STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP000765CR

GEORGE W. MALLUM III,

Defendant-Appellant..

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# APPELLANT'S REPLY BRIEF AND APPENDIX

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ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE
OF THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. MEL FLANAGAN, PRESIDING
AND FROM A POSTCONVICTION DECISION AND ORDER
HON. MICHELLE ACKERMAN HAVAS, PRESIDING
CIRCUIT COURT CASE NO. 2014CM003050

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### I. RESPONDENT'S ANSWERS TO THE ISSUE QUESTIONS, ITS PRESENTATION OF FACTS, ITS STANDARD OF REVIEW ON THE SENTENCING ISSUES, AND ITS TEST FOR MULTIPLICTY ARE INACCURATE AND MISLEADING.

In answer to its Issue questions 1(a), II, III, and V, the State says that the trial court "implicitly" answered the question. In question I(b) respondent said the trial court answered No. In Question IV, respondent said the trial court was not presented with the issue. All of these answers are inaccurate and misleading. Likewise, the State presentation of "facts" on pages 3-4 of its brief and its standard of review on page 5 for the second issue are inaccurate or misleading.

Neither the original trial court judge nor the successor judge gave an answer, explicit or implicit, to any of the State's issue questions. Although neither judge answered the issues the State raises on appeal, all those issues were raised before the trial court, either in the post-trial motion [R.61] filed by trial counsel or in the postconviction motion filed by appeal counsel. The original trial Judge, Hon. Mel Flanagan, refused to consider the post-trial motion [R.61] submitted by Mallum's trial counsel right after the trial ended. She denied it "without deciding the merits." [R.30]. Hon. Mel Flanagan then left the circuit court before a postconviction motion was filed by the undersigned appeal counsel.

The successor judge, Hon. Michelle Ackerman Havas, did not consider or decide any of the issues presented in the postconviction motion [R. 45]. Regarding the multiplicity challenge, she said that the record showed "that trial counsel raised a multiplicity challenge during the course of the trial and Judge Flanagan denied it."[R. 49&Ap. 105, ¶ 1]. However, that completely ignored the argument in Mallum's postconviction motion that the multiplicity challenge on appeal did not concern multiplicity in *charging*, which had been considered by Judge Flanagan during trial. Instead the motion concerned a multiplicity challenge to *proof*, which can only be offered after the trial. Neither Judge Flanagan nor Judge Havas considered the multiplicity challenge to proof. Thus, they gave no direct answer to the question, and there is no evidence on the record of an "implicit" answer, if that were even an acceptable legal category.

Regarding the other issues Mallum presented in the postconviction motion, Judge Havas did not answer those questions because Mallum's appeal counsel had refused the request of a staff attorney to get additional trial transcripts after the postconviction motion was filed. [R. 49&Ap. 105, ¶ 2]. Requesting additional transcripts after the postconviction motion is filed would be a departure from the statutory procedures and time limits for requesting transcripts in Wis. Stat. § 809. 30(2)(f) and filing the postconviction motion in § 809. 30(2)(h). If Mallum's appeal counsel had

complied with the request of the staff attorney, that would have imperiled Mallum's right to appeal. Appeal counsel had not deemed any other transcripts necessary for the appeal other than the ones that were ordered before the postconviction motion was filed. There was no Order from Judge Havas herself requesting more transcripts or specifying which transcripts were necessary. If the request for more transcripts had come in an Order issued by the trial court, rather than in a letter from a staff attorney, compliance with the Order would likely not have imperiled Mallum's appeal. Judge Havas lost an election shortly after her decision in this case and is no longer on the court.

It is unfair to a defendant if the court of appeals were to penalize him for failure to comply with a request from someone who has no authority and whose request could imperil the defendant's appeal. It is also unfair to give deference to decisions of two trial judges who are no longer on the court and who did not consider the arguments Mallum presented in the postconviction motion, and repeated in his appeal brief. Moreover, this appeal presents issues of law so no deference is required.

Additionally, the State says in answer to issue 4 in its brief that the constitutionality of 18 U.S.C. § 922 was not presented to the court. However, it was presented in the postconviction motion, but Judge Havas did not consider that issue.

