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SUPREME COURT

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

RESPONSE BRIEF OF THE DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the weight of the evidence presented by the State at sentencing prove by a preponderance of the evidence that Loayza was convicted of a qualifying OWI offense in California in 1990?

The circuit court found the State proved a 1990 conviction at sentencing and denied Loayza's postconviction motion on the basis that the State provided sufficient evidence of the alleged 1990 conviction.

The court of appeals reversed the decision of the trial court, finding that the DOT driving record entry for an OWI conviction in May 1990 was rendered unreliable by documents from the California criminal case files. The court determined that the State's evidence, when viewed as a whole, was not sufficiently reliable to prove by a preponderance of evidence that Loayza had been convicted of a qualifying OWI offense in May 1990.

This court should conclude that the State has failed to meet its burden to prove the alleged 1990 prior OWI conviction by a preponderance of the evidence, based on the weight of all the evidence.

II. Should the admission of a certified DOT driving record allow the State to shift its burden of proof regarding qualifying OWI convictions onto a defendant?

This issue was not argued before the circuit court or court of appeals.

This court should conclude that, consistent with precedent relating to proving prior OWI convictions, the State bears the burden of proving prior convictions by a preponderance of the evidence, regardless of the type of evidence provided by the State. Therefore, where the State presents a certified DOT driving record as evidence of a prior conviction, a defendant may attempt to rebut the information it contains the same as any other piece of evidence, but the burden does not shift to the defendant. The court must view the total weight of all evidence in determining whether the State has met its burden.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

INTRODUCTION

At sentencing, it is the State's burden to provide competent proof of alleged prior OWI convictions it seeks to use to enhance a defendant's sentence. The State's burden of proving these prior convictions is by a preponderance of the evidence. While a certified DOT record may constitute competent proof of a prior conviction, the DOT record is not infallible or irrefutable. Where a defendant requires the state be put to its proof at sentencing, the court must review all evidence presented by either party to determine whether the State has met its burden. In this case, notwithstanding the fact that the State presented a DOT record, it failed to meet its burden because the totality of the evidence does not show it is more likely than not that the 1990 California case resulted in a qualifying prior OWI conviction.

STATEMENT OF CASE AND FACTS

In 2012, Alfonso Loayza was charged with operating while intoxicated as a ninth offense. (R.2.) Three of the alleged prior convictions stemmed from California offenses alleged to have occurred on or about March 1, 1989; March 5, 1990; and October 12, 1991; the remaining convictions occurred in Wisconsin. (*Id*.) At issue in this case is whether the State proved the existence of a qualifying OWI conviction related to the alleged 1990 offense.

Prior to his plea in this case, Loayza filed a motion to collaterally attack the alleged California convictions. (R.18.) In support of his motion, he attested that he had no memory regarding the events related to the California cases. (R.41.) The motion was denied without a hearing. (R.87:5.)

Loayza pled guilty to one count of operating while intoxicated as a ninth offense, subject to the state providing sufficient competent proof of all prior offenses at a later sentencing hearing. (R.93:9-10.)

At sentencing, the State submitted both a Wisconsin DOT record and documents from the California courts in which Loayza had previously been charged with OWI. (R.39, 40, 41; A-App. 153-92.) Exhibit 1 contained a certified copy of defendant's driving record from the Wisconsin Department of Transportation. (R.39; A-App.153-59.) Exhibit 2 contained a set of documents from San Mateo County, California, including a criminal complaint charging violations of operating while under the influence of an intoxicant and operating while suspended or revoked occurring on March 5, 1990; a plea questionnaire dated May 11, 1990; and a criminal case docket for the case. (R.40; A-App. 160-72.) Exhibit 3 contained a set of documents from Santa Clara County, California, including a criminal complaint for an

offense of operating while under the influence of an intoxicant occurring on October 12, 1991, a bench warrant, an ex parte order for recall of probation violation warrant, a felony minutes sheet detailing a guilty/no contest plea dated October 30, 1991, and a sentence report. (R.41; App. 173-92.) Exhibit 3 also contained an uncertified printout, apparently from the California DMV, which lists offenses, but no information regarding convictions or sentences for any offenses. (R.41:20; A-App. 192.)

