STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2066-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ALFONSO C. LOAYZA,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER AND THE HONORABLE JOHN M. WOOD, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES PRESENTED

The penalty for a conviction for operating a motor vehicle while under the influence of an intoxicant (OWI) is based on the number of the defendant's prior convictions. The State must prove a defendant's prior convictions by a preponderance of the evidence. Here, the State proved Alfonso C. Loayza's prior convictions by submitting his certified Wisconsin Department of Transportation (DOT) driving record, which included his earlier Wisconsin convictions and three convictions from California in 1989, 1990, and 1991.

1. Is Loayza's Wisconsin DOT driving record so unreliable it failed to prove his 1990 California OWI conviction by a preponderance of the evidence?

The circuit court answered "no." It concluded that Loayza's Wisconsin DOT record proved his 1990 California OWI conviction by a preponderance of the evidence.

The court of appeals answered "yes." It reversed because it concluded that documents from California, which did not include a judgment of conviction, so discredited the Wisconsin DOT record that they rendered it unreliable and insufficient to prove Loayza's 1990 California conviction by a preponderance of the evidence.

This Court should answer "no." At a minimum, the Wisconsin DOT record proved Loayza's California conviction by a preponderance of the evidence, and Loayza provided nothing that cast doubt on his DOT record, much less proved that it is inaccurate.

2. What must a defendant do to successfully challenge the existence of a conviction included on his or her Wisconsin DOT driving record?

The circuit court did not answer, but it concluded that the Wisconsin DOT record sufficiently proved Loayza's 1990 California OWI conviction.

The court of appeals did not directly answer, but it concluded that other documents from Loayza's California cases, and the absence of a judgment of conviction among those documents, cast doubt on his DOT driving record and made the record so unreliable that it did not prove Loayza's 1990 California OWI conviction.

This Court should hold that to successfully challenge a prior conviction listed on a Wisconsin DOT driving record, a defendant must do more than cast doubt on the DOT record. He or she must prove that the record is inaccurate.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

Loayza pleaded guilty to OWI. The State alleged that Loayza had eight prior OWI convictions and presented his certified Wisconsin DOT driving record that listed those convictions, including three from California in 1989, 1990, and 1991. Loayza was convicted of OWI, and because his certified Wisconsin DOT driving record proved his eight prior convictions, he sentenced for a ninth offense.

Loayza moved for resentencing, challenging his 1989 California conviction. The circuit court concluded that the State did not adequately prove the 1989 California conviction, so it granted the motion. The circuit court resentenced Loayza, imposing the same sentence it had imposed for the ninth offense. Loayza's defense counsel filed a no merit

appeal. The court of appeals rejected the no merit report and instructed counsel to address whether the State proved Loayza's 1990 California conviction.

After briefing, the court of appeals concluded that documents from Loayza's 1990 California case, and in particular the absence of a judgment of conviction among those documents, cast such doubt on Loayza's Wisconsin DOT driving record, that the DOT record no longer qualified as competent proof of the 1990 conviction. The court of appeals therefore remanded with instructions that the judgment be amended to reflect a conviction for OWI as a 7th offense and that Loayza be resentenced accordingly.

This case presents two issues. The first is whether the court of appeals correctly reversed the circuit court's determination that the State proved Loayza's 1990 California conviction. It didn't. Under Wisconsin case law, a certified DOT driving record proves a prior conviction beyond a reasonable doubt, so the court of appeals plainly erred when it concluded that Loayza's certified DOT record did not qualify as competent proof of his prior conviction. This Court should conclude that the State more than satisfied its preponderance of the evidence burden when it proved Loayza's prior convictions through his certified DOT record.

This Court should also reject the court of appeals' conclusion that the documents from the California cases and the absence of a judgment of conviction among those documents undermined the reliability of Loayza's certified DOT record. The absence of a judgment of conviction after nearly 30 years, when court records may be destroyed after 10 years under California law, does not undermine Loayza's Wisconsin DOT record. And the documents that are in the California record actually bolster the DOT record by confirming the existence of Loayza's 1990 OWI conviction. Indeed, Loayza admitted that he was convicted of OWI in

California in 1989, 1990, and 1991 when he collaterally attacked those convictions. And nothing even suggests that Loayza challenged those convictions when he was convicted of five subsequent OWIs in Wisconsin. Loayza did not show that his DOT driving record was so unreliable and insufficient that it disproved his 1990 conviction. This Court must reverse the court of appeals' decision or other lower courts may follow its faulty reasoning.

The second issue in this case concerns what a defendant must do to successfully challenge a prior conviction included in his or her DOT driving record. Again, under Wisconsin case law, a certified DOT driving record proves a prior conviction beyond a reasonable doubt. To render that record so unreliable that it does not prove a prior conviction by the lesser preponderance of the evidence standard, a defendant must do more than simply cast doubt on the reliability of the DOT record. He or she should be required to prove that the conviction does not exist, and therefore the DOT record is inaccurate.