The State's "facts" on pages 3-4 of its brief are inaccurate or misleading. Trial testimony from Mallum's wife [R.55] and his grandson [R.54] show that Mallum did not flail a firearm around wildly, that he repeatedly asked where the magazine was which should have indicated an empty gun, that his grandson knew the gun was empty, that he did not push a firearm into his grandson's chest, that no struggle ensued, and that Mallum did not call his wife an obscene name upon arrival by police but after he was handcuffed and being led away by police. Contrary to the State's statement at p. 4 of its brief, citing R.56:33, Mr. Mallum's trial counsel did not say that Mr. Mallum made an inappropriate comment "when the police entered his residence." [R.56:33]. The State's citation of the original complaint on page 3 saying that Mallum pushed the point of the firearm into his grandson's chest is also misleading in view of the grandson's testimony [R.54] and in light of the fact that the jury did not find guilt on Count 1 of the Amended Complaint with its allegation about a gun being pointed at the grandson.

The state erroneously says that the standard of review for its Issue 2 is the discretionary standard. That is not correct because Mallum has presented issues of law for the court of appeals to decide in regard to sentencing.

The State gives a misleading test for multiplicity on page 6 of its brief. That is the test for multiplicity in *charging*. However, this appeal does not

concern multiplicity in charging. It concerns multiplicity in *proof*, as discussed at pages 15-16 of Appellant's Brief.

## II. THE JURY WAS THE FACT FINDER IN THIS CASE, BUT THE JURY NEVER FOUND THAT MALLUM VIOLATED THE ELEMENTS OF DOMESTIC ABUSE IN WIS. STAT. § 968.075 (1)(a).

On page 4 of its Brief, the State erroneously says that the court instructed the jury on the elements of Count 3. However, Count 3 of the Amended Complaint charged Mallum with disorderly conduct and domestic abuse. The court did NOT instruct the jury on the elements of domestic abuse. That is the gravamen of this appeal.

The State's brief not only misstates the court's instructions for Count 3. It also goes on to cite closing arguments as proof of domestic abuse. However, closing arguments are not evidence and should not be considered by the court of appeals as evidence. If the trial court had instructed the jury on the elements of domestic abuse, perhaps the jury might have found that Mallum was guilty of domestic abuse, although there was no testimony of any physical act by Mallum against his wife or any threat to use a deadly weapon, pursuant to the requirements of Wis. Stat. § 968.075(1)(a). But we will never know what the jury hypothetically might have found regarding domestic abuse because the jury was not instructed on domestic abuse and they did not have a jury question on

domestic abuse. The verdict question on Count 3 only asked about disorderly conduct. The same instruction was given for disorderly conduct in Count 3 as in Count 2, but for count 2 an additional instruction was given on *possession* of a dangerous weapon during the disorderly conduct.

Count 3's conviction for disorderly conduct should not remain along with Count 2's conviction because there was no evidence of multiple acts of disorderly conduct. It should be remembered that Mallum was in his own home when he was arrested. There was no evidence that he threatened his wife or grandson with the EMPTY gun [R.54:12] he had in his hand when he was looking for the magazine. For better or worse a person has a constitutional right to have a gun, especially in their own home. The State erroneously says at p. 8 that Mallum was "disarmed" *after* the police came. There is no evidence of that in the record. The evidence is that Mallum was sitting on a sofa with his arm around his grandson and he was not holding the EMPTY gun when the police arrived. [R.54:12,14,15] Nothing Mallum did before he was handcuffed and arrested in his own home without a warrant constituted domestic abuse, even if his wife's call to police indicated she was worried about what he was going to do with a gun in his intoxicated state. The only testimony that is used by the State to justify the disorderly conduct charge was that after Mallum was arrested he called his wife an obscene name as he was led away by police.

