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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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Case No. 2021AP957-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

JAMES J. SOCHA,  
Defendant-Appellant.

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ON APPEAL FROM AN ORDER DENYING A MOTION  
FOR SENTENCE MODIFICATION AND AN ORDER  
DENYING A MOTION FOR RECONSIDERATION,  
ENTERED IN THE OZAUKEE COUNTY CIRCUIT  
COURT, THE HONORABLE PAUL V. MALLOY,  
PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## INTRODUCTION

James J. Socha pleaded no contest to operating a motor vehicle while under the influence of an intoxicant (OWI) in 2005. He admitted to having ten prior convictions, so the circuit court sentenced him for OWI as a fifth or subsequent offense.

Fifteen years later, Socha moved for sentence modification on the basis of an alleged new factor. He claimed that six of his ten convictions were declared void after he was sentenced in this case, and that another conviction should not have been counted because while the circuit court had accepted his guilty plea in that case, it had not yet sentenced him. Socha claimed that without those seven convictions, he would have been guilty of only a fourth offense in this case and could not have received the sentence the sentencing court imposed.<sup>1</sup>

The circuit court rejected Socha's motion, concluding that he failed to establish a new factor warranting sentence modification. Socha moved for reconsideration. The circuit court denied Socha's motion, noting that Socha did not raise a new issue, but merely rehashed the same claims the court had previously denied. Socha filed notice of appeal from the circuit court's order denying his motion for sentence modification and its order denying his motion for reconsideration.

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<sup>1</sup> Socha was sentenced under the 2004-05 statutes, under which the maximum penalty for OWI as a fourth offense was one year of imprisonment, while OWI as a fifth or subsequent offense was a Class H felony with a maximum sentence of six years of imprisonment

In an order issued July 23, 2021, this Court determined that it lacks jurisdiction to review the circuit court's order denying Socha's motion for sentence modification because Socha did not timely file notice of appeal from that order. And this Court ordered the parties to address, as the first issue in their briefs, whether the Court also lacks jurisdiction to review the circuit court's order denying Socha's motion for reconsideration. In his brief, Socha does not acknowledge, much less address, the jurisdictional issue. He has therefore forfeited any argument that this Court has jurisdiction. And this Court does not have jurisdiction because Socha's motion for reconsideration did not raise new issues but merely rehashed the ones Socha raised in his original motion. This Court should therefore dismiss Socha's appeal.

Even if this Court had jurisdiction over this appeal, Socha would not be entitled to relief. Socha has abandoned his claim that he is entitled to sentence modification based on a new factor. He now claims that he is entitled to commutation of his sentence under Wis. Stat. § 973.13. But he plainly is not. The circuit court imposed a valid sentence in accordance with the number of convictions Socha admitted. Socha is therefore not entitled to relief.

### **ISSUES PRESENTED**

1. Does this Court have jurisdiction to review the circuit court orders Socha is appealing?

The circuit court did not answer.

This Court should answer "no." This Court has determined that it lacks jurisdiction to review the circuit court's order denying Socha's motion for postconviction relief. And this Court also lacks jurisdiction to review the circuit court's order denying Socha's motion for reconsideration

because the motion did not raise new issues not raised in the original motion for sentence modification.

2. Is Socha entitled to sentence modification on the basis of a new factor?

The circuit court answered “no,” and denied Socha’s motion.

If this Court determines that it has jurisdiction, it should answer “no,” and affirm. Socha has not shown a new factor and has abandoned his new factor sentence modification claim.

3. Is Socha entitled to commutation of his sentence under Wis. Stat. § 973.13 because the court imposed a sentence in excess of that authorized by law?

The circuit court did not answer, but it recognized that Socha admitted to ten prior convictions and was properly sentenced for OWI as a fifth or subsequent offense.

If this Court determines that it has jurisdiction, it should answer “no,” and affirm. Socha admitted to ten prior convictions and the circuit court imposed a valid sentence for OWI as a fifth or subsequent offense. Section 973.13 therefore does not apply.

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties’ briefs, and the issues presented involves the

application of well-established principles to the facts presented.