STATEMENT OF THE CASE AND FACTS

On May 26, 2012, a police officer stopped Loayza for a speeding violation. (R. 2.) During the stop, Loayza admitted he had consumed "hard liquor" and had "too much to drink." (R. 1.) A preliminary breath test registered an alcohol concentration of 0.14. (R. 2:2.)

The officer ran Loayza's driving record, which showed eight prior OWI convictions. (R. 2:2.) Given Loayza's prior convictions, he was prohibited from driving with an alcohol concentration above 0.02. (R. 2:1); *see* Wis. Stat. § 340.01(46m)(c). A blood test revealed a blood alcohol concentration of 0.165. (R. 10.) The State charged Loayza with one count of OWI, as a ninth offense, and one count of operating with a prohibited alcohol concentration, also as a

ninth offense. (R. 10.) The criminal complaint outlined Loayza's prior convictions:

> The Wisconsin Department of Transportation records show that Loayza has eight prior convictions for operating while intoxicated as follows: three from the State of California for offenses committed on March 1, 1989, March 5, 1990, and October 12, 1991; and five convictions in Walworth County, Wisconsin, for offenses committed on October 31, 1992, March 26, 1995, March 16, 1997, December 21, 2001, and March 4, 2009.

(R. 2:2.)

Loayza moved to collaterally attack his three California convictions. (R. 18, A-App. 193–96.) He asserted in his motion that his "pleas in those cases were entered without a valid waiver of counsel." (R. 18:1, A-App. 193.) In his affidavit in support of the motion, Loayza acknowledged that he was convicted of "DUI/OWI" in California in 1989, 1990, and 1991. (R. 24:1, A-App. 197.) The circuit court denied the motion without an evidentiary hearing. (R. 87:5.)

Loayza eventually pleaded guilty to one count of OWI as a ninth offense. (R. 93:15.) But the parties made Loayza's plea contingent on the State being able to prove his number of prior convictions at sentencing. (R. 93:7–10, 15–16.)

At sentencing, the State submitted three exhibits as proof of Loayza's prior convictions. (R. 95:9, A-App. 118; R. 39–41, A-App. 153–92.) First, the State submitted a certified copy of Loayza's driving record from Wisconsin DOT that listed all eight convictions. (R. 39, A-App. 153–59.) Second, the State submitted a series of documents from the Superior Court of California, County of San Mateo, sent in response to the prosecutor's request for records related to Loayza's 1989 and 1990 convictions. (R. 40, A-App. 160–72.) The documents included the criminal complaint, the plea questionnaire and waiver of rights form, and the criminal

docket for the 1990 case. (R. 40.) Third, the State submitted a series of documents from the Superior Court of California, County of Santa Clara, sent in response to the prosecutor's request for records related to Loayza's 1991 conviction. (R. 41, A-App. 173–92.) The documents included the complaint, a bench warrant, and a minutes sheet for the 1991 case. (R. 41.)[1]

Loayza conceded that the State offered sufficient proof for his 1991 California OWI conviction, but he argued that the State failed to offer sufficient proof of his 1989 and 1990 offenses. (R. 95:4–6; A-App. 113–15.) Loayza argued that the State's submission of the "certified Wisconsin Department of Transportation record" qualified as "competent proof" of the Wisconsin violations, but it did not qualify as "confident proof with respect to the California violations." (R. 95:8, A-App. 117.) The State argued that the certified DOT record "alone [was] sufficient proof of the prior convictions." (R. 95:9, A-App. 118.)

Relying on the documents submitted in exhibits two and three, the circuit court concluded that the State offered sufficient proof for both the 1989 and 1990 convictions. (R. 95:14–17, A-App. 123–26.) Accordingly, the court sentenced Loayza for OWI as a ninth offense. (R. 95:24.) The court imposed ten years of imprisonment, consisting of five years of initial confinement followed by five years of extended supervision. (R. 95:27.)

After sentencing, Loayza filed a motion for resentencing, challenging the circuit court's conclusion that the State submitted sufficient proof of the 1989 conviction. (R. 46.) The court granted Loayza's motion after a hearing.

[1] The State also presented a presentence investigation report that listed Loayza's eight prior convictions. (R. 95:9–10, A-App. 118–19.)

(R. 50; 96.) It amended the judgment to reflect a conviction of OWI as an eighth offense, and resentenced Loayza to the same ten-year sentence including five years of initial confinement and five years of extended supervision. (R. 56, A-App. 107; 97:9–10.)[2]

After resentencing, Loayza filed a postconviction motion, alleging that his sentence was unduly harsh. (R. 58:1.) The court denied Loayza's motion after a hearing. (R. 61; 98:8–10.)

