STATE OF WISCONSIN
IN SUPREME COURT

Appellate Case No. 2020AP475

In the Matter of the Refusal of Jack Ray Zimmerman, Jr.:

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JACK RAY ZIMMERMAN, JR.,

Defendant-Appellant-Petitioner.

APPEALED FROM A DECISION OF THE COURT OF APPEALS DATED NOVEMBER 4, 2020, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH II, THE HONORABLE JAMES K. MUEHLBAUER PRESIDING, TRIAL COURT CASE NO. 19-TR-2191

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

WHETHER THE LEGISLATURE INTENDED VIOLATIONS OF WIS. STAT. §§ 940.09 & 940.25(1) WHICH PRE-DATE JANUARY 1, 1989 TO BE USED AS PENALTY ENHANCERS IN THE PROSECUTION OF ALCOHOL-RELATED DRIVING OFFENSES?

Trial Court Answered: YES. The circuit court concluded that the addition of the "lifetime plus" language[1] which was added to Wis. Stat. § 346.65(2)(am)[2] was unambiguous on its face regardless of the fact that prior amendments to the law had precluded the counting of violations which occurred prior to January 1, 1989. R24 at pp. 3-6; P-App. at 104-06.

Court of Appeals Answered: YES. P-App. at 112-16. The court of appeals determined that the language of the counting provision was plain on its face and therefore was not subject to further interpretation. P-App. at 114-15.

STATEMENT OF THE CASE

Mr. Zimmerman was charged in Washington County with both Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a), and Unlawfully Refusing to Submit to an Implied Consent Test, contrary to Wis. Stat. § 343.305(9)(a), arising out of an incident which occurred on July 10, 2019. R1; R13 at ¶ 2.

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[1]"Lifetime plus" is the shorthand nomenclature used by the lower court to refer to the language in, for example, § 346.65(2)(am) which provides in pertinent part that the counting of prior offenses for purposes of penalty enhancement shall count "convictions under ss. 940.09(1) and 940.25(1) in a person's **lifetime, plus** the total number of . . . convictions counted under s. 343.307(1)."

[2]At the time this provision of the statutes was affected by 1999 Wis. Act 109, it was numbered as § 346.65(2)(b). It has since been renumbered as § 346.65(2)(am). Subsection (2)(am) is the reference Mr. Zimmerman will use throughout this Petition because it represents the current incarnation of the law and because the renumbering has no substantive effect on the nature of the issue.

Mr. Zimmerman retained private counsel and subsequently filed a request for a refusal hearing. R5. A hearing on the lawfulness of Mr. Zimmerman's refusal was held on September 26, 2019, before the Circuit Court for Washington County, the Honorable James K. Muehlbauer presiding. R9; R35.

Deputy Joseph Conery, the arresting officer in the instant matter, was the single witness called to testify on behalf of the State. R35 at pp. 3-21. At the conclusion of the evidentiary portion of the hearing, counsel for Mr. Zimmerman made two legal arguments, including, *inter alia*: (1) Mr. Zimmerman's prior convictions for violations of §§ 940.09 & 940.25(1) should not have been counted as penalty enhancers in his case because they occurred prior to January 1, 1989; and (2) Mr. Zimmerman was misinformed by the arresting officer that he would be prosecuted as a third offender, which misinformation adversely impacted his right to make an informed decision regarding whether he should submit to implied consent testing. R13; R19; R23.

The circuit court rejected both of Mr. Zimmerman's arguments, and by Conviction Status Report dated February 4, 2020, ordered Mr. Zimmerman's operating privilege revoked for a period of three (3) years. R25; P-App. at 101.

It is from that adverse judgment that Mr. Zimmerman appealed his case by Notice filed March 10, 2020. R32. On November 4, 2020, a one-judge panel of the court of appeals affirmed the decision of the lower court holding that the language in § 346.65(2)(am) was plain on its face. P-App. at 112-16.