### STATEMENT OF THE CASE AND FACTS

Socha pleaded no contest to operating a motor vehicle while under the influence of an intoxicant (OWI) in 2005. (R. 3:8.) The State alleged that Socha had ten prior convictions, and Socha admitted all ten. (R. 3:10–11.) The circuit court accepted Socha's plea and sentenced him for OWI as a fifth or subsequent OWI offense. (R. 3:14.) The court imposed six years of imprisonment, including three years of initial confinement and three years of extended supervision. (R. 3:24.)<sup>2</sup>

In 2020, Socha moved for sentence modification on the basis of an alleged new factor. (R. 192.) He claimed that six of his ten convictions were declared void after he was convicted and sentenced in this case. (R. 192:3–4.) And he claimed that another conviction should not have been counted as a prior conviction because he had been sentenced in that case at the time he was sentenced in this case. (R. 192:2.) Socha claimed that without those seven convictions, he would have been guilty of only a fourth offense in this case and could not have received the sentence the sentencing court imposed. (R. 192:5.)<sup>3</sup>

The circuit court rejected Socha's motion, concluding that he failed to establish a new factor warranting sentence modification. (R. 205.) Socha moved for reconsideration. (R. 209.) The circuit court denied Socha's motion (R. 212),

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<sup>2</sup> The court also sentenced Socha for operating a motor vehicle after revocation and felony bail jumping. (R. 3:24–25.)

<sup>3</sup> When Socha was sentenced, the maximum penalty for OWI as a fourth offense was one year of imprisonment, while OWI as a fifth or subsequent offense was a Class H felony with a maximum sentence of six years of imprisonment. Wis. Stat. §§346.65(2)(am)4., 5. (2005–06.)



noting that in the motion, Socha merely “rehash[ed] the same arguments and [took] umbrage at this Court’s decision” (R. 212:2).

Socha filed notice of appeal of the circuit court’s order denying his motion for sentence modification, and its order denying his motion for reconsideration. (R. 224.) In an order issued July 23, 2021, this Court determined that it lacks jurisdiction over the circuit court’s February 15, 2021 order denying Socha’s motion for sentence modification because Socha did not timely appeal that order. (R-App. 103.) And this Court ordered the parties to address as the first issue in their briefs whether this Court lacks jurisdiction over the circuit court’s March 15, 2021 order denying reconsideration. (R-App. 103.)

### STANDARD OF REVIEW

Whether an appellate court has jurisdiction over an order denying a motion for reconsideration because it raises new issues is a matter of law reviewed de novo. *State v. Edwards*, 2003 WI 68, ¶ 7, 262 Wis. 2d 448, 665 N.W.2d 136.

Whether facts presented constitute a new factor is a question of law, reviewed independently. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828. “The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court,” and is reviewed “for erroneous exercise of discretion.” *Id.*

## **ARGUMENT**

### **I. This Court lacks jurisdiction over this appeal.**

#### **A. This Court lacks jurisdiction over the circuit court's order denying Socha's motion for sentence modification.**

Socha filed notice of appeal of the circuit court's February 15, 2021 order denying his motion for sentence modification and its March 15, 2021 order denying his motion for reconsideration. (R. 224.) On July 23, 2021, this Court "ORDERED that this court lacks jurisdiction to review the February 15, 2021 order." (R-App. 103.) Socha did not seek review of this Court's order, and in his brief, he does not assert that this Court was somehow incorrect. He simply ignores that this court has already determined that it lacks jurisdiction over the circuit court's February 15, 2021 order denying his motion for sentence modification.

#### **B. This Court lacks jurisdiction over the circuit court's order denying Socha's motion for reconsideration.**

##### **1. Socha has forfeited any argument that this Court has jurisdiction over the circuit court's order denying his motion for reconsideration.**

In its July 23, 2021 order, this Court also questioned whether it has jurisdiction over the circuit court's March 15, 2021 order denying Socha's motion for reconsideration. This Court "ORDERED that the parties should address, as the first issue in their appellate briefs, whether this court has jurisdiction to review the March 15, 2021 reconsideration order." (R-App. 103.) In his brief, Socha does not address the jurisdiction issue. He simply ignores this Court's order. By not addressing the jurisdiction issue as ordered by this Court,

Socha has forfeited any argument that this Court has jurisdiction over the circuit court's March 15, 2021 order.

In *Poteete v. Wales*, 2020AP741, 2020 WL 6787586, (Wis. Ct. App. Nov. 19, 2020) (unpublished), this Court addressed a similar situation.<sup>4</sup> In *Poteete*, after the circuit court granted judgment, the appellants filed a motion for post-judgment relief. *Id.* ¶ 1. The circuit court denied the motion. *Id.* ¶ 2. The appellants filed notice of appeal after the deadline to appeal the initial judgment had passed, and the court “issued an order identifying the need for the parties to address appellate jurisdiction.” *Id.* ¶ 2. This Court questioned whether it had jurisdiction to hear an appeal from the post-judgment order, so it issued an order in which it “explained that the timing of the notice of appeal may deprive this court of jurisdiction to consider the appeal,” and “directed the parties to make the threshold issue of jurisdiction the first topic in their appellate briefing.” *Id.* “The [appellants] inexplicably failed to follow this order, but the [respondent] did follow it, submitting a facially valid argument that this court lacks jurisdiction.” *Id.* This Court concluded “that it is appropriate to deem the [appellants] to have forfeited their argument that this court has jurisdiction to address their appeal from the March 2020 order.” *Id.* ¶ 3.