The sentencing court found that the state had provided sufficient proof of eight prior offenses based on the documents in States exhibits 2 and 3. (R.95:17.) Loayza was sentenced to five years initial confinement and five years extended supervision, consecutive to any other sentence. (*Id.* at 27.)

Loayza filed a postconviction motion arguing the court erred in finding eight prior offenses, because it relied on inaccurate information regarding California's operating while intoxicated statute in determining that the state had proven the 1989 offense. (R.46.) The court granted the motion, concluding the evidence was not sufficient to establish the alleged 1989 conviction. (R.96; R.50.) Loayza was resentenced for operating while intoxicated (8th), to the same sentence he had previously received. (R.56; R.97:9.)

Loayza then filed a second postconviction motion on May 18, 2018 arguing that the state had failed to provide sufficient proof of a 1990 California conviction. (R.64-66.) The circuit court denied the motion, finding that information in State's exhibit 3 supported the existence of an OWI conviction in 1990. (R.99; R.71.)

In the court of appeals, Loayza argued the record as a whole did not contain sufficient competent proof of an

alleged 1990 conviction because the California records called into question whether there had been (1) any conviction at all or (2) a conviction for a qualifying OWI offense. (Loayza's Br. at 8-10.) The state's response argued solely that a certified DOT record was competent proof of a prior conviction and did not address Loayza's arguments regarding the other evidence in the record. (State's Resp. Br. at 9-12.)

The court of appeals reversed the decision of the circuit court, holding that while in general a DOT record may be sufficiently reliable standing alone, additional evidence in this case cast doubt upon the reliability of the DOT record regarding the alleged 1990 conviction, rendering it insufficiently reliable to meet the State's burden of proof by a preponderance of the evidence. *State v. Loayza*, No. 2018AP2066-CR, 2019 WL 6518289, ¶¶ 7, 14-15 (Wis. Ct. App. Nov. 7, 2019) (unpublished) (A-App. 101-06).

ARGUMENT

I. The Court of Appeals Correctly Held that the State Failed to Prove Loayza's Alleged 1990 California OWI Conviction by a Preponderance of the Evidence.

Wisconsin law providing for escalating penalties for multiple OWI convictions is clear and was properly applied by the court of appeals in this case. Qualifying OWI convictions are counted as prior convictions to enhance a defendant's sentence. The state must provide competent evidence of qualifying prior OWI convictions by the time of sentencing. The burden is on the state to prove the existence of a prior qualifying OWI conviction by a preponderance of the evidence. While a DOT record may be competent proof of a conviction standing alone, a defendant may always challenge or rebut the information in the record. In such

cases, the court should evaluate the total weight of the evidence to determine whether the state has met its burden by the preponderance of the evidence. Here, the court of appeals properly looked at the weight of all the State's evidence, taken as a whole, and correctly determined that the State had failed to meet its burden of proving that the 1990 California case resulted in a qualifying OWI conviction.

A. Qualifying OWI convictions are counted as prior convictions to enhance a defendant's sentence.

Wisconsin law establishes escalating penalties for multiple offenses of operating while under the influence. Wis. Stat. § 346.65(2). The prior convictions, suspensions, or revocations to be counted as offenses for determining the penalty are defined by Wis. Stat. § 343.307. Courts must count as prior offenses convictions from other jurisdictions which meet the following description:

> (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 jurisdictions laws.