STATEMENT OF FACTS

On July 10, 2019, the above-named Petitioner, Jack Zimmerman, was operating his motor vehicle in Washington County when Deputy Thomas Conery of the Washington County Sheriff's Office received a report of a vehicle which had been "swerving." R35 at 18:7-12. After receiving a specific license plate number, Deputy Conery learned that the registered owner, Mr. Zimmerman,

had a revoked operating privilege. R35 at 19:1-3. Deputy Conery caught up to Mr. Zimmerman's vehicle and initiated a traffic stop. R35 at 21:23 to 23:23.

After making contact with Mr. Zimmerman, Deputy Conery observed that he had bloodshot eyes and slurred speech. R35 at 25:1-14. Based upon this information, Deputy Conery asked Mr. Zimmerman to perform field sobriety tests, to which request Mr. Zimmerman consented. R35 at 28:4-6; 30:5-8. Mr. Zimmerman allegedly failed the standardized battery of field sobriety tests. R35 at 34:12-20.

Upon failing the field sobriety tests, Deputy Conery placed Mr. Zimmerman under arrest for Operating a Motor Vehicle While Under the Influence of an Intoxicant, contrary to Wis. Stat. § 346.63(1)(a). R35 at 34:21-23. At the time he took Mr. Zimmerman into custody, Deputy Conery informed Mr. Zimmerman that this was his "third offense" for operating a motor vehicle while intoxicated. R35 at 50:11-18.

Once seated in the rear of the deputy's squad, Deputy Conery read the Informing the Accused form [hereinafter "ITAF"] to Mr. Zimmerman and asked him whether he would be willing to submit to an evidentiary chemical test of his breath. R35 at 35:10-14; 37:4-8. Mr. Zimmerman responded "No" to the deputy's question. R35 at 37:9-13. Mr. Zimmerman was then issued a Notice of Intent to Revoke Operating Privilege. R1.

Mr. Zimmerman requested a hearing on the lawfulness of his refusal, and a hearing was held on September 26, 2019, before the Circuit Court for Washington County, the Honorable James K. Muehlbauer presiding. R9; R35. Mr. Zimmerman raised the issues as described in the Statement of the Case, *supra*, and the circuit court ultimately found his refusal unreasonable and ordered his operating privilege revoked for a period of three years. R25; P-App. at 101.

STANDARD OF REVIEW ON APPEAL

The question presented to this Court concerns whether convictions for violations of §§ 940.09 & 940.25(1) which occurred prior to January 1, 1989 may permissibly be counted as penalty enhancers under §§ 346.65 & 343.307(1) in a prosecution for either operating a motor vehicle while intoxicated or for improperly refusing to submit to a chemical test. Questions relating to the application of statutory law to an undisputed set of facts are reviewed by this Court *de novo*. *Lands' End, Inc. v. City of Dodgeville*, 2014 WI App 71, ¶ 52, 354 Wis. 2d 623, 848 N.W.2d 904; *State v. Wilke*, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989).

STATEMENT OF CRITERIA TO SUPPORT PETITION FOR REVIEW UNDER WIS. STATS. § 809.62(1r)(a), (1r)(c)2., (1r)(c)3., & (1r)(d).

1. Section 809.62(1r)(a): This Case Presents a Real and Significant Question of Constitutional Law.

Review should be granted in the instant case because it implicates concepts of constitutional due process "notice." As more fully set forth below, Mr. Zimmerman proffers that there is a genuine ambiguity in the law with respect to which prior convictions for violations of §§ 940.09 & 940.25(1) ought to be counted as penalty enhancers in impaired driving cases. More specifically, a question arises as to whether *all* convictions within a person's "lifetime" ought to be counted or, alternatively, whether the counting of lifetime convictions begins with those convictions arising *after* January 1, 1989. *See* Section I.A. & B., *infra*. Since the law is not clear on this matter, a suspect at the time of his or her arrest cannot reasonably divine whether any prior violations of §§ 940.09 & 940.25(1) occurring before January 1, 1989 will be counted against them. In essence, the accused has not properly been placed on "notice" of what the law does or does not forbid in violation of both the United States and Wisconsin Constitutions.