This Court's reasoning in *Poteete* applies equally to this appeal. By simply ignoring this Court's order that the parties address whether the Court has jurisdiction over the circuit court's March 15, 2021 order, Socha has forfeited any argument that this Court has jurisdiction.

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<sup>4</sup> The State cites *Poteete* only for its persuasive value. See Wis. Stat. 809.23(3). The opinion is appended to this brief at R-App. 104–14.

**2. Socha's motion for reconsideration did not raise new issues.**

“No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered.” *Silverton Enters., Inc. v General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988) (citing *Marsh v. Milwaukee*, 104 Wis. 2d 44, 46, 310 N.W.2d 615 (1981); *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 26, 197 N.W.2d 752 (1972)). A party that moves for reconsideration and presents the same issues decided in the original motion is required to appeal the order denying the original motion. *Ver Hagen*, 55 Wis. 2d at 26.

In his motion for sentence modification (new factor), Socha sought sentence modification on the ground that seven of the ten convictions used to enhance his sentence for OWI in this case and make it a fifth or subsequent offense are invalid. (R. 192.) He claimed that six of the convictions have been invalidated, and were “void ab initio,” and that another could not properly have been used for sentence enhancement because he had not yet been sentenced in that case. (R. 192:2–5.) Socha claimed that these “new factors” entitled him to sentencing for a fourth offense rather than a fifth or subsequent offense. (R. 192:5.) After a hearing (R. 204), the circuit court rejected Socha's motion in a written decision and order (R. 205).

Socha then filed a “motion for reconsideration of court order denying defendant's motion for sentence modification (new factor).” (R. 209.) Socha asserted that when the court denied his motion for resentencing, the court failed to consider Wis. Stat. § 973.13, *State v. Flowers*, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998), and *State v. Matke*, 2005 WI App 4, ¶ 12, 278 Wis. 2d 403, 692 N.W.2d 265, and improperly addressed laches and strategic error. (R. 209:2–8.) But those were not new issues—only arguments that the circuit court

erred in failing to grant his original motion for sentence modification (new factor). In seeking reconsideration, Socha “argue[d] hereupon that he did in-fact meet the two-prong New Factor test, that the imposed sentence was excessive by five years imprisonment, and that the Court erroneously exercised its discretion in denying the motion sub-judice:” (R. 209:1–2.)

In its decision denying Socha’s motion for reconsideration, the circuit court recognized that Socha did not raise new issues in his motion for reconsideration: “What [Socha] does is rehash the same arguments and take umbrage at this Court’s decision,” denying his motion for sentence modification. (R. 212:2.) The circuit court was correct. Socha’s motion for reconsideration did not raise new issues.

The issue Socha raised when seeking reconsideration was the same issue he raised in his original motion—those new factors warrant modification of his sentence to the maximum sentence for OWI as a fourth offense rather than for OWI as a fifth or subsequent offense. (R. 209:9–12.) Rephrasing or re-theorizing a claim does not make it a new claim. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Because Socha’s motion for reconsideration did not raise new issues, and he did not timely file notice of appeal of the circuit court’s order denying his motion for sentence modification, this Court lacks jurisdiction over this appeal. *See Marsh*, 104 Wis. 2d at 49 (holding that the court of appeal lacks jurisdiction over an appeal of an order denying a motion for reconsideration that does not raise new issues). This Court should therefore dismiss Socha’s appeal.

**II. The circuit court properly denied Socha's claim that a new factor warrants sentence modification.**

**A. A defendant must overcome a high hurdle to get sentence modification.**

A circuit court may modify a defendant's sentence upon a showing of a new factor. *Harbor*, 333 Wis. 2d 53, ¶ 35. A new factor consists of facts “highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.* ¶ 40 (quoting *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

A defendant seeking sentence modification “must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence.” *Harbor*, 333 Wis. 2d 53, ¶ 38. A defendant who asserts that a new factor warrants sentence modification “has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *Id.* ¶ 36 (citing *State v. Franklin*, 148 Wis. 2d 1, 8–9, 434 N.W.2d 609 (1989)).

