STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 21A001111

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

AMAN D. SINGH,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH 5, THE HONORABLE NICHOLAS J MCNAMARA, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication. This court may decide this case by applying well-established legal principles to the facts presented.

STATEMENT OF THE FACTS

As respondent, the State exercises its option not to present a full statement of the case. *See* Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

Singh was convicted of an Implied Consent violation (refusal) in the State of Illinois on September 12, 2001. (R. 136, p. 1, 7). On May 13, 2005, Singh was convicted of Operating While under Influence (2nd) in Dane County Circuit Court Case No. 2004CT882. (R. 151). Singh did not file a direct appeal with the circuit court, but did petition the circuit court for a writ of *coram nobis* on February 16, 2015. (R. 153, p. 1). Dane County Circuit Court Judge Stephen Ehlke denied Singh's petition on March 9, 2015 and this court

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2017-18 edition.

affirmed the denial of relief. *State v. Singh*, No. 2015AP850-CR, unpublished slip op. (WI App Jan. 7, 2016).

Mr. Singh's filed a subsequent request for relief in Appeal #17AP1609. He argued that the judgement of conviction for this second OWI should be vacated because this prosecution violated the prohibition against double jeopardy in § 345.52. The sole statute under which Mr. Singh claimed relief was § 973.13. When the State failed to respond to Mr. Singh's appeal, this court held that the State abandoned its position on Mr. Singh's appeal and therefore summarily reversed Judge Ehlke's decision. This court held that Mr. Singh was entitled to the one remedy allowed under § 973.13: "voiding of any penalty in excess of the statutory maximum." This court stated that § 973.13 "does not provide for vacation of the conviction or relief from the valid portion of the sentence." This court remanded this matter to the circuit court for further proceedings consistent with its opinion. *State* v. *Singh*, No. 2017AP1609, unpublished slip op. ¶12 (WI App July 26, 2018).

On remand, Dane County Circuit Court Judge Nicholas McNamara held a hearing on September 21, 2018. The circuit court made clear to Mr. Singh that § 973.13 does not permit vacation of his conviction, which is consistent with this court's holding. Judge McNamara signed an order stating any

excessive penalty was void, as that is the only remedy allowed Mr. Singh under § 973.13.

On April 20, 2020, this court affirmed Judge McNamara's decision, finding that the lower court properly denied Mr. Singh's request for further relief in addition to his motion for reconsideration. Specifically, this court held that the intent of its decision granting Mr. Singh a single remedy of "voiding any penalty in excess of the statutory maximum" in *State v. Singh,* No. 2017AP1609, unpublished slip op. ¶11 (WI App July 26, 2018) did not permit "vacation of the judgment of conviction and to a refund of the fine, or, alternatively, to withdrawal of his plea, based on either a correct reading of this court's appellate mandate or a recently issued Wisconsin Supreme Court decision." *State v. Singh,* No. 2018AP2412, unpublished slip op. ¶3, 4 (WI App April 20, 2020).

On June 3, 2020, Mr. Singh filed the present motions. The appellant petitioned the circuit court for a writ of *coram nobis* based on a supposed "factual error" by the circuit and appellate courts. (R. 124). Mr. Singh simultaneously filed a motion and seeking another writ of *coram nobis* on the grounds that it is not constitutional, under § 973.13, to

enhance an OWI sentence due to a prior chemical blood test refusal. (R. 124).

On January 20, 2021, the circuit court, through Judge McNamara, orally denied the Mr. Singh's motions The circuit court held that Mr. Singh failed to raise any new issues that the Court of Appeals did not already adjudicate. Judge McNamara pointed out that Mr. Singh was again attempting to raise issues he failed to raise in his previous appeals and were therefore untimely. The judge emphatically denied the motions for *coram nobis*, stating that there was no equitable principle upon which the court could grant a remedy in law that did not exist until 16 years after Mr. Singh's 2001 conviction. (R. 182).

On May 6, 2021, Mr. Singh filed a motion to reconsider after the recent Wisconsin Supreme Court decision *State v. Forrett*, 2021 WI App 31, 398 Wis.2d 371 , 961 N.W.2d 702. (R. 164). The court denied Mr. Singh's motion to reconsider on June 22, 2021. (R. 168).

