 308 Wis. 2d 279, 746 N.W.2d 457. Provisions involving the same subject matter should be construed in a way that harmonizes them, and gives each of them full force and effect. *Schaefer*, 308 Wis. 2d 279, ¶ 55.

The fact that neither of the related offenses of operating without a license or operating while suspended requires knowledge as an element of either the base offense or the first penalty enhancer strongly suggests that the Legislature did not intend to include knowledge as an element of either the base offense or the first penalty enhancer of operating after revocation.

More likely, the Legislature intended the penalty scheme for all three offenses to be symmetrical. More likely, the Legislature intended that for operating without a license, operating while suspended and operating after revocation, the base offense should not include an element of knowledge, that the first penalty enhancer should not require knowledge, and that knowledge should be an element of the second penalty enhancer, making that offense a felony rather than a misdemeanor.

The legislative history of § 343.44, which can be considered in determining the intended meaning of an ambiguous statute, *Schwarz*, 279 Wis. 2d 223, ¶ 14, shows that the Legislature unequivocally intended to differentiate

the misdemeanor and felony offenses of causing a death while operating after revocation, and simply made a minor drafting error by neglecting to delete the word "knowingly" from the formulation of the base offense.

The analysis of a bill by the Legislative Reference Bureau, which is printed with and displayed on the bill when it is introduced in the Legislature, is indicative of the intent of the Legislature when it enacts that bill into law. *State v. Freer*, 2010 WI App 9, ¶ 22, 323 Wis. 2d 29, 779 N.W.2d 12; *Schwarz*, 279 Wis. 2d 223, ¶ 22.

The LRB analysis of 2011 Assembly Bill 80 (26, Ex. C),[1] which was enacted into law as 2011 Wis. Act 113, notes that under the law as it existed at the time this legislation was proposed, "a person who, in the course of a 'knowing' OWS [operating while suspended] violation or OAR [operating after revocation] violation, cause[d] . . . death to another person [was] guilty of a Class A misdemeanor."

Under the former statutory scheme referenced in this analysis, both operating while suspended and operating after revocation required knowledge of license status as an element of the base offenses. Wis. Stat. § 343.44(1)(am), (b) (2009-10). The penalty for these base offenses was increased, making the offenses Class A misdemeanors, if "in the course of a violation of sub. (1)(am) or (b)," a person "cause[d] the death of another person." Wis. Stat. § 343.44(2)(h) (2009-10).[2] So under the

[1] http://docs.legis.wisconsin.gov/2011/related/proposals/ab80.

[2] The question whether the provisions of Wis. Stat. § 343.44(2) create separate aggravated offenses or enhance the penalties for the base offense need not be resolved on this appeal. The same issues raised in this case would be presented, and solved, under either view of these provisions. To make it easier to understand the

former statutory scheme, knowledge was an element of the base offense. It was not an element of the penalty enhancer. The penalty for knowingly operating was increased when a death was caused.

The LRB advised that 2011 A.B. 80 "creat[ed] new penalties for OWS, OAR, and OWL [operating without a license] violations in which the person, in the course of the violation, causes great bodily harm or death." In creating the new penalties for these violations, the bill attempted to change the former statutory scheme by transferring the element of knowledge from the base offense to the second enhanced felony offense. The legislative changes to the sibling offense of operating while suspended clearly show that this is what the Legislature intended.

The LRB analysis points out that the bill eliminated "knowing" OWS as a violation. The present statute defining OWS as a base offense states that a "person's knowledge that his or her operating privilege has been suspended is not an element of the offense." Wis. Stat. § 343.44(1)(a). Thus, the offense of operating while suspended is a strict liability offense, committed when a person whose operating privilege has been suspended operates a motor vehicle. Wis. Stat. § 343.44(1)(a).

With respect to the penalty enhancers for the present base offense of operating while suspended, the LRB stated,

> If the person causes the death of another in the course of the . . . OWS violation, the person: 1) must forfeit not less than $7,500 nor more than $10,000 if the person did not know . . . that his or her operating

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arguments in this brief, these provisions will be referred to as "penalty enhancers."

> privilege was suspended; or 2) is guilty of a Class H felony if the person knew.

The statute ultimately created by 2011 A.B. 80 says the same thing in a little different way.

> Any person who violates sub. (1)(a) and, in the course of the violation, causes the death of another person is required to forfeit not less than $7,500 nor more than $10,000, except that, if the person knows at the time of the violation that his or her operating privilege has been suspended, the person is guilty of a Class H felony.

Wis. Stat. § 343.44(2)(ag)3.