Wis. Stat. § 343.307(1)(d). In determining whether a prior out-of-state conviction meets the requirements of section 343.307(1)(d), the court must look to whether the out-of-state law under which the defendant was convicted prohibits the

conduct specified in that section. *State v. Carter*, 2010 WI 132, ¶ 45, 330 Wis. 2d 1, 794 N.W.2d 213. The court is limited to examining the conduct prohibited by the offense for which the defendant was actually convicted – and not, for example, the conduct alleged in the complaint – to determine whether it meets the definition of a prior conviction in section 343.307(1)(d). *State v. Jackson*, 2014 WI App 50, ¶¶ 15-16, 354 Wis.2d 99, 851 N.W.2d 465 ("Every term in subsection (1)(d) relates in some way to a person operating a motor vehicle with either drugs or alcohol, or both, in his or her system.").

The definition of "conviction" set forth by Wis. Stat. § 340.01(9r), is used to determine whether a conviction is counted under Wis. Stat. § 343.307. *Carter*, 2010 WI 132, ¶ 43. There, "conviction" is defined as:

> 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, 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…

Wis. Stat. § 340.01(9r).

The question of whether a prior offense should be used to enhance a defendant's penalty for operating while intoxicated involves interpretation and application of Wis. Stat. § 343.307(1) to undisputed facts – a question of law this court reviews de novo. *State v. Braunschweig*, 2018 WI 113,

¶¶ 9-11, 384 Wis. 2d 742, 921 N.W.2d 199; *State v. Carter*, 2010 WI 132, ¶ 19, 330 Wis. 2d 1, 794 N.W.2d 213.

B. The State bears the burden of proving the existence of each qualifying prior OWI conviction by a preponderance of the evidence.

Before a circuit court may impose an enhanced penalty under Wisconsin's operating while intoxicated laws, "the State must establish the prior offense." *State v. Wideman*, 206 Wis. 2d 91, 104, 556 N.W.2d 737 (1996). The state bears the burden of proving qualifying prior OWI convictions by a preponderance of the evidence. *Braunschweig*, 2018 WI 113, ¶ 39. The state "must reliably demonstrate with particularity, the existence of each prior…conviction." *State v. Spaeth*, 206 Wis. 2d 135, 151, 556 N.W.2d 728 (1996).

The state may satisfy its burden "by presenting 'certified copies of conviction or other competent proof…before sentencing.'" *Wideman*, 206 Wis. at 94 (quoting *State v. McAllister*, 107 Wis.2d 532, 539, 319 N.W.2d 865 (1982)). A defendant's admission, copies of prior judgments of conviction, or a teletype of a defendant's Department of Transportation driving record constitute competent proof. *Spaeth*, 206 Wis. 2d at 153. A certified DOT driving record is admissible evidence and can satisfy the state's burden of proof of prior OWI convictions where not controverted by other evidence. *See State v. Van Riper*, 2003 WI App 237, ¶¶ 2, 5, 267 Wis. 2d 759, 672 N.W.2d 156; *Braunschweig*, 2018 WI 113, ¶¶ 5, 40.

A defendant may challenge the existence of penalty-enhancing prior convictions, as well as the reliability of the State's evidence. *Wideman*, 206 Wis. 2d at 105 ("the accused must have an opportunity to challenge the existence of the prior offense"); *McAllister*, 107 Wis. 2d at 539 ("The

defendant does have an opportunity to challenge the existence of the previous penalty-enhancing convictions before the judge prior to sentencing."). Where such a challenge is made, the circuit court will evaluate competing evidence or arguments and determine whether the state has met its burden to provide competent proof by a preponderance of the evidence. *Braunschweig*, 2018 WI 113, ¶ 39; *Wideman*, 206 Wis. 2d at 108 ("Defense counsel should be prepared at sentencing to put the State to its proof when the state's allegations of prior offenses are incorrect or defense counsel cannot verify the existence of the prior offenses.").