Constitutional "notice" is rooted in the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304

(2007). Because deprivations of life or liberty may result from the failure to satisfy the concept of notice, the Supreme Court has held that the Fourteenth Amendment is implicated as well in circumstances where a legislature has failed to give notice to the public regarding a change in the law. *See generally, Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). In describing the due process requirement of "notice," the United States Supreme Court has observed:

> **No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.** All are entitled to be informed as to what the State commands or forbids.

Lanzetta v. New Jersey, 306 U.S. 451, 444 (1939)(emphasis added). If the foregoing holding is to have any meaning, the very fact that the Parties in this case are arguing over whether the legislature did or did not intend to count violations of §§ 940.01(1) & 940.25 which occurred before January 1, 1989 means that the Parties are "speculat[ing] as to the meaning of a penal statute." If this is so, then the notion of constitutional due process notice has not been satisfied, and this Court is obligated to act under § 809.62(1r)(a) because Mr. Zimmerman presents a "real and significant question" of constitutional law.

2. Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is a Novel One Which Will Have Statewide Impact.

There exist no decisions of this Court or the court of appeals which address the issue presented herein, namely: Whether the "lifetime" counting of convictions for violations of §§ 940.09 & 940.25(1) includes those violations which occurred prior to January 1, 1989? The issue presented is therefore, by definition, "novel" and satisfies the criterion set forth in § 809.62(1r)(c)2.. Similarly, there are no common law decisions on remotely tangential issues which provide guidance regarding how to approach the question presented, or establish a standard for determining the answer, or describe elements which should be considered when assessing "counting periods," *etc.*

Doubtless, a decision of this Court will have statewide impact as nearly 29,000 individuals per year are arrested in Wisconsin for operating while intoxicated violations according to Department of Transportation statistics.[3] These cases arise in all seventy-two Wisconsin counties, and a full thirty-three percent of the same are violations which are enhanced by some prior offense (albeit not necessarily a violation of either § 940.09 and/or § 940.25(1)). Clearly, § 809.62(1r)(c)2. is satisfied with respect to the issue presented having statewide impact.

3. Wis. Stat. § 809.62(1r)(c)2.: The Question Presented Is Likely to Recur Unless This Court Intervenes.

The question presented by Mr. Zimmerman is likely to recur based upon the statistics set forth above. With 29,000 operating while intoxicated arrests occurring annually, there undoubtedly will be those cases in which the accused has a prior violation for an offense under either § 940.09 and/or § 940.25(1) which occurred prior to January 1, 1989. Given that the issue, as framed by Mr. Zimmerman, implicates constitutional notions of due process, it is not one which defense counsel will likely "toss aside" in favor of raising other issues in a particular defendant's case. Rather, the gravity and pervasiveness of the issue compels its being raised in the defense of the relevant client lest counsel subject their representation to "ineffectiveness" scrutiny under *Strickland v. Washington*, 466 U.S. 668 (1984). Given the unpleasantness of *Strickland* inquiries, counsel will certainly err on the side of raising these issues unless this Court first intervenes in Mr. Zimmerman's case to answer the question presented definitively.

Unless this Court intervenes to establish a clear boundary for the counting of prior violations, courts throughout Wisconsin will interpose their own local interpretations which is not conducive to harmonizing the law as discussed below. Moreover, disparate treatment of similarly situated defendants will occur throughout the

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[3]*See* https://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx. The statistics for alcohol-related offenses cited herein are from 2015, the most recent year for which the DOT has the same compiled.

State as some circuit courts will exclude counting violations prior to January 1, 1989, while other courts will end up counting these violations. Because it is patently unfair for a defendant in the first type of jurisdiction to be treated so differently from a person in the latter type of jurisdiction, this Court should intervene to provide direction to courts throughout this State under § 809.62(1r)(c)2..