Under the present scheme, therefore, there are now two cumulative penalty enhancers for OWS. *See generally State v. Quiroz*, 2002 WI App 52, ¶¶ 7-15, 251 Wis. 2d 245, 641 N.W.2d 715, *modified on other grounds, State v. Cross*, 2010 WI 70, ¶ 40, 326 Wis. 2d 492, 786 N.W.2d 64 (discussing cumulative penalty enhancers).

The first enhancer is causing death. The penalty for the base offense of OWS is increased if the person causes a death when driving while their operator's license is suspended. Knowledge is not an element of either the base offense or the first penalty enhancer.

Knowledge is the second enhancer. If the person causes a death when driving while their operator's license is suspended, the penalty is additionally increased to a felony if the driver knew that their license was suspended.

So the base OWS offense has two elements: (1) operating a vehicle, (2) after suspension of an operator's license. The first enhanced OWS offense has three elements:

(1) operating a vehicle, (2) after suspension of an operator's license, and (3) causing a death. The second enhanced OWS offense has four elements: (1) operating a vehicle, (2) after suspension of an operator's license, (3) causing a death, and (4) knowledge that the license has been suspended.

This enhancement strategy is logical, easy to understand, and creates no problem with two penalty enhancers apparently imposing substantially different penalties for the same conduct.

The LRB analysis indicates that the same enhancement strategy that applies when a driver operates while their driver's license is suspended was intended to apply when a driver operates after their driver's license was revoked.

With respect to the penalty enhancers for the offense of OAR, the LRB commented in a way that mirrors its comment on the penalty enhancers for OWS.

> If the person causes the death of another in the course of the OAR violation, the person: 1) must be fined not less than $7,500 nor more than $10,000 or imprisoned for not more than one year or both *if the person did not know* that his or her operating privilege was revoked; or 2) is guilty of a Class H felony *if the person knew* (emphasis added).

This comment indicates that, like the companion penalty scheme for OWS, knowledge of a license revocation is not required to punish a fatal OAR violation as a misdemeanor, but is required to punish a fatal OAR violation as a felony. The comment indicates that the first enhanced OAR offense has three elements: (1) operating a vehicle, (2) after revocation of an operator's license, and (3) causing a death. The second enhanced OAR offense has four elements:

(1) operating a vehicle, (2) after revocation of a driver's license, (3) causing a death, and (4) knowledge that the license has been revoked.

Indeed, the LRB comment indicates not only that the Legislature intended to eliminate the element of knowledge from the first enhancer of OAR, just as it had eliminated that element from the first enhancers of OWL and OWS, but that the Legislature thought it had eliminated it. The Legislature thought it had created a symmetrical penalty scheme where knowledge was not an element of the base offense of OAR, and was therefore not an element of the first enhanced misdemeanor offense of causing a death while committing the base offense of OAR. The Legislature thought that knowledge became relevant in the penalty scheme for OAR only in the second penalty enhancer for causing a death while knowingly operating after revocation.

A memo of the Wisconsin Legislative Council (26, Ex. B),[3] which is also indicative of legislative intent, *State v. Champion*, 2002 WI App 267, ¶¶ 11, 14, 258 Wis. 2d 781, 654 N.W.2d 242, *modified on other grounds, State v. Harbor*, 2011 WI 28, ¶¶ 47, 52 & n.11, 333 Wis. 2d 53, 797 N.W.2d 828, concurs with the LRB's analysis.

The Legislative Council memo indicates that under 2011 Wis. Act 113 (2011 A.B. 80), the penalty structure for both OWS and OAR offenses was intended to be symmetrical. There was an initial penalty enhancer for "committing an OWS/OAR/OWL violation and causing the death of another," and an additional greater penalty enhancer for "***knowingly*** committing an OWS/OAR/OWL violation and causing the death of another." Like the LRB, the Legislative Council also

[3]http://docs.legis.wisconsin.gov/2011/related/lcactmemo/act113.pdf

indicated that, like the penalty scheme for OWS, knowledge of a license revocation is not required to punish a fatal OAR violation as a misdemeanor, but is required to punish a fatal OAR violation as a felony.

It is clear that the Legislature fully intended to eliminate the element of knowledge from its formulation of the base offense of OAR, just as it had eliminated that element from the base offenses of OWL and OWS, and to similarly eliminate the element of knowledge from the first penalty enhancer for causing a death while committing the base offense. But it did not delete the word "knowingly" from § 343.44(1)(b). So for want of proper proofing or other technical drafting error, the offense of operating after revocation is still committed only if a person whose operating privilege has been revoked operates a motor vehicle *knowingly*. Wis. Stat. § 343.44(1)(b).