Mr. Singh now appeals the circuit court's decision.

ARGUMENT

III. THE TRIAL PROPERLY GRANTED MR. SINGH THE LEGALLY PERMISSABLE RELIEF UNDER § 973.13.

Mr. Singh is not entitled to any further relief under § 973.13. As this court has repeatedly found, he is not entitled to a vacation of his 2001 conviction.

A. This Court Did Not Already Grant This Relief.

Given the aforementioned, it is absurd for Mr. Singh to claim that the Appellate Court already commuted or vacated his 2001 OWI first offense sentence. To draw this conclusion would require a willful ignoring of the Appellate Court's repeated past decisions.

B. Mr. Singh Forfeited His Right to Argue that Blood Test Refusals Cannot Be Used as a Prior Offense When Counting OWIs.

In its April 2020 decision, this court held that because Mr. Singh failed to raise these issues in a timely manner, he forfeited the right to subsequently raise the issue that that an administrative suspension for a refusal cannot be considered a prior offense for counting succeeding OWIs because of the decisions in *State v. Dalton, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, and Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).* *State v. Singh*, 2020 WI App 31, ¶ 4, 392 Wis. 2d 382, 944 N.W.2d 356. Judge Kloppenburg uphold the

circuit court's decision denying Mr. Singh's request to vacate the judgement of conviction and found that "Singh forfeited the argument he asserts is based on the recent Wisconsin Supreme Court decision."

The Appeals Court further stated that they "generally do not consider issues raised for the first time on appeal." *Id.* at ¶27. This is a longstanding principle that has been confirmed and codified by the Wisconsin Supreme Court. Often described as the "waiver rule," issues that are not originally raised before the trial court are deemed waived. As the state Supreme Court has stated, "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730. Because "Singh did not clearly raise such a constitutional challenge to the statutory scheme in the circuit court," his right to raise this argument was effectively waived. *Singh* at ¶ 27. Citing *Huebner*, the Appeals Court explained that it declined to consider "new arguments or theories because doing so would 'seriously undermine the incentives the parties now have to apprise circuit courts of specific arguments in a timely

fashion so that judicial resources are used efficiently and the process is fair to the opposing party.'" *Id.*

Yet, that is exactly what Mr. Singh attempts to do in the current appeal when he cites the recent *Forrett* decision. Even as this court considered *Forrett*, the Court of Appeals clarified their denial of Mr. Singh's Writ of Mandamus on December 10, 2020. In this filing, the court confirmed that that Mr. Singh forfeited his argument under *Dalton* and *Birchfield* that he could not be charged with an OWI second offense. In response to Mr. Singh's request for reconsideration, the Appeals Court further confirmed that Mr. Singh forfeited this argument. The Court lost confirmed that Mr. Singh lost his appeal and he continues to "reraise an issue that this court already concluded was forfeited."

Mr. Singh now raises before the Appeals Court, for the first time, an argument under *Forrett*. His claim appears to be grounded in a conclusory statement that the ruling in *Forrett* is retroactive because it is a substantive ruling and not a procedural ruling. In its *Forrett* decision, this court never stated that it was making a substantive ruling or that this decision applied retroactively to situations such as that of Mr. Singh.

On the other hand, the Appeals Court in *Forrett* did confirm that its decision was an extension and arose out of its decisions in *Dalton* and *Birchfield*. *Forrett* at ¶ 19. As this court has found, Mr. Singh cannot argue that he raises an issue for the first time because it was not available to him when he drafted his previous appeal because "the 2016 United States Supreme Court decision in *Birchfield*" from which the Court concluded Mr. Singh's argument arose, "was issued *before* Singh's motion to vacate judgment was filed in the circuit court in 2017." *Singh* at ¶ 27.