4. *Wis. Stat. § 809.62(1r)(d): The Court of Appeals Decision Is Seemingly in Conflict With* State ex rel. Sauk Cty. Dist. Attorney v. Gollmar, *32 Wis. 2d 406, 145 N.W.2d 670 (1966), and* Pattermann v. Whitewater, *32 Wis. 2d 350, 145 N.W.2d 705 (1966).*

Pursuant to § 809.62(1r)(d), justification for the granting of review may be made in those instances in which a decision of the court of appeals is in conflict with decisions of other courts of supervisory jurisdiction. While the Petitioner must concede that it may not appear at first blush that the court of appeals' decision in Mr. Zimmerman's case is in *direct* conflict with the decisions in cases such as *State ex rel. Sauk Cty. Dist. Attorney v. Gollmar*, 32 Wis. 2d 406, 145 N.W.2d 670 (1966), *Pattermann v. Whitewater*, 32 Wis. 2d 350, 145 N.W.2d 705 (1966), and *Kienbaum v. Haberny*, 273 Wis. 413, 78 N.W.2d 888 (1956), closer scrutiny does reveal that the court of appeals' holding may very well conflict with the doctrine established in these cases as more fully described in Section I.B., *infra*.

The *Gollmar*, *Patterman*, and *Kienbaum* decisions all establish that that repeals of law by *implication* are not favored when disposing of legal issues relating to statutory enactments. *Gollmar*, 32 Wis. 2d at 412. That is, common law decisions ought not "read language out" of a statute. In this case, as Mr. Zimmerman argues below, a decision which ignores the language set forth in § 9348(2f) of 1997 Wis. Act 237, effectively eviscerates the legislatively-imposed counting scheme for prior violations of §§ 940.09 & 940.25(1) or, put another way, "repeals the law by implication"—a disposition *not* favored under *Gollmar*, *Pattermann*, and *Kienbaum*. As such, it appears that, at some level, the granting of Mr. Zimmerman's Petition is appropriate under § 809.62(1r)(d).

ARGUMENT

I. CONVICTIONS FOR VIOLATIONS OF WIS. STAT. §§ 940.09(1) & 940.25(1) WHICH OCCURRED PRIOR TO JANUARY 1, 1989 WERE NOT INTENDED TO BE COUNTED AS PENALTY ENHANCERS IN OPERATING WHILE INTOXICATED RELATED CASES.

A. Framing the Issue Raised Herein.

The Wisconsin statute dealing with the counting of prior convictions under the penalty-enhancement provision applicable herein is § 346.65(2)(am). This section provides in pertinent part that violations which are counted under § 343.307(1)(a) shall include convictions for violations of §§ 940.25(1)(1) and 940.09(1) "in the person's lifetime." Wis. Stat. § 346.65(2)(am)3. (2019-20). The "lifetime" counting of convictions for violations of §§ 940.25(1)(a) and 940.09(1) was first introduced into the language of § 346.65(2)(am) by 1999 Wis. Act 109, §§ 43-46 [hereinafter "Act 109"].

It is Mr. Zimmerman's position that the notion of "lifetime" counting described in Act 109, however, did not actually include the accused's entire natural life. Earlier legislation, in the form of 1997 Wis. Act 237, provided a date before which violations under § 346.65(2)(am) *could not be counted*. *See* 1997 Wis. Act 237, § 9348(2f)[hereinafter "Act 237"]; P-App. at 110.

Section 9348(2f) of Act 237, entitled "Counting of Offenses," provided in pertinent part that "[t]he treatment of sections . . . 346.65(2)(am)(b), (c), (d) and (e) . . . of the statutes . . . **preclude[s] the counting offenses that occurred before January 1, 1989**, as prior convictions, suspensions or revocations." *Id.* (emphasis added). It should not be lost on this Court that § 9348(2f) of Act 237 *expressly* and *specifically* included affirmative language that the counting of offenses prior to January 1, 1989 **under § 346.65(2)(am)**—the statute at issue herein—was precluded.