C. The solution: The problems can be corrected by finding that the knowledge element of the base offense of operating after revocation has been impliedly repealed.

So we now have a statute that, read literally, says something that the Legislature plainly did not intend it to say, and that, by saying something different from what was intended, creates problems with the administration of the penalty scheme for offenses involving violations of driver's license requirements. These problems can be corrected by finding that the knowledge element of the base offense of operating after revocation has been impliedly repealed.

Repeal of a statute by implication is not favored. *Heaton v. Indep. Mortuary Corp.*, 97 Wis. 2d 379, 392, 294 N.W.2d 15 (1980); *State v. Zawistowski*, 95 Wis. 2d 250, 264, 290 N.W.2d 303 (1980). But an older provision will be deemed to have been

impliedly repealed when, although there is no express repeal, the intent of the Legislature to repeal clearly appears by implication. *Heaton*, 97 Wis. 2d at 393. *See Zawistowski*, 95 Wis. 2d at 264 (older and newer statutory provisions should be construed together, subject to restrictions on or modifications of the meaning of the law where that appears to have been the legislative purpose).

Repeal of the element of knowledge in the base offense of operating after revocation is irresistibly implied by the LRB Analysis of 2011 A.B. 80 and the Legislative Council Memo regarding 2011 Wis. Act 113, which make clear that the Legislature not only intended to create, but thought it had created, a penalty scheme in which neither the base offense of operating after revocation nor the first penalty enhancer for causing a death while operating after revocation required knowledge of the revocation as an element of the offense.

There was symmetry between the offenses OWS and OAR prior to 2011 Wis. Act 113. The base offenses of OWS and OAR both required knowledge of the license suspension or revocation for conviction. Wis. Stat. § 343.44(1)(am), (b) (2009-10). The penalty for both knowing offenses was increased if the defendant caused a death while operating a vehicle while suspended or revoked. Wis. Stat. § 343.44(2)(h) (2009-10).

The Legislature intended to shift the element of knowledge from the base offenses of OWS and OAR to the penalty enhancers for both offenses. It succeeded with respect to OWS by deleting the element of knowledge from the base offense of OWS and added it to the penalty enhancer. Wis. Stat. § 343.44(1)(a), (2)(ag)3. But it failed with respect to OAR because, while it added knowledge to the penalty enhancer, Wis. Stat. § 343.44(2)(ar)4., it did not delete it from the base

offense of OAR. Wis. Stat. § 343.44(1)(b). So instead of a transfer of the element of knowledge, there was a duplication.

Nothing whatever in the legislative history of Act 113 remotely suggests that the Legislature actually intended to duplicate the element of knowledge in both the base offense of OAR and the felony penalty enhancer for that offense.

To the contrary, the Legislative Council memo states that "2011 Wisconsin Act 113 repeals all existing penalties for *knowingly* committing an OWS, OAR or OWL violation, and creates new penalties" (emphasis added). This strongly suggests that the Legislature thought that the base offenses of OWS and OAR were treated the same way in the new legislation. It suggests that the Legislature thought that it had eliminated all the penalties for knowingly operating while suspended and knowingly operating after revocation, thereby eliminating knowledge as an element of the base offenses of OWS and OAR, and thought that it had shifted the element of knowledge to the new penalty enhancers for these offenses.

The memo further states that there is one penalty enhancer for "committing an OWS/OAR/OWL violation and causing the death of another," and another more severe enhancer for "***knowingly*** committing an OWS/OAR/OWL violation and causing the death of another." This strongly suggests the Legislature thought that neither an OWS violation nor an OAR violation required knowledge as an element. Neither was knowledge an element of the first penalty enhancer for any of these offenses. Knowledge was now an element only of the felony penalty enhancer for all these offenses.

Furthermore, it is hard to understand how the LRB could have stated that the penalty for causing a death in the course of an OAR violation could be enhanced in the first instance when the person did not know his operating privilege had been revoked if the LRB thought that a base OAR violation continued to require knowledge as an element. Enhancing a penalty when a defendant who committed an OAR violation did not have knowledge would make sense only if the LRB believed that knowledge was no longer required to violate the base OAR provision.

So although Act 113 did not facially repeal the element of knowledge in the base offense of operating after revocation, it appears that the Legislature was under the impression that it did. It appears that the failure to delete the word making knowledge an element of the base offense of OAR was just a drafting oversight, likely a failure of proofing.