C. The court of appeals correctly determined that the totality of the evidence failed to prove by a preponderance of the evidence that Loazya was convicted of a qualifying prior OWI offense in 1990, notwithstanding information contained in the DOT record

The court of appeals followed the established legal principles detailed *supra* at I.A. and I.B. in determining that the evidence before the circuit court, taken as a whole, did not satisfy the state's burden to prove the prior conviction by a preponderance of the evidence. *Loayza*, 2019 WL 6518289, ¶¶ 14-15. After evaluating the weight of all the evidence, the court concluded: "the DOT driving record entry for an OWI conviction in May 1990 is rendered unreliable by the California materials. The Wisconsin DOT and California materials submitted by the State, when viewed as a whole, are not sufficiently reliable to show by a preponderance of evidence that there was an OWI conviction in May 1990." *Id.* at ¶ 15.

The State had argued, as it argues before this court, that because the court of appeals previously deemed an

uncontroverted certified copy of a DOT driving record admissible evidence sufficient to prove beyond a reasonable doubt of a qualifying prior OWI conviction in an OWI-PAC case, *see Van Riper*, 2003 WI App 237, ¶ 2, the mere fact that the State provided Loayza's certified DOT driving record is not decisive in this case. However, as the court of appeals correctly distinguished, "A DOT record may be sufficiently reliable when that is the only information available, but additional information may cast doubt on the reliability of a DOT entry to such a degree that makes the entry insufficiently reliable to meet the State's burden." *Loayza*, 2019 WL 6518289 at ¶ 7.

The court of appeals' holding, that the DOT record did not prove the alleged 1990 conviction by a preponderance of the evidence because other evidence provided by the state cast doubt upon its reliability, is not in conflict with cases upholding the use of an *uncontroverted* DOT driving record. *See Braunschweig*, 2018 WI 113, ¶¶ 5, 40 (certified driving record was only evidence). While *Van Riper* held that the certified driving record – in that case the sole piece of evidence in the record, *id.* at ¶ 5 – was sufficient to prove a prior conviction, that case does not hold that a certified driving record will prove a prior conviction beyond a reasonable doubt in *every* case, regardless of any competing evidence also admitted. *See also State v. Saunders*, 2002 WI 107, ¶ 30, 255 Wis. 2d 589, 649 N.W.2d 263 ("a defendant is always permitted to contest the authenticity or, more likely, the accuracy of even a *certified* copy of a judgment of conviction") (emphasis in original). Neither the circuit court nor court of appeals was required to end its evaluation of the evidence at the certified driving record, given the fact that the State had submitted additional evidence.

Specifically, the court held that the California records "cast doubt on whether any conviction occurred in [the 1990] case, and if it did, that it was for OWI." *Loayza*, 2019 WL 6518289 at ¶ 9. The evidence that the court of appeals looked to was as follows:

- Despite the existence of a docket sheet listing case activity and disposition, the record contained no information about how and when each count was disposed. Nor is there any information showing case activity or events around the date of the plea form. *Id.* at ¶ 10.

- A plea form indicated only that Loayza pled guilty to operating while suspended or revoked[1] – an offense which would not count as a prior conviction under Wis. Stat. § 343.307(1)(d). Nothing on the plea form indicated a plea to a qualifying OWI offense. *Id*. at ¶ 11.

- A reference in the docket to Loayza being revoked from probation "is diminished by the fact that the docket does not contain any earlier entry showing that Loayza was ever placed *on* probation in that

[1] The plea form indicates that Loayza pled guilty to "Vehicle Code, § 14601.2(a)," which corresponds to the statute number used in the complaint for count three, operating while suspended and revoked. (R.40:4; A-App. 163.) California Vehicle Code § 14601.2(a) provides, "A person shall not drive a motor vehicle at any time when that person's driving privilege is suspended or revoked for a conviction of a violation of Section 23152 or 23153 if the person so driving has knowledge of the suspension or revocation." A conviction for this offense does not qualify as a prior conviction under Wis. Stat. § 343.307(1)(d). *See State v. Carter*, 2010 WI 132, ¶ 45; *State v. Jackson*, 2014 WI App 50, ¶ 15.

case, whether for OWI or something else." *Id.* at ¶ 12 (emphasis in original).