It is arguable that Mallum's Fourth Amendment rights were violated when the police entered his home without a warrant and when they arrested him in his home without a warrant, even though no crime had been committed. It is also arguable that it is unconstitutional to charge someone with disorderly conduct for speech, even obscene speech, if it does not rise to the level of crying fire in a crowded theater or does not threaten someone. However, even though any conviction for disorderly conduct in Mallum's case is arguably unconstitutional, Mallum has accepted and is not challenging his conviction for disorderly conduct in Count 2. He is not challenging that conviction on grounds of unconstitutionality, in spite of the arguably illegal arrest and infringement of his right to free speech. However, he is challenging the fact that he was given two convictions for the same disorderly conduct, without proof of two instances of disorderly conduct and with no proof or verdict for domestic abuse.

Concerning the penalties Mallum received for "domestic abuse" without a jury decision that he violated the elements of the domestic abuse statute, the State tries to get around the lack of a jury verdict on domestic abuse by saying that it was the court which determined that the domestic abuse designation applied. However, allowing the court to be the fact finder on the elements of a crime, which involves increased punishment and penalties, violates the sacred constitutional right of a defendant to a jury trial in criminal cases. **U.S. Const. Amend. VI and Wis. Const. Art. I, § 7.** Moreover, the United States Supreme

Court has said: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury, and proved beyond a reasonable doubt." **U.S. v. Booker**, 543 U.S. 220, 227-228 (2005), *quoting* **Apprendi v. New Jersey**, 530 U.S. 466, 490 (2000).

Similarly, the Wisconsin Court of appeals in an unpublished opinion, **State v. O'Boyle**, 2014 WI App 38 [Ap. 153], said that "The complaint must contain allegations that fit the crimes stated in [Wis. Stat. § 968.075(1)(a)] subparts 1. through 4. in order to qualify for domestic abuse status." Id. ¶22. The court also said: "Although not specifically mentioned, implicit in Wis. Stat. § 973.055 is that the complained of conduct must fall within the definition of domestic abuse found in Wis. Stat. §968.075(1)(a)1.-4." Id. ¶24.

Even if it were constitutionally permissible for the court to be the finder of fact for a penalty, in Mallum's case, the trial court at sentencing simply said, "the Court finds that the facts and circumstances of this case do merit the domestic violence designation and assessment." [R.58,p.35 & Ap.142]. The State calls this a "specific" finding on page 7 of its brief. However, it is a non-specific finding which does not tell how Mr. Mallum's conduct constituted domestic abuse so as to merit the domestic abuse surcharge. Moreover, Wis. Stat. § 973.055 says that the court has to find that the underlying crime (disorderly conduct in this case) involved "an act" involving the spouse. There is

no "act" of disorderly conduct alleged in this case involving Mallum's wife, only speech. The court made no finding of fact about an "act" to justify a domestic abuse surcharge under Wis. Stat. § 973.055.

The court calls the domestic abuse crime contained in Count 3 simply a modifier or enhancer. However, the "use of a dangerous weapon" in Count 2 was also a modifier or enhancer but the jury was given a separate verdict on that. This is because the court of appeals has said that "a defendant has the right to a jury determination on every element of the crime charged" and specifically on the "use of a dangerous weapon" charge. **State v. Villarreal,** 153 Wis.2d 323, 326, 450 N.W.2d 519, 521 (Ct. App. 1989). Similarly, domestic abuse was a "crime charged" in Count 3 of Mallum's complaint. Thus, Mallum had a right to a jury verdict on that charge finding him guilty beyond a reasonable doubt of the elements of Wis. Stat. § 968.075(1)(a).

Even if the State's semantics were correct, that the domestic abuse surcharge is not a penalty, the surcharge can become the sole basis in the future for determining a punishment for domestic abuse as a repeater, as the court of appeals recently determined in **State v. Hill**, 2016 WI App 29, ¶2, 368 Wis.2d 243, 246, 878 N.W.2d 709, 711. Therefore, the surcharge itself is a penalty. The possibility of that penalty should require proof beyond a reasonable doubt. The State says at p. 12 that "[d]etermination of whether an offense is an act of domestic abuse is applicable if the penalty is increased." The penalty is increased

when a person is assessed a domestic abuse surcharge because they becomes susceptible of a repeater allegation in the future as well as being charged $100.