**B. Socha has not shown a new factor that warrants resentencing.**

When he pleaded no contest in this case, Socha admitted to having ten prior convictions. (R. 3:10–11.) He was sentenced for OWI as a fifth or subsequent offense. (R. 3:24.) In his motion for sentence modification (new factor), Socha argued that a new factor warrants sentence modification. (R. 192.) Specifically, Socha argued that the new factor is that seven of his ten convictions should not have been counted to enhance the sentence for his current OWI conviction, and he should have been sentenced for a fourth offense rather than a

fifth or subsequent offense. (R. 192:3–4.) The circuit court denied Socha’s motion, concluding that he did not show a new factor that warrants sentence modification. (R. 205.)

On appeal, Socha does not argue that a new factor warrants sentence modification. He has abandoned his new factor claim entirely. In fact, he asserts that the circuit court “erred when it misconstrued Mr. Socha’s motion as cognizable under new factor analysis.” (Socha’s Br. 18.) He does not explain how, exactly, the circuit court erred when it construed his motion for sentence modification (new factor) as a sentence for modification on the basis of a new factor.<sup>5</sup>

Since Socha no longer claims that a new factor warranting sentence modification, this Court should affirm the circuit court order denying his claim for sentence modification (new factor).

### **III. Socha is not entitled to commutation of his sentence under Wis. Stat. § 973.13.**

On appeal, Socha argues that the circuit court should have construed his motion for sentence modification (new factor) as a motion for commutation of his sentence under Wis. Stat. § 973.13. (Socha’s Br. 19.) He claims that he is entitled under Wis. Stat. § 973.13 to have his sentence for OWI as a fifth or subsequent offense commuted to the maximum sentence for OWI as a fourth offense. (Socha’s Br. 23–24.)

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<sup>5</sup> Socha asserts that the circuit court should have construed his motion for sentence modification (new factor) as a motion for commutation of his sentence under Wis. Stat. § 973.13 because he is pro se. (Socha’s Br. 19.) However, in his motion for sentence modification (new factor), Socha insisted that his motion not be construed as a motion for resentencing (R. 192:1 n.1), even though he is claiming that his sentence was invalid.

Section 973.13 provides that “In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.” Socha is not entitled to relief under Wis. Stat. § 973.13 because the sentencing court did not impose a sentence in excess of that authorized by law.

“Section 973.13, as it pertains to sentencing a repeat offender, applies only when the State fails to prove the prior conviction necessary to establish the habitual criminal status (by proof or by admission) or when the penalty given is longer than permitted by law for a repeater.” *State v. Mikulance*, 2006 WI App 69, ¶ 18, 291 Wis. 2d 494, 713 N.W.2d 160 (citing *Flowers*, 221 Wis. 2d at 28–29; *State v. Spaeth*, 206 Wis. 2d 135, 155–56, 556 N.W.2d 728 (1996)).

Wisconsin Stat. § 973.13 simply does not apply in this case. First, the State did not fail to prove Socha’s prior convictions. A defendant’s admission to prior convictions is sufficient to prove them for purposes of sentence enhancement. *State v. Loayza*, 2021 WI 11, ¶ 38, 395 Wis. 2d 521, 954 N.W.2d 358. Here, at sentencing, the circuit court listed ten convictions, including all the convictions Socha now claims are invalid, and asked Socha “You agree you have all of those prior convictions?” (R. 3:10–11.) Socha answered “Yes, sir.” (R. 3:11.)

Second, the circuit court did not impose a penalty longer than permitted by law. The maximum sentence for an OWI as a fifth or subsequent offense was six years of imprisonment. Wis. Stat. §§ 346.65(2)(am)5., 939.50(3)(h). After Socha admitted to ten prior offenses, the court sentenced him to six years of imprisonment, including three years of initial confinement and three years of extended supervision. (R. 3:24.) The sentence did not exceed the maximum sentence for a fifth or subsequent offense. Because Socha admitted to



ten prior convictions, and the court imposed a valid sentence for OWI as a fifth or subsequent offense, Wis. Stat. § 973.13 does not apply.

### CONCLUSION

This Court should dismiss this appeal because it lacks jurisdiction. Alternatively, it should affirm the circuit court's order denying Socha's motion for sentence modification (new factor).

Dated: December 1, 2021.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3082 words.

Dated this 1st day of December 2021.

Electronically signed by:

Michael C. Sanders

MICHAEL C. SANDERS

Assistant Attorney General

### **CERTIFICATE OF EFILE/SERVICE**

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on December 1, 2021, to:

James J. Socha #446226  
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Dated this 1st day of December 2021.

Electronically signed by:

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