Loayza's appellate counsel filed a no merit appeal, but the court of appeals rejected it. (R. 62.) The court ordered Loayza's counsel to pursue the issue of whether the State offered sufficient proof of Loayza's 1990 California offense. ("Accordingly, counsel must further pursue this issue.").[3] Loayza filed a postconviction motion to modify his sentence on the ground that he should have been sentenced for OWI as a seventh offense. (R. 64:1, A-App. 127.) After a hearing, the court denied Loayza's motion.[4] (R. 71:2, A-App. 109; 99:6–18, A-App. 139–51.) The court concluded that the State's three exhibits provided "more than sufficient competent evidence" to prove Loayza's 1990 California offense." (R. 99:18, A-App. 151.)

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[2] The State did not appeal the decision which resulted in Loayza receiving the same sentence for OWI as an eighth offense as he had received for a ninth offense.

[3] The court of appeals' order rejecting the no merit report is appended to Loayza's brief-in-chief to the court of appeals. (Loayza's Br. App. 168.)

[4] The Honorable Richard T. Werner presided over Loayza's plea, sentencing, motion for resentencing, and postconviction motion alleging that his sentence was unduly harsh. (R. 93; 95; 50; 61.) The Honorable John M. Wood presided over Loayza's postconviction motion to modify his sentence. (R. 71.)

Loayza appealed, raising a single issue: "Does the record lack sufficient proof [ ] of an alleged 1990 conviction to support Mr. Loayza's conviction for OWI-8th?" (Loayza's Br. 1.) In his brief, Loayza acknowledged that a Wisconsin DOT driving record is competent proof of a prior conviction. (Loayza's Br. 5.) But he argued that the information the State provided from California was itself insufficient to prove the 1990 conviction. (Loayza's Br. 6–11.)

The court of appeals reversed the judgment of conviction and the order denying Loayza's motion for postconviction relief. *State v. Loayza*, No. 2018AP2066-CR, 2019 WL 3949000 (Wis. Ct. App. Aug. 22, 2019) (unpublished). After the State petitioned for review by this Court, the court of appeals withdrew its opinion and issued a new opinion that reached the same result. *State v. Loayza*, No. 2018AP2066-CR, 2019 WL 6518289 (Wis. Ct. App. Nov. 7, 2019) (unpublished) (A-App. 101–06). The court of appeals concluded that the California materials, and in particular the absence of a judgment of conviction for the 1990 offense, rendered the Wisconsin DOT record unreliable. *Id.* ¶¶ 9–15. It therefore remanded the case to the circuit court with instructions to sentence Loayza for OWI as a seventh offense. *Id.* ¶ 16.

The State again petitioned for review, and this Court granted the petition.

STANDARD OF REVIEW

Whether the State has proved the existence of a prior conviction for sentence enhancement purposes is a question of law that this Court reviews de novo. *State v. Braunschweig*, 2018 WI 113, ¶¶ 9–11, 384 Wis. 2d 742, 921 N.W.2d 199; *State v. Saunders*, 2002 WI 107, ¶ 16, 255 Wis. 2d 589, 649 N.W.2d 263.

ARGUMENT

I. The court of appeals erred in concluding that the State failed to prove Loayza's 1990 California OWI conviction by a preponderance of the evidence.

A. Convictions under the law of another jurisdiction that prohibit a person from operating while intoxicated are counted when determining an offender's sentence under Wisconsin's accelerated penalty structure for OWI offenses.

Wisconsin has an accelerated penalty structure for OWI offenses. *State v. Carter*, 2010 WI 132, ¶ 3, 330 Wis. 2d 1, 794 N.W.2d 213. The penalty for an OWI violation under Wis. Stat. § 346.63(1)(a) is determined by Wis. Stat. § 346.65(2)(am)2., which explains that the penalty depends on "the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1)."

Wisconsin Stat. § 343.307(1) tells a court when an offense from another jurisdiction counts as a conviction for OWI counting purposes. The statute provides:

> (1) The court shall count the following to determine the length of a revocation under s. 343.30(1q)(b) and to determine the penalty under ss. 114.09(2) and 346.65(2):
>
> . . . .
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range

> of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

Wis. Stat. § 343.307(1)(d).

The term "conviction" is defined in Wis. Stat. § 340.01(9r), which provides, as relevant to this case, that "'Conviction' or 'convicted' means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal." Wis. Stat. § 340.01(9r).[5]

Courts are therefore required to count "unvacated adjudication[s] of guilt" or "determination[s] that a person has violated of failed to comply with the law" of "another jurisdiction that that prohibits a person from . . . using a motor vehicle while intoxicated . . . as those or substantially similar terms are used in that jurisdiction's laws" to determine an offender's penalty under Wis. Stat. § 346.65(2). Wis. Stat. §§ 343.307(1)(d); 340.01(9r).

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[5] "Conviction" also includes:

> an unvacated forfeiture of property deposited to secure the person's appearance in court, a plea of guilty or no contest accepted by the court, the payment of a fine or court cost, or violation of a condition of release without the deposit of property, regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. It is immaterial that an appeal has been taken.