Despite the opportunity to do so, Mr. Singh failed to raise this argument in his 2017 appeal, instead raising it for the first time before the Appeals Court as it considered other issues. Mr. Singh failed to raise this argument in a timely fashion and is asking the circuit court to now undermine the incentives parties have to advance arguments in a timely manner meant to ensure judicial efficiency and fairness to all parties. Mr. Singh waived his right to raise this argument. *See State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994) (holding that public policy precludes a defendant from bringing successive postconviction motions unless a compelling reason can be shown why the issue was not

raised earlier, and that this principle is necessary to promote finality in criminal case litigation.)

C. *Birchfield*, *Dalton*, and by extension, *Forrett*, Are Not Substantive or Retroactive.

Mr. Singh is incorrect that the holding in these cases is substantive and retroactive and applies to his case. In fact, this court drew this very conclusion in 2019 unpublished opinion *Matter of Hammersley*, 2019 WI App 48, 388 Wis. 2d 476, 934 N.W.2d 578. This court considered an appeal brought by Robert Hammersley, who argued that that the United States Supreme Court's decision in *Birchfield* "held that refusal proceedings based upon the refusal to submit to a warrantless blood draw are unconstitutional because such blood draw demands violate the Fourth Amendment to the United States Constitution." *Id. at* ¶6. Similar to the Mr. Singh's situation, appellant Hammersley claimed that *Birchfield* rendered his "refusal revocation [order] invalid," and that he is "entitled to relief from this void portion of the Judgment." *Id.* In response to Hammersley's motion, which was brought in April 2018 (about twenty-three years after his 1995 conviction), the circuit court found that is motion was moot. The circuit court explained that "*Birchfield* 'has no effect on the circumstances of [his] case, some twenty-three years ago.'" *Id.* at ¶7.

In *Hammersley*, the Appeals Court held that the appellant was mistaken that the *Birchfield* ruling clearly and without exception constituted a "substantive rule that must be applied retroactively." *Id.* at ¶ 10. As the Appeals Court stated, new constitutional rules apply only to "similar cases pending on direct review." *Id.* at ¶ 12. Citing *State v. Dearborn*, 2010 WI 84, ¶31, 327 Wis. 2d 252, 786 N.W.2d 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987)). Additionally, regarding "cases involving the Fourth Amendment, the Supreme Court opined that a decision 'construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.'" *Id.* (quoting *United States v. Johnson*, 457 U.S. 537, 562 (1982)).

Even though appellant Hammersley had been actively filing appeals for years, the Appeals Court found that Hammersley's 1995 case was final and no longer pending on direct review nor was it pending at the time *Birchfield* was decided. Similarly, Mr. Singh's case was closed in 2004 and it has been many years since his case was pending on direct review. It is further indisputable that Mr. Singh's case was not pending on direct review at the time of the *Birchfield* decision in 2016. In fact, despite Mr. Singh's failure to

raise it at the time of his initial 2017 appeal, the *Birchfield* decision had already been decided.

IV. THE TRIAL PROPERLY DENIED MR. SINGH A WRIT OF *CORAM NOBIS*.

Coram nobis "is a common law remedy which empowers the trial court to correct its own record." *State v. Heimermann*, 205 Wis. 2d 376, 381-82, 556 N.W.2d 756 (Ct. App. 1996) (citing *Jessen v. State*, 95 Wis. 2d 207, 212, 213-14, 290 N.W.2d 685 (1980)); *see also Houston v. State*, 7 Wis. 2d 348, 96 N.W.2d 343 (1959). It is an "extraordinary remedy" meant to be granted "only under circumstances compelling such action to achieve justice," *United States v. Morgan*, 346 U.S. 502, 511 (1954), and circuit courts are to "exercise[ ] . . . the utmost caution and care" when considering it. *Ernst v. State*, 181 Wis. 155, 158, 193 N.W. 978 (1923); *see also State v. Kanieski*, 30 Wis. 2d 573, 576, 141 N.W.2d 196 (1966); *State v. Dingman*, 239 Wis. 188, 193, 300 N.W. 244 (1941); Albert F. Neumann, *Comments, Criminal Law - Writ of Error Coram Nobis*, 11 Wis. L. Rev. 248, 252 (1935-36). It is limited to the rare case where a defendant can show "the existence of an error of fact which was unknown at the time of trial and which is of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment." *Jessen*, 95

Wis. 2d at 214. The writ is not to correct errors of law or of fact appearing on the record since such errors are traditionally corrected by appeals and writs of error. *See id.* (citations omitted). On an application for a writ of error coram nobis the merits of the original controversy are not in issue.