This drafting oversight, which creates inconsistency in the statutory scheme for punishing persons who cause a death while operating a vehicle after their operating privilege has been taken away, can and should be corrected by finding that the element of knowledge in the base offense of OAR has been impliedly repealed in accord with the clear intent of the Legislature. Although implied repeal may not be favored as a general principle, it is the preferred remedy in this situation where the intent of the Legislature is so evident despite its inaction.

This Court should construe Wis. Stat. § 343.44(1)(b) so that knowledge of the revocation is not an element of the base offense of OAR, or of the first penalty enhancer for causing a death while driving after revocation, but only of the second penalty enhancer for causing a death while knowingly driving after revocation.

II. Wisconsin Stat. § 343.44(2)(b) should be construed to be directory rather than mandatory, to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other proper sentencing factors.

This Court should also construe Wis. Stat. § 343.44(2)(b) to make consideration of the enumerated factors directory rather than mandatory in sentencing.

Although Wis. Stat. § 343.44(2)(b) states that the court "shall" consider the listed factors when imposing a sentence for any offense involving operating after revocation, the word "shall" can be either mandatory or directory. *Warnecke v. Estate of Warnecke*, 2006 WI App 62, ¶ 12, 292 Wis. 2d 438, 713 N.W.2d 109; *State v. R.R.E.*, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991).

There is a presumption that the word "shall" is mandatory. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 16, 262 Wis. 2d 720, 665 N.W.2d 155; *R.R.E.,* 162 Wis. 2d at 707. But this is not a mandatory presumption, and "shall" will be construed as directory if necessary to give effect to the intent of the Legislature. *Marberry*, 262 Wis. 2d 720, ¶ 15; *R.R.E.*, 162 Wis. 2d at 707.

There is no per se rule to determine which way the word is used. *Marberry*, 262 Wis. 2d 720, ¶ 15; *R.R.E.*, 162 Wis. 2d at 707. The determination is made by ascertaining the intent with which the Legislature used the word in the statute. *Marberry*, 262 Wis. 2d 720, ¶ 15; *R.R.E.*, 162 Wis. 2d at 707. In determining whether the Legislature intended "shall" to be mandatory or directory, the court can consider the objectives intended to be accomplished by the statute and the potential

consequences of each interpretation. *Warnecke*, 292 Wis. 2d 438, ¶ 12; *Marberry*, 262 Wis. 2d 720, ¶ 17; *R.R.E.*, 162 Wis. 2d at 708.

Here, the potential consequences, i.e., unreasonable results, show that the Legislature intended these guidelines to be directory only.

These factors apply to all OAR offenses, including the base forfeiture offense of simply operating a vehicle after the revocation of a driver's license. Wis. Stat. § 343.44(1)(b). But they do not apply to any OWL or OWS offenses, including the Class H felony of causing a death while knowingly operating without or after the suspension of a driver's license. Requiring a court to consider the factors in sentencing for an OAR forfeiture but not for an OWL or OWS felony makes little sense.

Moreover, neither these nor other similar factors have to be considered in sentencing for any other offense committed when the defendant causes a death, including the more serious offenses of intentional homicide, reckless homicide, felony murder, homicide by intoxicated use of a vehicle or homicide by negligent operation of a vehicle. Wis. Stat. §§ 940.01, 940.02, 940.03, 940.05, 940.06, 940.09, 940.10. Requiring a court to consider these factors when sentencing for an OAR causing death when a court is not required to consider any particular factors in sentencing for any other crimes where death is caused similarly makes little sense.

Logically, the rule regarding consideration of factors with such limited application must be intended to be directory only. Thus, the Legislature must have intended to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing

discretion, just as it may, but is not required to, consider other proper sentencing factors.

The circuit court was not required to consider the enumerated factors, and did not erroneously exercise its discretion by not considering them, when sentencing Lazo Villamil.

CONCLUSION

This Court should construe Wis. Stat. § 343.44(1)(b) as though the word "knowingly" did not appear there, to correct an obvious oversight by the Legislature in failing to delete this word when it revised the statute, to clarify the statutory scheme for punishing drivers who cause a death while operating after revocation of their operator's license, and to fully effectuate the Legislature's actual intent.

The Court should also construe Wis. Stat. § 343.44(2)(b) to be directory rather than mandatory, to provide that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other proper sentencing factors.

Both the judgment and the order of the circuit court should be affirmed.

Dated this 8th day of February, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 6,762 words.

Dated this 8th day of February, 2017.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 8th day of February, 2017.

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