Wis. Stat. § 340.01(9r).

B. The State must prove prior OWI convictions with competent proof by a preponderance of the evidence.

"The State bears the burden of establishing prior offenses as the basis for the imposition of enhanced penalties." *Carter*, 330 Wis. 2d 1, ¶ 25. Because prior convictions are not an element of an OWI, the State need prove them by only a preponderance of the evidence. *Braunschweig*, 384 Wis. 2d 742, ¶ 39.

The State satisfies its burden when it places "before the circuit court 'competent proof' of prior convictions." *State v. Spaeth*, 206 Wis. 2d 135, 148, 556 N.W.2d 728 (1996) (quoting *State v. McAllister*, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982)). Establishing prior convictions "by competent proof is not an onerous task." *Id.* at 155. For proof to be competent, it "must reliably demonstrate, with particularity," the existence of each prior conviction. *Id.* at 150. The evidence proving a conviction need not be admissible at trial since "[t]here is no presumption of innocence accruing to the defendant regarding . . . previous . . . convictions; such convictions have already been determined in the justice system and the defendant was protected by his rights in those actions." *Id.* at 150–51 (alterations in original) (quoting *McAllister*, 107 Wis. 2d at 539).

Competent proof includes an accused's admission to the prior offense. *State v. Wideman*, 206 Wis. 2d 91, 105, 556 N.W.2d 737 (1996) ("If an accused admits to a prior offense that admission is, of course, competent proof of a prior offense and the State is relieved of its burden to further establish the prior conviction."). And it includes "copies of prior judgments of conviction" or "a teletype of the defendant's Department of Transportation (DOT) driving record." *Spaeth*, 206 Wis. 2d at 153. A certified Wisconsin DOT record is sufficient competent

evidence to prove a prior OWI conviction. *Braunschweig*, 384 Wis. 2d 742, ¶ 40. It is proof of the conviction beyond a reasonable doubt. *State v. Van Riper*, 2003 WI App 237, ¶ 2, 267 Wis. 2d 759, 672 N.W.2d 156. A certified Wisconsin DOT record is competent proof of a conviction whether the conviction occurred in Wisconsin or in another jurisdiction. *Id.* ¶ 19 ("That one of Van Riper's convictions occurred in Minnesota does not change our decision.").

C. Loayza's certified Wisconsin DOT driving record proved his 1990 California OWI conviction.

To prove Loayza's prior convictions at the sentencing hearing, the State submitted a certified copy of his DOT driving record, his presentence investigation report, and documents from San Mateo County and Santa Clara County in California. (R. 95:9–11, A-App. 118–120.) The DOT record showed that Loayza was convicted of OWI in California in 1989, 1990, and 1991. (R. 39, A-App. 153–59.) For the 1989 conviction, the DOT record recited that Loayza was convicted of "OWI-Operating While Intoxicated" in California, with a violation date of 03-11-1989 and a conviction date of 08-25-1989. (R. 39:6, A-App. 158.) For the 1990 conviction, it showed that Loayza was convicted of "OWI-Operating While Intoxicated" in California, with a violation date of 03-05-1990 and a conviction date of 05-11-1990. (R. 39:7, A-App. 159.) For the 1991 conviction, it showed that Loayza was convicted of "OWI-Operating While Intoxicated" in California, with a violation date of 10-12-1991 and a conviction date of 10-12-1991. (R. 39:7, A-App. 159.)

These are the relevant snippets from the DOT record:

Violation	: 10-12-1991		GUILTY
Conviction	: 10-12-1991	Points	: 00
Reason	: OWI-OPERATING WHILE INTOXICATED		
Operation	: CLASS D		
State	: CALIFORNIA		
ACD Code	: A21		
Violation	: 03-05-1990		GUILTY
Conviction	: 05-11-1990	Points	: 00
Reason	: OWI-OPERATING WHILE INTOXICATED		
Operation	: CLASS D		
State	: CALIFORNIA		
Violation	: 03-01-1989		GUILTY
Conviction	: 08-25-1989	Points	: 00
Reason	: OWI-OPERATING WHILE INTOXICATED		
Operation	: CLASS D		
State	: CALIFORNIA		
ACD Code	: A21		

(R. 39:6–7, A-App. 158–59.)

The DOT record proves that Loayza was convicted of OWI in California in 1989, 1990, and 1991. (R. 39:6–7–158–59.) Accordingly, each of those offenses qualifies as a "conviction," as that term is defined under the statute. Wis. Stat. § 340.01(9r) ("'Conviction' or 'convicted' means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction . . . .").