- The absence of a judgment of conviction for a qualifying OWI offense from the record – despite the record itself being preserved. *Id.* at 14.

Contrary to the State's argument, it was not simply "the absence of a corroborating document" (State Br. at 16) that rendered the DOT record of the 1990 conviction unreliable. Rather, it was the absence of any confirmation of a conviction for a qualifying OWI offense, *within the existing case record.* This case is not about inferring a conviction does not exist because case records have been destroyed.[2] It is about existing records controverting the DOT record. *Id.* at ¶ 15.

Because the California documents controvert the DOT record as to its accuracy and reliability regarding a 1990

[2] For this reason, the State's references to the Supreme Court of Wisconsin Record Retention Rules and a notation on the San Mateo County records regarding record destruction timeframes are irrelevant to the question of whether the weight of the evidence that was before the court proved Loayza was convicted of a qualifying OWI offense in 1990. Despite the California court notation that "all misdemeanor records ten (10) years and older may be purged and destroyed," (R.40:2; A-App. 161), that obviously did not occur in this case because the State obtained the records. Notably, the State does not explain why only a judgment of conviction, and not the remainder of the case file, would be destroyed.

Additionally, the State's argument that Loayza "seemingly waited years to challenge his California convictions," (State Br. at 17-18), is also irrelevant to whether the evidence provided by the State met its burden of proof. Again, this case is not about the destruction of evidence. Nor has the State provided any support for the equitable remedy of laches relieving it of its burden of proving each prior conviction by a preponderance of the evidence.

qualifying OWI conviction, the State has failed to prove it more likely than not that Loazya was in fact convicted of a qualifying OWI offense in the 1990 California case.

D. The State forfeited its argument that the remaining evidence at sentencing supports the existence of a qualifying prior OWI conviction from 1990 by conceding it before the court of appeals; but even on its merits, this argument fails.

In the court of appeals, Loayza argued the record as a whole did not contain sufficient competent proof of an alleged 1990 conviction because the California records called into question whether there had been (1) any conviction at all or (2) a conviction for a qualifying OWI offense. (Loayza's Brief-in-Chief, p. 8-10.) The state's response argued solely that a certified DOT record was competent proof of a prior conviction and did not address Loayza's arguments regarding the other evidence in the record. (State's Resp. Br. at 9-12.) The court of appeals correctly held that the state conceded Loayza's argument that the California case records made the DOT record of conviction unreliable by its failure to make may argument regarding those records. *Loayza*, 2019 WL 6518289 at ¶ 8. Therefore, the State's arguments that documents in the California record confirm the existence of a qualifying prior OWI conviction, or that Loayza himself admitted such a conviction, (*see* State Br. at 3-4, 15-20), should likewise be deemed forfeited as they were not made below.

However, even addressing the merits of these arguments, the State's claims fail.

The State argues that, despite the 1990 plea form only detailing a plea to an operating after revocation offense,

Loayza could have also been convicted of a qualifying OWI offense, and claims support for its argument is contained in Exhibit 3, containing case documents relating to the 1991 case. The State argues that because the 1991 complaint alleged a prior conviction in 1990, that complaint and Loayza's later guilty plea in the 1991 case were competent proof of a conviction for a qualifying OWI offense in 1990. (State Br. at 18.) The fact that Loayza plead guilty to charges stemming from a criminal complaint that alleged a 1990 prior offense is not proof of what happened in the 1990 case. Allegations in a complaint are merely allegations, and do not provide competent proof of a prior conviction by a preponderance of the evidence. *See State v. Jackson*, 2014 WI App 50, ¶¶ 15-16, 354 Wis.2d 99, 851 N.W.2d 465 (court is limited to examining the conduct prohibited by the out-of-state offense for which the defendant was actually convicted to determine whether it meets the definition of a prior conviction in section 343.307(1)(d)).