The State says at p. 11 of its brief that Mallum should have to distinguish the facts of his case from the facts in every other case where a person has been assessed a domestic abuse surcharge. This is not the standard for challenging an unjust conviction or sentence or penalty or surcharge on appeal. Just because surcharges have been assessed, even in cases where there was no finding of guilt by a jury and no guilty plea, does not mean those surcharges were legitimate. Mallum is challenging his surcharge on the grounds he has presented. The State has not addressed those arguments.

Insofar as the domestic abuse surcharge statute does permit a surcharge where there is no guilty plea on domestic abuse and no finding of guilt regarding the elements of domestic abuse, then Mallum is challenging the surcharge statute, Wis. Stat. § 973.055, as unconstitutional as applied to him.

## III. THE TRIAL COURT'S COMMENTS ON MALLUM'S RIGHT TO POSSESS GUNS AFTER PROBATION MUST BE VACATED IN HIS JUDGMENT OF CONVICTION AND SENTENCE NO MATTER WHAT IS THE PROPER SEMANTIC DESIGNATION OF THESE COMMENTS.

Mallum does not challenge the trial court's ban on weapons during his period of probation. However, he does challenge the ban on weapons after

probation ends because he was not found guilty of the misdemeanor crime of domestic abuse and because 18 USC 922(g)(9) is unconstitutional.

The State's semantic arguments on pages 8-9 of its brief, ignore the fact that the court's statement about the federal law banning firearms and other weapons "after conviction of a misdemeanor crime of domestic violence" appears on the written judgment of conviction and sentence [R.43;Ap.102]. The State says the court was simply providing notice. Moreover, there was no "conviction" of a "misdemeanor crime" of domestic violence in this case because there was no verdict or even a specific finding of fact by the trial court that Mallum violated the elements of the domestic violence statute. Wis. Stat. § 968.075(1)(a)1.-4. The words "domestic violence" appear in the document called "Judgment of conviction" but that is not what is meant in the federal law when it speaks of "conviction of misdemeanor crime." The federal law envisions an actual finding of the elements of the crime, not simply a statement by a court. The jury in Mallum's case never found "the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 USC § 921(a)(33)(A). The jury was not instructed on threatened use of a deadly weapon. For Count 2, the jury was instructed on "possession" of a dangerous weapon while committing the crime of disorderly conduct. That is a big difference. Moreover, WIS JI-Criminal 900, which the court used in Mallum's case, gave the court the possibility of instructing the jury on "threatening to use" a dangerous weapon,

but the court instructed only on "possession" and that is what the jury found for Count 2. Thus, the federal law banning weapons for a lifetime does not apply because Mallum was not found guilty of the use or attempted use of physical force against his wife or the threatened use of a deadly weapon against his wife.

The State says at p. 10 that the unconstitutionality of the federal statute is not ripe for determination in this case and says at p. 12 that Mallum does not have standing to raise the issue of the application of the federal firearms prohibition to him. However, the issue is ripe and he does have standing because the court made the comment about the federal statute's application to him in writing in his judgment of conviction. [R.36;Ap.102]. Moreover, the court apparently also made a lifetime ban on guns a condition of his probation.in Wisconsin because of the federal statute. [R.58; Ap.145,lines 2-3 and lines 7-8]. Also, by not submitting the question of domestic abuse to the jury but still assessing a domestic abuse surcharge, the court made Mallum liable for prosecution under the federal law if he ever has a gun in the future. Finally, the court specifically invoked the federal law during sentencing. [R.58;Ap.145]. The fact that the federal ban is mentioned in the judgment of conviction cannot be dismissed as simply "giving notice" because these comments and the surcharge would undoubtedly keep Mallum from being able to purchase guns.

Dated this 27th day of September, 2016.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,000 words.

Dated: September 27, 2016

Signed:_____/s/_____

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## ELECTRONIC COPY CERTIFICATION

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 with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: September __27____, 2016

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## APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains a table of contents.

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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## APPELLANT'S REPLY APPENDIX

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