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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

Appellate Case No. 2017AP002408-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-VS-

BENJAMIN R. TIBBS,

Defendant-Appellant.

**APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE CIRCUIT COURT FOR PORTAGE
COUNTY, BRANCH II, THE HONORABLE ROBERT
SHANNON PRESIDING,
TRIAL COURT CASE NO. 15-CM-510**

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY TO STATE'S ARGUMENT

The State argues that Mr. Tibbs' position should be rejected because a "vacated" conviction can be used in California for enhancement of subsequent offenses. Throughout its brief, the State repeatedly—and notably, *only*—refers to the California conviction as "vacated." The State chooses not to recognize that the prior conviction was more than "vacated" in that the California Order at issue herein explicitly stated "that the plea, verdict, or finding of guilt in the [Orange County] action ***be set aside and a plea of not guilty be entered.***" (R7 at 3.)(Emphasis added.) Thus, there does not exist an original finding on the underlying charge that Mr. Tibbs violated the law because a not guilty plea means that Mr. Tibbs denied the elements, and the facts pled in support, of the crime with which he was charged. Thus, unlike what counts as a "conviction" in Wisconsin, the California case cannot be numbered among since a denial of the elements of the underlying charge was entered by the California court.

This is also what continues to distinguish *State v. List*, 2004 WI App 230, 277 Wis. 2d 836, 691 N.W.2d 366, from applicability to the present case. *List* is distinguishable from the present situation because the guilty plea itself was vacated *and* a not guilty plea was specifically entered prior to the dismissal. (R7 at 3.) This is different than a deferred conviction agreement where everyone agrees there was a violation or failure to comply with the law. The California Court reversed the determination that the defendant violated the law by allowing the original plea to be withdrawn before dismissing the case. Regardless of how California may subsequently treat such plea withdrawals under California Vehicle Code § 13555, Wisconsin does not permit violations which *have not been admitted* by a defendant to count as prior convictions. Thus, the California prior would be excluded

from the definition of conviction under Wis. Stat. § 340.01(9r) as that defining statute requires there to be “an adjudication” or “a finding” by a court of some violation. *See* Wis. Stat. § 340.01(9r)(a) – (d). Simply put, there cannot exist “an adjudication” or “a finding” under the auspices of an order which expressly states that “a plea of not guilty be entered.” It would truly require some serious contortion of logic and the rule of law to characterize the entry of a “not guilty plea” as an adjudication of guilt.

CONCLUSION

Because Mr. Tibbs’ California offense was one in which a “not guilty” plea was entered on his behalf, it should not be considered an “accusatory finding” under § 340.01(9r). Mr. Tibbs therefore respectfully requests that this Court remand his case to the court below with directions to vacate his second offense conviction for Operating a Motor Vehicle While Under the Influence of an Intoxicant.

Dated this 10th day of April, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

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CERTIFICATIONS

I hereby 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. The text is 13 point type and the length of the brief is 470 words.

Further, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief.

Finally, I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 10, 2018. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Dated this 10th day of April, 2018

Respectfully submitted,

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