Additionally, because the prior offense was not an element of the 1991 offense proven beyond a reasonable doubt by the state of California as a necessary prerequisite for conviction, the 1991 conviction is not competent proof of any prior offenses. *See* CA Veh. Code § 23152 (1992); *Curl v. Superior Court*, 51 Cal.3d 1292, 1306 n.8, 801 P.2d 292 (1990) (prior operating while intoxicated offenses treated as sentencing enhancers not elements of underlying offense).

The State's argument that references to probation in the 1990 case record prove a qualifying OWI conviction. However, it does not offer any support for the assertion that Loayza was placed on probation for a qualifying OWI offense. (The State argues, "Logically, if Loayza was placed on probation for his 1990 OWI, he must have been convicted of the offense." – but again, does not provide support for the

assertion that Loayza was placed on probation for an OWI offense.) Nothing in the plea form suggests Loayza pled guilty to operating while intoxicated, nor is there any other typical evidence of conviction of this charge. (R.40:6-7; App. 165-66.) Further, neither the "case synopsis" nor the "record of case events" shows that anything occurred on or near the date that form was signed. (R.40:8-13; App. 167-72.) While the case docket sheet suggests that Loayza was revoked from probation, nothing in the case docket or other materials shows that Loayza was ever placed on probation in the case. (*Id*.) Notably, the agreement listed on the plea form does not include a probation sentence. (R.40:6; App. 165.)

Finally, the State argues for the first time before this court that Loayza himself admitted to a 1990 OWI conviction by filing a motion to collaterally attack the alleged California prior convictions. Because this argument was never previously made before the circuit court or court of appeals, it should be deemed forfeited. Further, Loayza's affidavit in support of the collateral attack motion does not admit that he was convicted of a qualifying OWI offense. (*See* R.24; A-App. 197-98.) Based on his attestations, it is unclear how Loayza could have admitted to such a fact – he attested that he did not recall whether he was represented by counsel during the cases or whether the court advised him of his right to an attorney. (*Id.*) Given Loayza's lack of memory about the California cases, it is clear he was not admitting to their existence for the purposes of sentence enhancement at the time that his trial attorney filed the collateral attack motion in this case.

Because the record does not contain sufficient competent proof that Loayza was convicted of an operating while intoxicated offense in 1990, as required by Wis. Stat. §

343.07(1)(d), Loayza should be resentenced for operating while intoxicated as a seventh offense.

II. Because the State Bears the Burden of Proving Each Qualifying Prior OWI Conviction, a Defendant May Rebut the State's Proof, Including a Certified DOT Record, by Demonstrating the Weight of the Evidence Taken as a Whole Does Not Support the Existence of a Prior Conviction by a Preponderance of the Evidence

Before the court of appeals, the state maintained the 1990 California conviction was established solely by the admission of Loayza's certified driving record, (state resp. br. at 9-12), implicitly arguing that the court's inquiry should stop there. The court of appeals correctly evaluated all of the evidence "viewed as a whole" in determining whether the State met its burden. *Loayza*, 2019 WL 6518289 at ¶ 15. The State now asks this court to create a burden-shifting scheme where upon admission of a certified DOT driving record, the burden of proof shifts to the defendant to prove that the record is inaccurate. (State Br. at 21.) Support for such a burden-shifting scheme is not found in existing case law addressing the issue of sufficiency of evidence of a prior OWI conviction. *See, e.g.*, *Braunschweig*, 2018 WI 113, ¶ 39 ("the State must prove this prior conviction by a preponderance of the evidence"); *see also McAllister*, 107 Wis. 2d at 539 (detailing state's burden of proof of prior convictions at sentencing) *Wideman*, 206 Wis. at 104 (same); *Spaeth*, 206 Wis. 2d at 149 (same). The departure from these well-established principles advocated by the State is not appropriate in this case. To the extent that a defendant must rebut information contained in a DOT driving record, this court should simply require the defendant to establish enough

doubt to overcome the preponderance of the evidence standard.