California and Wisconsin's laws prohibit substantially similar conduct—operating while under the influence of an intoxicant. California's offense of operating while intoxicated fits squarely within Wis. Stat. § 343.307(1)(d).[6] As the circuit court correctly recognized, the DOT record is competent proof of Loayza's 1990 California OWI conviction. And while the

[6] *See State v. Van Riper*, 2003 WI App 237, ¶ 20, 267 Wis. 2d 759, 672 N.W.2d 156 ("The certified DOT transcript recites that Van Riper was convicted of 'operating under influence' in Minnesota with a violation date of '11/21/89.' . . . From this information, the trial court could reasonably conclude that the Minnesota laws governing drunk driving were substantially similar to Wisconsin's OWI laws.").

State is required to prove a prior conviction by only a preponderance of the evidence, *Braunschweig*, 384 Wis. 2d 742, ¶ 39, Loayza's certified DOT driving record is proof beyond a reasonable doubt of all three of his California OWI convictions. *See Van Riper*, 267 Wis. 2d 759, ¶¶ 2, 21.

D. The court of appeals erred in concluding that Loayza's DOT driving record is unreliable and therefore insufficient to prove his 1990 California OWI conviction.

On appeal, Loayza presented a single issue: "Does the record lack sufficient proof [ ] of an alleged 1990 conviction to support Mr. Loayza's conviction for OWI-8th?" (Loayza's Br. 1.)

The answer to that question is plainly "no." The State had to prove Loayza's 1990 conviction by a preponderance of the evidence, and it did that (and more) when it presented Loayza's certified DOT driving record. *See Van Riper*, 267 Wis. 2d 759, ¶¶ 2, 21.

The court of appeals acknowledged that a Wisconsin DOT record is competent proof of a prior conviction. *Loayza*, 2019 WL 6518289, ¶ 6. But it concluded that Loayza's DOT record showing his 1990 California conviction was rendered unreliable, and therefore not competent proof of the conviction, by other documents in the record. *Id.* ¶ 15.

The court of appeals believed the California documents "cast doubt on whether any conviction occurred in that case, and, if it did, that it was for OWI." *Id.* ¶ 9. According to the court of appeals, the California documents so discredited Loayza's Wisconsin DOT driving record that it and the California materials, together, were "not sufficiently reliable to show by a preponderance of the evidence that there was an OWI conviction in 1990." *Id.* ¶ 15.

The court's conclusion is wrong. Nothing in the California documents casts any doubt on Loayza's 1990 conviction. Instead, those documents *confirm* what Loayza's DOT driving record proves—that he was convicted on May 11, 1990, for an OWI that he committed on March 5, 1990.

As a preliminary matter, even if this Court were to accept the court of appeal's assumption that the California documents cast doubt on the 1990 conviction, doubt alone should not discredit a certified DOT record. And doubt alone certainly should not mean that we toss out a countable conviction. As will be argued in section II, even if the California documents did not confirm the OWI conviction, but simply cast doubt on whether the conviction occurred, that should not be enough for the conviction to not be counted. A certified DOT driving record is proof beyond a reasonable doubt of the convictions it includes. A defendant challenging a certified DOT record should have to do more than just poke holes—he should have to prove that the DOT record is inaccurate.

Substantively, nothing in the record casts any doubt on Loayza's DOT record or his 1990 conviction. Indeed, even the court of appeals could not point to a portion of the California documents that undermined the 1990 conviction. Instead, it pointed to the absence of a document—a judgment of conviction from California. Because the court believed a judgment of conviction was normally recorded, it speculated that "the absence of such an event from the record supports the inference that the event did not occur." *Loayza*, 2019 WL 6518289, ¶ 14. In other words, because the State offered no judgment of conviction for a 1990 conviction from California, there must have been no conviction.

Wrong. The absence of a judgment of conviction in a court record nearly *30 years after* the conviction was entered does not prove that the conviction did not occur. As the circuit

court recognized in this case, "a lot of times when we see these collateral attacks of old convictions we run into problems where certain jurisdictions don't keep documents forever." (R. 99:17, A-App. 150.) In fact, in Wisconsin, court records in OWI cases are often destroyed long before 30 years have passed. *See State v. Drexler*, 2003 WI App 169, ¶ 11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182 (discussing Supreme Court Record Retention Rules prescribing time for destruction of various records). In particular, "court reporter's notes are destroyed after ten years," "traffic forfeiture case files and related documents are destroyed after five years," and "misdemeanor case files and related documents are destroyed after twenty years." *Id.*

Because records are routinely destroyed after a set period of time, in cases in which a defendant is charged with OWI as a second or subsequent offense, it is "conceivable" that "there will be no court records to support his or her conviction for the first offense—traffic forfeiture records are destroyed after five years—or the second and subsequent offenses—misdemeanor records are destroyed after twenty years." *Id.*

Applying the above, had Loayza been convicted of OWI in 1990 in Wisconsin (rather than California), it is likely there would be no judgment of conviction or other supporting documents in his Wisconsin court record. But the absence of a corroborating court record would not make a defendant's DOT record of the conviction inaccurate or unreliable. And it should not make a defendant's out-of-state conviction unreliable.

