STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2021AP957-CR

STATE OF WISCONSIN,

Plaintiff-Respondant,

v.

JAMES J. SOCHA,

Defendant-Appellant.

ON APPEAL FROM AN AMENDED JUDGMENT OF CONVICTION AND TWO DECISIONS AND ORDERS DENYING POSTCONVICTION RELIEF ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JOSEPH D. MCCORMACK AND HONORABLE PAUL V. MALLOY PRESIDING

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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I. THIS COURT MAINTAINS JURISDICTION OVER THE CIRCUIT COURT'S DECISION DENYING SENTENCE MODIFICATION AND ITS SUBSEQUENT DECISION DENYING RECONSIDERATION

After Notice of Appeal was filed in this action the Court issued an order on July 23, 2021 declaring that it did not have jurisdiction to hear the circuit court's decision of February 15, 2021 denying sentence modification, as it was not timely appealed. The Court then questioned whether it had jurisdiction over the March 15, 2021 decision of the circuit court denying reconsideration, because the preceding decision was not reviewable. The Court ordered the parties to address as the first issue in their briefs, whether it has jurisdiction over the circuit court's decision denying the reconsideration motion.

On August 4, 2021, a "Motion for Reconsideration/Reinstatement of the Court's Jurisdiction" was filed by Mr. Socha. The motion sought reinstatement of the Court's jurisdiction over the February 15, 2021 decision of the circuit court denying sentence modification. An order of the Court was issued on August 9, 2021 granting reconsideration of the appellant's motion and reinstating its jurisdiction over the circuit court's decision denying sentence modification. The order also confirmed this Court's jurisdiction of the circuit court's order denying reconsideration; and ordered that its previous order of July 23, 2021 was vacated. (Reply App. 100).

The State's first argument in its brief erroneously claims that the Court lacks jurisdiction over this appeal and the circuit court's orders denying sentence modification and reconsideration. The State further contends, incorrectly, that Mr. Socha did not seek review of the Court's July 23, 2021 order; that he has ignored the Court's order to brief the jurisdictional issue; and has also forfeited his appeal. (State's Br. 10-11). The State's argument obviously carries no weight, as the Court's order of August 9, 2021 reinstated its jurisdiction and vacated its order of July 23, 2021. Therefore, the appellant was not required to brief the jurisdictional issue, and has not forfeited his appeal.

Furthermore, the State argues that "[b]ecause Socha's motion for reconsideration did not raise new issues, and 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." (State's Br. 12-13). Again, the State's claim here is not supported by the record or applicable law. The Court's August 9, 2021 order reinstated and confirmed jurisdiction over both circuit court orders appealed from.

Mr. Socha's reconsideration motion raised new arguments, and shows that the circuit court erroneously exercised its discretion when deciding his sen-

tence modification motion. The court's March 15, 2021 decision states that for the movant to prevail on a motion for reconsideration he must present either newly discovered evidence or establish a manifest error, and cites **Oto v. Metropolitan Life Ins. Co.**, 224 F.3d 601 (7th Cir. 2000), cited with approval, **Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons Ltd.**, 2004 WI App 129, p 44, 275 Wis.397, 685 N.W.2d 853 (2004)., "in the context of a motion for reconsideration 'manifest error' is defined as a wholesale disregard, misapplication, or failure to recognize controlling precedent." Id. at p.5-6. After citing the aforesaid, the court found that "Socha fails to establish a manifest error or newly discovered evidence." Id. (151:1-2).

The circuit court's finding that the appellant's reconsideration motion did not show a manifiest error is contrary to what the record reflects. Mr. Socha's reconsideration motion pointed to unequivocal manifest errors by the court when deciding his motion. Examples include 1) the court ignoring "controlling precedent" concerning the invalidity of an OWI offense alleged in the State's complaint that was not eligible for penalty enhancement; 2) "misapplication" of law when failing to conduct a review of an excessive sentence invoked under Wis. Stat. § 973.13; and 3) exhibiting a "wholesale disregard" for a bright-line rule of our supreme court which entitles the appellant to seek relief because he has had prior convictions vacated post-sentencing, which were used to enhance his sentence.

This Court has full authority and jurisdiction to review both the circuit court's decision of February 15, 2021 denying sentence modification and its decision of March 15, 2021 denying reconsideration.

II. THE CIRCUIT COURT ERRED IN NOT RECOGNIZING THAT WIS. STAT. SEC. 973.13 AND STATE V. HAHN COMPEL POST-SENTENCING COMMUTATION OF THE REPEATER SENTENCE IN THIS CASE.

Mr. Socha presented pleadings in the circuit court and now on appeal which rely on Wis. Stat. § 973.13; this Court's opinion in **State v. Flowers**, 221 Wis.2d 20 (1989); and our supreme court's holding in **State v. Hahn**, 2000 WI 118. The aforesaid statute and cases control the outcome here, because they authoritatively sanction mandated relief from the excess and void portion of the enhanced sentence originally imposed in this case.