As noted above, the subsequent Act 109 added language to the penalty provision of § 346.65(2)(am) which included "lifetime" counting of violations for §§ 940.09(1) & 940.25(1). Notably, however, Act 109 *never expressly changed* the rule regarding the counting of convictions for violations which occurred prior to January 1, 1989 as set forth in § 9348(2f) of Act 237. The notion set forth in § 9348(2f) remains unmolested by Act 109 and fully applicable herein. That is, the counting of alcohol-related driving offenses involving death or great bodily harm was to include offenses from the accused's entire "lifetime" *beginning with* those offense that occurred *after* January 1, 1989. This interpretation is the *only* interpretation of the law which leaves § 9348(2f) of Act 237 **and** the "lifetime counting" provision of the substantive penalty-enhancer statute both unmolested. Interpreting the "lifetime" penalty enhancer provision as the court of appeals' decision does "repeals § 9348(2f) by implication"—a resolution which is *not* favored.

B. The Language Precluding Counting of Offenses Which Occurred Prior to January 1, 1989 Was Never Amended or Redacted.

If the legislature made the effort and took the responsibility to clearly express in § 9348(2f) of Act 237 when the look-back period was to begin for counting penalty-enhancing offenses, then why would it not do the same thing in Act 109 if it intended there to be a change in the way prior felony offenses under §§ 940.09(1) & 940.25 were to be counted? What sense does it make for a legislature in one Act to very plainly state when a look-back period begins, but when changing that very period, *fail to express the change in the Act modifying the original period*? This is an inexplicable logical inconsistency which can only be resolved if one takes the approach that the subsequent Act was never intended to modify the original.

There is no enabling language in Act 109 which gives rise to an interpretation that suddenly the language in § 9348(2f) is to be disregarded. Mr. Zimmerman, however, can point directly to enabling language in the Act which he proffers as providing the correct interpretation of the law, namely § 9348(2f). Section 9348(2f) is unambiguous. Mr. Zimmerman posits that the change in the law under Act 109 was nothing more than a clarification that

violations of §§ 940.09(1) & 940.25 were never intended to be included in the ten-year "restart" rule expressed in § 346.65(2)(am)2.,[4] but rather, were to be counted for the person's lifetime *beginning with the date of January 1, 1989 expressly set forth in Act 237.*

The foregoing argument is consistent with the principle set forth in *State ex rel. Sauk Cty. Dist. Attorney v. Gollmar*, 32 Wis. 2d 406, 145 N.W.2d 670 (1966), and its predecessor cases which hold that repeals of law by implication *are not favored. Id.* at 412, citing *Pattermann v. Whitewater*, 32 Wis. 2d 350, 350, 145 N.W.2d 705 (1966).

Quoting *Kienbaum v. Haberny*, 273 Wis. 413, 78 N.W.2d 888 (1956), the *Gollmar* court stated that "'[t]he doctrine of implied repeal is not favored, and an earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together.'" *Gollmar*, 32 Wis. 2d at 413, quoting *Kienbaum*, 273 Wis. at 420. The requirement that the party moving to disregard a portion of a prior enactment establish *manifest inconsistency* ***and*** *repugnance* to the later act is indeed a very high burden and evidence of the strength of the *presumption* that the doctrine of implied repeal *is not favored.*

The *Kienbaum* court observed that when two acts of the legislature can stand together, they are not manifestly repugnant to one another. *Kienbaum*, 273 Wis. at 421. Such is the case between § 9348(2f) of 1997 Wis. Act 237—the provision of the law which excludes the counting of offenses which occurred prior to January 1, 1989—and the later Act 109 which created the "lifetime" counting of prior violations of §§ 940.09(1) & 940.25(1) in that Mr. Zimmerman has offered this Court an analysis of the law which does harm to neither Act, unlike the court of appeals' decision which, frankly,

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[4]This penalty provision provides that if an individual has one prior violation which would be counted under § 343.307(1), and that violation occurred more than ten years prior to the violation for which the individual is currently being prosecuted, it may not be counted as a penalty enhancer. Reference to this particular application of the penalty-enhancement rule, and its relevance to Mr. Zimmerman's position, is discussed in more detail in Section II., *infra.*

completely ignores this point of law. Nowhere within the four corners of the court of appeals' decision is there an examination of § 9348(2f) which describes, explains, or clarifies exactly how it can remain standing in light of the court's conclusion that the counting of offenses under §§ 940.09(1) & 940.25(1) ought to extend back *before* January 1, 1989.