The same routine destruction of court records that occurs in Wisconsin also occurs in California. A letter from the Superior Court of California, County of San Mateo, in response to the prosecutor's request for records for Loayza's 1990 OWI conviction states, "Pursuant to **Government Code Section 68150 through 68153,** all misdemeanor

records ten (10) years and older may be purged and destroyed." (R. 40:2, A-App. 161.) It is therefore not surprising that there are no judgments of conviction for Loayza's 1989, 1990, and 1991 California OWI convictions in the California court records. As the prosecutor noted at sentencing, it was "some great stroke of fortune" that *any documents* relating to those convictions were available. (R. 95:10, A-App. 119.)

Given the above, the court of appeals' conclusion that a DOT record is unreliable unless supported with a corroborating judgment of conviction, cannot stand. If a certified DOT driving record is competent proof of a prior conviction only if it is corroborated by a judgment of conviction, *Spaeth*, *Wideman*, *Braunschweig*, and *Van Riper*—which recognize that a certified DOT driving record is sufficient to prove prior convictions—are all wrong. Notably, there is no judgment of conviction in the record for any of Loayza's three California OWI convictions, or his 1990 OAR conviction. Nor is there a judgment of conviction in the record for *any* of Loayza's five prior Wisconsin OWI convictions. But even though there is no judgment of conviction for Loayza's 1991 California OWI or any of his five Wisconsin OWI convictions, he did not even challenge those convictions or argue that his DOT record was wrong in regard to those convictions.

This Court should also take note of the fact that Loayza seemingly waited years to challenge his California convictions. Loayza has been convicted of several OWI offenses in Wisconsin, and he could have challenged his California priors in 1992, 1995, 1997, 2001, or 2009. (R. 2:2.) Had Loayza challenged his California priors then, we may have had access to judgments of convictions from California. Loayza and others should not be encouraged to raise untimely challenges to their convictions and should not receive a

windfall for waiting until records are destroyed according to law before they raise those challenges. If a defendant does wait to challenge a conviction, the State may have a laches defense. *See State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶¶ 20, 27 29, 290 Wis. 2d 352, 714 N.W.2d 900 (concluding that a laches defense requires the State to show unreasonable delay in bringing the claim, lack of knowledge that the claim would be brought, and prejudice due to the delay).

The court of appeals also relied on documents from San Mateo County regarding Loayza's 1990 case that include a complaint alleging OWI, operating with a prohibited alcohol concentration (PAC), and two counts of operating after suspension or revocation (OAR), and also a plea form for one of the OAR charges. *Loayza*, 2019 WL 6518289, ¶ 11. The court concluded that "the plea form supports an inference that, if there was a conviction in May 1990 as reported by the DOT record, it was not for OWI, but only for operating after suspension and revocation." *Id.*

But even assuming the documents from Loayza's 1990 case suggest he was convicted of OAR, they do not suggest he was convicted *only* of OAR. He also could have been (and was based on the DOT record) convicted of OWI.

Indeed, the documents from Santa Clara County, confirm just that—they prove that Loayza was convicted of both OWI and OAR in 1990. A 1991 felony minutes sheet from Santa Clara County, indicates that Loayza pleaded guilty to felony OWI in 1991, and admitted to three prior OWI convictions. (R. 41:18, A-App. 190; 99:17–18, A-App. 150 –51.) The felony complaint in the 1991 case alleges Loayza's three prior OWI convictions, including the May 11, 1990 OWI conviction at issue in this case. (R. 41:6–9, A-App. 178–181.) It also alleges the OAR conviction for which the plea form is included in the record. (R. 41:8, A-App. 180.) The felony minutes sheet was signed by a judge who "certif[ied] that the

foregoing is a true and correct copy of the proceedings had before me this date in said case." (R. 41:18–19, A-App. 190–91.)

Taken together, the complaint and felony minutes sheet show that when Loayza pleaded guilty to felony OWI in 1991, he admitted to having OWI convictions in 1989 and 1990, as well as an OAR conviction in 1990.[7]

The circuit court recognized that those documents provide "more than an abundance of reliable information" supporting the existence of Loayza's 1990 OWI conviction. (R. 99:14, A-App. 147.) Had the court of appeals considered these documents, it may have reached the right conclusion in this case.

The record also contains the docket printout for Loayza's 1990 San Mateo County case (R. 40:8–13, A-App. 167–172), which states that Loayza's probation for that case was later revoked (R. 40:11–13, A-App. 170–72). Logically, if Loayza was placed on probation for his 1990 OWI, he must have been convicted of the offense. But the court of appeals discounted the docket printout, somehow concluding that the reference to Loayza's probation being revoked did not support an inference that he was ever placed on probation. *Loayza*, 2019 WL 6518289, ¶ 12.