A *coram nobis* petitioner must pass over "two hurdles" to obtain *coram nobis* relief, *Heimermann*, 205 Wis. 2d at 384:

> First, he or she must establish that no other remedy is available. What this means for criminal defendants is that they must not be in custody, because if they are, § 974.06, Stats., as an example, provides them a remedy. Second, the factual error that the petitioner wishes to correct must be crucial to the ultimate judgment *and* the factual finding to which the alleged factual error is directed must not have been previously visited or "passed on" by the trial court.
>
> *Id.*

It may be true that Mr. Singh is without another remedy at law because he has long since served his sentence and passed the time to appeal the conviction he now wishes to, once again, challenge. Nonetheless, he is unable to satisfy the second requirement for *coram nobis* relief because the

error he complains of is not a factual error. Rather, it is a constitutional, and thus, legal issue. *See State v. Jacobs*, 186 Wis. 2d 219, 223, 519 N.W.2d 746, 748 (Ct. App. 1994) (citing *State v. Turley*, 128 Wis. 2d 39, 47, 381 N.W.2d 309, 313 (1986) and *State v. Thierfelder*, 174 Wis. 2d 213, 218, 495 N.W.2d 669, 672 (1993)). Because Mr. Singh's double jeopardy claim presents a legal issue, it does not fall within the scope of *coram nobis*. *See State ex. Rel. Patel v. State*, 2012 WI App 117, ¶ 26, 344 Wis. 2d 405, 824 N.W.2d 862 (citation omitted);1 *see Jessen*, 95 Wis. 2d at 214; *see also Kanieski*, 30 Wis. 2d 573.

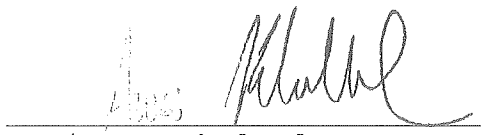
Mr. Singh fails to assert any actual factual errors in the record. Rather, Mr. Singh states that his request for *coram nobis* rests entirely on this court accepting his argument under his Motion to Dismiss the Repeater Allegations that this court cannot consider his 2001 Illinois Implied Consent conviction: "For reasons explained above in the Motion To Dismiss The Repeater Allegation, blood test refusals cannot count as prior offenses for sentence enhancement purposes. Therefore, if this factual question, what kind of chemical test did Singh refuse, is decided in Singh's favor, the criteria for a writ of coram nobis will be met. There would be no factual basis for a criminal OWI

conviction." Mr. Singh's argument appears to rely on a belief that this court will conclude there was a factual error if in concluding Mr. Singh had a prior offense OWI for counting purposes if it accepts his argument that the Dalton and Birchfield cases preclude him from being convicted of his 2001 Illinois conviction. He fails.

Additionally, the determination of whether to grant a writ of *coram nobis* is a discretionary one that rests with the circuit court. *Jessen*, 95 Wis. 2d at 213. The Court of Appeals has previously held that it will not reverse such determinations unless a circuit court erroneously exercised its discretion. *See Heimermann*, 205 Wis. 2d at 386-87. While Mr. Singh attempts to provide new reasons why he is deserving of a writ of *coram nobis*, he fails to offer any abuse of discretion by the circuit court or why this court should overrule the lower court's discretion.

CONCLUSION

The State asks this court to uphold Judge McNamara's rulings, as they are expressly consistent with this court's prior holdings and the relevant case law.



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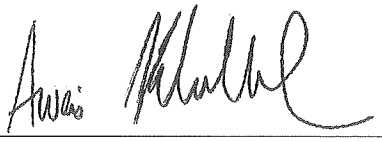
CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 21 pages.

Dated: January 3, 2022.

Signed,



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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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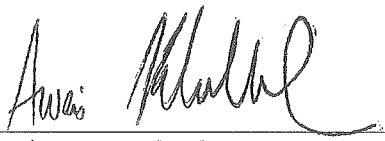

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