Act 109 ***never expressly changed*** the rule regarding counting of convictions for violations which occurred prior to January 1, 1989. The absence of any express change to the "starting date" for the counting of prior convictions makes perfect sense if one considers that violations of §§ 940.09(1) & 940.25 were never intended to be included in the ten-year "restart" rule expressed in § 346.65(2)(am)2.,[5] but rather, were to be counted for the person's lifetime beginning with the date of January 1, 1989.

Because the foregoing interpretation does no harm to any provision of either Act 237 or Act 109, and furthermore, because the court of appeals failed to demonstrate any manifest inconsistency and repugnance by interpreting the law in this fashion, this Court should conclude that Mr. Zimmerman's interpretation of the law is the correct one and grant his Petition.

II. EVEN IF THIS COURT CONCLUDES THAT CONVICTIONS FOR VIOLATIONS OF §§ 940.09(1) & 940.25(1) WHICH OCCURRED PRIOR TO JANUARY 1, 1989 ARE TO BE COUNTED, AN AMBIGUITY EXISTS WHICH MUST BE RESOLVED IN FAVOR OF THE DEFENDANT UNDER THE RULE OF LENITY.

A. Mr. Zimmerman's Interpretation of the Law Is "Reasonably Possible."

There is an adage which is regularly drilled into the psyche of every first year law student which was generally popularized by the Philosopher of Law, Professor Chaïm Perelman, which states that

[5]Again, as a reminder, this penalty provision provides that if an individual has one prior violation which would be counted under § 343.307(1), and that violation occurred more than ten years prior to the violation for which the individual is currently being prosecuted, it may not be counted as a penalty enhancer.

when it comes to the interpretation of law, "reasonable minds will differ."[6] C. Perelman, *Justice*, at p.96 (Random House 1967). As Prof. Perelman observed, if two interpretations are "*reasonably possible*," an ambiguity exists in the law. *Id.* at p.94. Mr. Zimmerman proffers that his interpretation of whether violations for convictions which occurred prior to January 1, 1989 is "reasonably possible," and because it is, an ambiguity exists in the law. This is an especially significant conclusion because it means that the Rule of Lenity should be applied to Mr. Zimmerman's case.

Before addressing the law as it relates to the Rule of Lenity, Mr. Zimmerman will further demonstrate how the issue with respect to whether the counting of prior convictions for violations of §§ 940.09(1) & 940.25(1) after January 1, 1989 under §§ 343.307(1) & 346.65(2)(am) is clouded by uncertainty.

The first notable fact which gives rise to reasonable minds differing with respect to the counting of prior convictions is the fact that Act 109 never expressly amended, changed, or rescinded the language in § 9348(2f) of Act 237.

Second, if "lifetime" counting was to have a "look-back" period greater than that of other violations, the silence of the Legislative Reference Bureau's [hereinafter "LRB"] analysis of the change in the law speaks volumes. 1999 Wis. Act 109 arose out of 1999 Senate Bill 125 [hereinafter "SB 125"]. **The engrossed version of SB 125 contains no language or analysis whatsoever regarding any change the Wisconsin Legislature intended the counting of violations which occurred prior to January 1, 1989**. It is a well-settled canon of statutory construction that the LRB's analysis of a Bill is indicative of legislative intent. *State v. Freer*, 2010 WI App 9, ¶ 22, 323 Wis. 2d 29, 779 N.W.2d 12, citing *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 32, 295 Wis. 2d 1, 719 N.W.2d 408. Because counting convictions arising prior to January 1, 1989 is a *significant departure* from the longstanding manner in which they had previously been counted in Chapters 343 and 346, it would seem that the Legislature should have indicated it intended a different

[6]This is the general approximation expounded in law school of what Prof. Perelman was stating in his text and not his exact words.

interpretation of the term. The absence of a statement of intent in this regard should be interpreted as an intention on the part of the Legislature that the term be used as it has always been understood.