Finally, in concluding that documents from California cast doubt on whether Loayza was convicted of OWI in California in 1990, the court of appeals seemingly overlooked that Loayza has already admitted that he was convicted of OWI in California in 1989, 1990, and 1991. When Loayza filed

[7] Loayza also admitted to having a 1987 OWI conviction in California, but that conviction does not count as a prior conviction under Wisconsin's law. *See* 1997 Wis. Act 237 (Wisconsin only counts convictions for offenses on or after January 1, 1989 as priors).

an affidavit in support of his collateral attack, he said he did "not recall whether he was represented in court at the time of sentencing" for his "California DUI/OWI Convictions from 1989, 1990 and 1991." (R. 24:1, A-App. 197.)

Loayza's admission that he was convicted of the three California OWI offenses that the State alleged should have been sufficient by itself to prove the prior convictions. *Wideman*, 206 Wis. 2d at 105 ("If an accused admits to a prior offense that admission is, of course, competent proof of a prior offense and the State is relieved of its burden to further establish the prior conviction."). Loayza's admission, which the court of appeals did not even consider, confirms the accuracy of his Wisconsin DOT driving record.

In sum, the State had to prove Loayza's 1990 California OWI conviction by a preponderance of the evidence, and the State more than met it's burden. The State offered Loayza's certified driving record, and several documents from California that bolstered his record, and the record contained Loayza's own admission to his convictions. That evidence is plainly sufficient, and the court of appeals' conclusion to the contrary is plainly wrong and inconsistent with established law.[8] This Court must reverse the court of appeals' decision so lower courts do not rely on its reasoning and analysis.

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[8] The court of appeals noted that in its brief on appeal, the State did not "attempt to rebut Loayza's argument that the California documents fail to support the existence of an OWI conviction for the 1990 offense." *State v. Loayza*, No. 2018AP2066-CR, 2019 WL 6518289, ¶ 8 (Wis. Ct. App. Nov. 7, 2019) (unpublished). The court said, "The State's failure to discuss the effect of the California documents, when combined with our conclusion that the DOT record is rebuttable, would by itself be a ground for us to reverse on the basis that the State has conceded Loayza's argument that the California documents make the DOT entry unreliable." *Id.* However, the State did not address that

II. To successfully challenge a conviction proved by a Wisconsin DOT driving record, a defendant should be required to prove that the record is inaccurate.

The State alleged in the criminal complaint that Loayza had eight prior convictions, including three from California, and it listed the dates of those offenses. (R. 2:2.) The complaint said those offenses were listed on Loayza's DOT driving record. (R. 2:2.) Loayza could have stipulated to those convictions. "The State and defense counsel should, whenever appropriate, stipulate to prior offenses." *Wideman*, 206 Wis. 2d at 108. Or, he could have challenged the convictions. A defendant "must have the opportunity to challenge the existence of the prior offense." *Id.* A defendant who challenges a conviction puts the State to its proof, so "[t]he State should be prepared at sentencing to establish the prior offenses by appropriate official records or other competent proof." *Id.*

The parties followed this procedure in this case. The State alleged Loayza's prior convictions and Loayza challenged the convictions and put the State to its proof. The State presented Loayza's certified Wisconsin DOT driving record, which proved Loayza's prior convictions beyond a reasonable doubt. *See Van Riper*, 267 Wis. 2d 759, ¶ 2. And the circuit court correctly concluded that the State proved the eight priors, so it imposed sentence for a ninth offense. (R. 95:17, A-App. 126.)

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argument because Loayza raised it for the first time in his reply brief. (Loayza's Reply Br. 1–3.) In his brief-in-chief, Loayza argued only that the State failed to provide competent proof of his 1990 California OWI conviction. (Loayza's Br. 6–10.) As the State argued, Loayza was wrong because his certified DOT driving record was competent proof of his 1990 California OWI conviction. (State's Br. 9–12.) Thus, no waiver occurred.

When Loayza later challenged his 1990 conviction, the court of appeals considered his motion to be a challenge to the reliability of his DOT driving record. The court of appeals acknowledged that a DOT record is competent proof of prior convictions but said that no case holds that DOT driving records "provide *conclusive* or *irrebuttable* proof." *Loayza*, 2019 WL 6518289, ¶ 6. The court said, "We see no indication in the case law cited by the State that a defendant is not permitted to cast doubt on the reliability of a DOT record." *Id.*

The court of appeals relied on *Wideman* and *Saunders* as providing that a defendant can cast doubt on the reliability of a DOT record so that it cannot be used to enhance his sentence. *Id.* But neither case provides that a defendant can overcome a DOT record by merely pointing to evidence, or a lack of evidence, that supposedly casts doubt on the accuracy of the DOT record.

In *Wideman*, this Court said that a defendant can challenge the State's allegation of prior conviction by requiring the State to prove the conviction. *Wideman*, 206 Wis. 2d at 108. Nothing in *Wideman* contemplates a defendant rendering a DOT record—which is proof beyond a reasonable doubt of a conviction—so unreliable as to no longer constitute competent proof to a preponderance of the evidence by providing the court with competing evidence that "casts doubt" on the record.