A. The burden of proving a qualifying prior OWI conviction should remain with the State, by a preponderance of the evidence.

The State's relies throughout its brief on *Van Riper* for the proposition that a certified DOT record is proof beyond a reasonable doubt of a prior OWI conviction in any and every case. But this is not what *Van Riper* holds. *Van Riper* was limited to the questions of whether the certified DOT record was admissible evidence in an OWI-PAC trial and that DOT record, standing alone, was sufficient evidence to satisfy the OWI-PAC element of a former conviction. 2003 WI App. 237, ¶ 1-2. The court of appeals answered yes to both questions. *Id.* at ¶ 2. However, nowhere in the *Van Riper* court's decision did it create a rule that the certified DOT driving record was unassailable by a defendant or should be entitled to a presumption of validity not afforded to other evidence that may be before a court.

The court of appeals correctly noted that none of the case law accepting a certified DOT driving record as proof of a qualifying prior OWI conviction "say that DOT records provide *conclusive* or *irrebuttable* proof." *Loayza*, 2019 WL 6518289 at ¶ 6. Similarly, the case law does not elevate the DOT driving record as the "be-all and end-all" evidence the State suggests.

The State also argues that courts should presume a person's Wisconsin DOT driving record is reliable because Wis. Stat. § 343.23(2) requires the DOT to maintain that record. (State Br. at 23.) There mere fact that an agency is statutorily mandated to maintain records does not create a presumption of reliability for those records. *See, e.g.*,

Saunders, 2002 WI 107, ¶ 30 (explaining that a defendant is always permitted to contest documentary proof of a prior conviction because, "[h]uman beings complete these forms and, although we would hope that typographical errors within these important documents are rare, errors may nonetheless exist.")

The enhancement of a sentence because of prior convictions implicates the due process rights of a defendant. *Wideman*, 206 Wis. 2d at 106. "[T]he state bears the full burden of proving prior convictions that may affect the maximum sentence of defendants." *Saunders*, 2002 WI 107, ¶ 53. Nothing in the current case law supports placing a burden on the defendant of proving the state's assertion of a prior conviction to be incorrect.

Rather than shifting the burden of proof onto a defendant when the state provides a certified DOT record, this court should adopt the methodology of the court's decision below:

> [W]e reject any suggestion that our analysis of the available information stops after seeing the entry in the DOT record. A DOT record may be sufficiently reliable when that is the only information available, but additional information may cast doubt on the reliability of a DOT entry to a degree that makes the entry insufficiently reliable to meet the State's burden.

Loayza, 2019 WL 6518289 at ¶ 7. Applying this rule to this case, Loayza need not prove that the DOT record is incorrect. Rather, he must show that it is insufficiently reliable to meet the State's burden of preponderance of the evidence – in other words, that the weight of the evidence makes it more likely than not that he was convicted of a qualifying OWI offense in 1990.

B. Loayza has rebutted the DOT driving record to a degree that makes it insufficiently reliable to prove the alleged 1990 OWI conviction by a preponderance of the evidence.

For the reasons detailed *supra* at I.C. and I.D., Loayza has rebutted the reliability of the information in the certified DOT driving record related to the alleged 1990 OWI conviction. The State has not proven it more likely than not that Loayza was convicted of a qualifying OWI offense in 1990.

CONCLUSION

For the reasons set forth above, Alfonso Loayza respectfully requests that the court affirm the decision of the court of appeals, and remit the case to the circuit court for resentencing as an OWI-7th offense.

Dated this 10th day of September, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this response meets the form and length requirements of Rules 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5164 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 on or after this date.

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

Dated this 10th day of September, 2020.

Signed:

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