A third serious problem with the notion that the limiting language in Act 237 was simply abandoned is that if the period has changed between Act 237 and Act 109, where is the required due process notice to the public? Constitutional "notice" is rooted in the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2007). Because deprivations of life or liberty may result from the failure to satisfy the concept of notice, the Supreme Court has held that the Fourteenth Amendment is implicated in circumstances wherein a legislature has failed to give notice to the public regarding a change in the law. *See generally, Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

If due process is to have any meaning, the very fact that the Parties in this case are arguing over whether the legislature did or did not intend to count violations of §§ 940.01(1) & 940.25 which occurred before January 1, 1989 means that the Parties are "speculat[ing] as to the meaning of a penal statute." If this is so, then the notion of constitutional due process notice has not been satisfied, and the court of appeals was obligated to adopt the interpretation of the statute in which left Act 237 unchanged and unaffected.

Fourth, further evidence from the legislative history of Act 109 makes Mr. Zimmerman's point about the law being ambiguous even more certain (no pun intended). In a "Drafter's Note" which was part of the legislative history associated with Act 109, Attorney Robert Nelson, who was then Legal Counsel for the Wisconsin Department of Transportation, plainly and unambiguously inquires of SB 125's sponsors whether convictions for violations of §§ 940.09(1) & 940.25 are ***not*** to be counted if they "occurred before December 31, 1988 [*sic*] . . . ." P-App. at 111. Attorney Nelson further inquires of the legislators who drafted SB 125 whether that "[i]s . . . what is wanted," wondering whether "those [violations] that occurred" before January 1, 1989, should now be counted. *Id.* Not only does this question expressly acknowledge that even serious felony-related operating while intoxicated convictions occurring prior to January 1, 1989, were never intended to be counted, but more

importantly, since the legislature never expressly revoked its previous implementation language in § 9348(2f) of Act 237, the *only* conclusion which can be drawn is this: The counting period for violations of §§ 940.09(1) & 940.25 begins on January 1, 1989, and the ten-year exclusion rule should not apply to those violations regardless of when the individual is next charged with an operating while intoxicated-related offense. Put another way, by asking the legislature whether it "wanted" violations of §§ 940.09(1) & 940.25 to now count if they occurred before January 1, 1989, Attorney Nelson of the Legislative Reference Bureau recognized that this ***was***, at the time he drafted his Note, the current status of the law—violations for 940.09(1) & 940.25 prior to January 1, 1989, simply ***did not count***. The silence on the part of the legislature in Act 109 with respect to expressly changing the language in § 9348(2f) speaks volumes about its intentions since this issue was brought to the legislature's attention by Attorney Nelson.

Finally, the last item which gives rise to an ambiguity in the law which could cause "reasonable minds to differ" relies simply upon common sense. If the legislature took the time, effort, and responsibility to plainly express in § 9348(2f) of Act 237 when the look-back period was to begin for counting penalty-enhancing offenses, then why would it not do the same thing in Act 109 if it intended there to be a change in the way prior felony offenses under §§ 940.09(1) & 940.25 were to be counted? What sense does it make for a legislature in one Act to very clearly state when a look back period begins, but when changing that very period, *fail to express the change in the Act modifying the original period*? This is an inexplicable logical inconsistency which can only be resolved if one takes the approach that the subsequent Act was never intended to modify the original.

Mr. Zimmerman posits that his interpretation that the change in the law under Act 109 was nothing more than a clarification that violations of §§ 940.09(1) & 940.25 were never intended to be included in the ten-year "restart" rule, but rather, were to be counted for the person's lifetime *beginning with the date of January 1, 1989 expressly set forth in Act 237*, as the more logically consistent interpretation.