In *Saunders*, this Court addressed a defendant's ability to challenge the accuracy of a record that proves a prior conviction. *Saunders*, 255 Wis. 2d 589, ¶ 30. This Court said that "a defendant is always permitted to contest the authenticity or, more likely, the accuracy of even a *certified* copy of a judgment of conviction." *Id.* This Court noted that judgments of conviction could have "typographical errors" and it said that "the state may not use as proof a judgment that has been reversed or expunged." *Id.* This Court said that

"even a certified copy of a document establishing a prior conviction may be rebutted, just as inaccuracy in a presentence investigation report may be challenged." *Id.*

Saunders provided that a defendant may challenge a judgment of conviction by showing that it is inaccurate or that the conviction has been expunged or reversed. It did not say that a defendant can overcome a DOT record that proves a conviction at sentencing by pointing to other evidence that supposedly "casts doubt" on the DOT record or renders the DOT record unreliable.

Courts should presume that a person's Wisconsin DOT driving record is reliable. DOT is required by statute to maintain a record of all OWI convictions for persons licensed in Wisconsin. Wis. Stat. § 343.23(2)(a) ("The department shall maintain a file for each licensee or other person containing . . . [an] abstract of convictions."). DOT is required to permanently maintain "[t]he record of suspensions, revocations, and convictions that would be counted under s. 343.307(2)." Wis. Stat. § 343.23(2)(b). That includes out-of-state offenses. Section 343.307(2) requires a court imposing sentence for an OWI-related offense to count, among other things, OWI-related offenses under Wis. Stat. § 346.63, and similar offenses from other jurisdictions. Wis. Stat. § 343.307(1)(a), (e), (f). There is no reason to assume that Wisconsin DOT performs its statutorily required duties so poorly that it regularly lists OWI convictions that do not exist. In this case, there is no reason to believe that DOT included on Loayza's driving record three California OWI convictions that do not exist.

Again, when a Wisconsin DOT driving record lists a conviction, it is proof beyond a reasonable doubt of that conviction. *Van Riper*, 267 Wis. 2d 759, ¶ 2. To successfully challenge a DOT record so that it cannot be used for sentence enhancement, a defendant should be required to do more than

point to evidence that supposedly casts doubt on the record or somehow renders the record unreliable. A defendant should be required to actually prove that the DOT record is wrong.

Both the circuit court and court of appeals attempted to determine, without hearing from DOT or knowing what information DOT considered in creating Loayza's driving record, and with no way to determine whether that information was correct, whether the record was reliable. Loayza provided nothing proving that his DOT driving record is inaccurate. He simply pointed to documents that the State provided from his incomplete and nearly 30-year old California records, and argued that those documents did not themselves prove his conviction, so his Wisconsin DOT driving record must be wrong. Neither the circuit court nor an appellate court should have to pore over incomplete 30-year-old records from another state to determine whether anything in those records cast doubt on a certified DOT driving record.

To successfully challenge a DOT record that lists a conviction, a defendant should be required to prove that the DOT record is inaccurate. The absence of a judgment of conviction from another State cannot reasonably be sufficient to prove that a Wisconsin DOT driving record is inaccurate, particularly when the other state's record may properly have been purged or destroyed under that state's law. And proof of a conviction for something other than OWI cannot reasonably be sufficient to prove that a person was not also convicted of OWI, as demonstrated by this case, where Loayza was convicted of both OWI and OAR in California in 1990.

In *Saunders*, this Court contemplated challenges to judgments of conviction for "typographical errors" or because a judgment may have been "reversed or expunged." *Saunders*, 255 Wis. 2d 589, ¶ 30. In other words, a defendant can challenge a judgment of conviction by proving that it is inaccurate.

The same should be true of a defendant's challenge to his or her DOT driving record. A DOT driving record is competent proof of the suspensions, revocations, and convictions it lists. *Braunschweig*, 384 Wis. 2d 742, ¶ 40. This Court should establish that to overcome a DOT record that proves a prior conviction, a defendant must prove that the conviction does not exist, and the record is therefore inaccurate. To disprove a conviction, a defendant will likely need documentary evidence because a defendant's self-serving testimony that no conviction exists cannot reasonably disprove a conviction included on a DOT driving record. And unlike in this case where Loayza admitted to his California convictions when he collaterally attacked them, a defendant who challenges the accuracy of a DOT driving record listing an OWI conviction should be required to at least allege that the conviction does not exist. A court presented with a DOT driving record that a defendant has not proved inaccurate should simply count the convictions included in the DOT record.

CONCLUSION

This Court should reverse the court of appeals' decision and affirm the judgment of conviction and the order denying Loayza's motion for postconviction relief.

Dated this 20th day of August 2020.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,723 words.

Dated this 20th day of August 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 20th day of August 2020.

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