All of the foregoing factors demonstrate that it is perfectly *reasonable* for those implementing the law to disagree on precisely which violations of §§ 940.09(1) & 940.25(1) are to be counted. Because reasonable minds can differ as to what is counted versus what is not counted, the law in this matter becomes subject to the Rule of Lenity as discussed below.

B. Application of the Rule of Lenity.

In any case in which the penalties for the underlying offense are to be enhanced by prior offenses, it is the State which bears the burden of establishing the prior offenses as the basis for the imposition of enhanced penalties. *State v. Wideman*, 206 Wis. 2d 91, 94, 556 N.W.2d 737 (1996). Seeking to enhance a penalty, however, remains subject to the Rule of Lenity. It is well known that:

> The principle objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. The court must ascertain the legislature's intent from the language of the statute in relation to its context, scope, history, and the objective intended to be accomplished. Statutes relating to the same subject matter should be read together and harmonized when possible. **Furthermore, when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused.**

State v. Cole, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 663 N.W.2d 700 (emphasis added).

The Wisconsin Supreme Court expounded at length as to precisely how the Rule of Lenity is to be applied in *State v. Morris*, 108 Wis. 2d 282, 322 N.W.2d 264 (1982), when it observed:

> When a criminal statute is ambiguous and is not clarified by resort to legislative history, this court has applied the canon of construction that **penal statutes should be construed strictly against the party seeking to exact statutory penalties and in favor of the person on whom statutory penalties are sought to be imposed. As a corollary of this principle of construction, in case of doubt concerning the severity of the penalty prescribed by the statute, the court will favor a milder penalty over a harsher one.** We explained the public policy on which this canon of construction is premised in *State v. Wilson*, 77 Wis. 2d 15, 28, 252 N.W.2d 64 (1977), as follows:

> "The canon of strict construction is grounded on policy. Since it is within the power of the lawmakers, the burden lies with them to relieve the situation of all doubts. 3 *Sutherland on Statutory Construction*, sec. 59.03, p. 7 (3d ed. 1968-1973). And 'since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it.' *Id.* p.8."

Morris, 108 Wis. 2d 289-90 (emphasis added).

Applying the foregoing principles to the instant case yields but one, and only one, conclusion: Because reasonable minds can differ as to whether offenses for violations under §§ 940.09(1) & 940.25(1) which occurred prior to January 1, 1989 ought to be counted as penalty enhancers in drunk driving related prosecutions, the Rule of Lenity requires this Court to "favor a milder penalty over a harsher one." In this instance, that means that Mr. Zimmerman's license may not be revoked for three years, as the lower court did in believing him to be a "third offender."

CONCLUSION

Because offenses which occurred prior to January 1, 1989 were impermissibly counted as penalty enhancers in the instant case, and furthermore, because the court of appeals failed to consider that its "repeal of law by implication" ran contrary to the Rule of Law established in cases like *Gollmar*, Mr. Zimmerman respectfully requests that this Court grant his Petition for Review.

Dated this 2nd day of December, 2020.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By: _____

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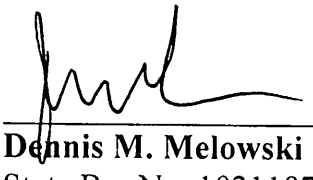
CERTIFICATION

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 5,495 words. I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains a (1) Table of Contents; (2) relevant trial and appellate court record entries; (3) the findings or opinion of the trial and appellate courts; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. 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. Finally, I hereby certify that I have submitted an electronic copy of this Petition, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic Petition is identical in content and format to the printed form of the brief. Additionally, this Petition and Appendix was deposited in the United States mail for delivery to the Clerk of the Wisconsin Supreme Court by first-class mail, or other class of mail that is at least as expeditious, on December 2, 2020. I further certify that the Petition and Appendix was correctly addressed and postage was pre-paid.

Dated this 2nd day of December, 2020.

MELOWSKI & ASSOCIATES, LLC



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