The circuit court and State did not address the applicability of **Hahn**, **Flowers**, nor § 973.13 Stats., though argued by Mr. Socha. On Appeal, the State abandons all arguments raised in the circuit court, claims that the above statute does not apply when prior convictions used to elevate penalties are not found to be invalid until after sentencing; and ignores and fails to brief the appellant's **Hahn** argument which presents a postconviction remedy that is a matter of first impression because it has not been previously argued and settled in a published Wisconsin opinion, but is well established law in other jurisdictions.

A significant narrowing of key elements involved in this appeal has occurred with the filing of the State's brief, wherein it has forfeited and/or

conceded multiple issues. 1) it has acknowledged that six of the ten prior convictions used to escalate the penalties here have been determined 'void ab initio;' 2) through omission, it has acquiesced to the fact that its 2nd amended complaint alleged a fictitious Milwaukee County OWI conviction that is not eligible for sentencing consideration; and 3) it has relinquished any argument against **Hahn** and other supporting authority found in the appellant's pleadings which show that the cases cited do support a post-sentencing cure for relief that a defendant is entitled to when faulty repeater sentences are imposed. See **Charolais Breeding Ranches Ltd. v. FPC Sec. Corp.**, 90 Wis.2d 97, 109 (1997). (Unrefuted arguments are deemed conceded).

The State's brief argues that Mr. Socha is entitled to no relief and hangs its hat on the assumption that all ten prior convictions alleged were in existance and valid when admitted, therefore, they all still attach today even though it has conceded the seven do not now exist. Also, that "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." (State's Br. 16). Without citing legal authority, the State attempts to circumvent § 973.13 Stats. mandate by inferring that it cannot be applied retroactively when void ab initio prior convictions are unknowingly admitted at sentencing and are not presented for relief until after the enhanced sentence erroneously founded on them is imposed.

Wisconsin law strongly opposes the State's position in its brief, and commands that all enhanced criminal penalties be based on prior convictions which "actually exist." When an enhanced sentence is found to be reliant on non-existant prior convictions previously used to escalate penalties beyond that permitted by statute, it is excessive, and claims for relief are governed by § 973.13. It simply makes no difference if the convictions that do not actually exist are made known to the court before or after sentencing.

> Excessive sentence, errors cured. **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.
>
> Section 973.13, Stats.
>
> Thus, given the significant liberty interest at stake and the demand that enhanced penalties be based upon prior convictions which actually exist, **all** sentences imposed in excess of their maximum term are void. And the legislature's decision to use the quantifer "any" in the opening clause "in any case" forcefully states that there are no exceptions to this rule...." It would raise the specter of a defendant being incarcerated for a term (possibly years) in excess of that prescribed by law simply because he or she failed to raise the issue earlier. Such a result is in direct conflict with the explicit language of § 973.13. The State is without authority to incarcerate individuals for a term longer than the maximum term authorized by law. Therefore, we conclude that the express statutory mandate in § 973.13 to alleviate all maximum penalties imposed in excess of that prescribed by law applies to faulty repeater sentences and is not "trumped" by a procedural rule or exclusion.

Flowers, supra, Id. at 29. (emphasis original).

Flowers is the precedent case supporting § 973.13 Stats. applicability when prior convictions used to enhance a subsequent sentence do not "actually exist," and "conclude[s] that the express statutory mandate in § 973.13 to alleviate **all** maximum penalties imposed in excess of that prescribed by law applies to faulty repeater sentences and is not "trumped" by a procedural rule or exclusion." Id. (emphasis added). The statute emphasizes that "all sentences imposed in excess of their maximum term are void. And the legislature's decision to use the quantifier "any" in the opening clause "in any case" forcefully states that there are no exceptions to this rule..." Id. (emphasis original).

Nowhere does § 973.13 Stats., Flowers, or any other germane law hold as contended by the State, that if a defendant admits to a prior conviction, he cannot later seek relief from an excessive sentence when the mistakenly admitted conviction is not known to be void or ineligible until after sentencing, nor that any infermity in this context requiring relief had to occur before a sentence was imposed. Contrarily, relevant law says the opposite when using the qualifiers "any" and "all" sentences in excess of a statutes maximum term are void as a matter of law and subject to commutation when based on prior convictions that do not "actually exist."

State v. Mikulance, 2006 WI APP 69, ¶18, is cited by the State as supporting that Mr. Socha does not raise a proper claim for sentence commutation. (States's Br. 16). "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 admission) or when the penalty is longer than permitted by law for a repeater." Id. (citations omitted, emphasis added).

Mikulance as cited above, favors Mr. Socha over the State. The former wording cited does not preclude this challenge because the State cannot possibly obtain a valid admission of prior convictions that do not "actually exist." And, under the latter wording above, § 973.13 Stats. is a proper claim and cure in this case, because "the penalty given is longer than permitted by law for a repeater," in light of the seven nonexistant convictions proven.

The State claims that because the appellant admitted the six convictions unknown to be void at the time, and the fictitious one in its complaint, it did not fail to prove that the convictions existed. The State pushes away the reality that seven of the ten prior convictions did not "actually exist" when admitted, as they have now been shown to be either void ab initio; originally reported to the DOT in error; or unlawfully recorded as a prior conviction in its 2nd amended criminal complaint. These were seven alleged prior convictions wrongly of record when admitted, none were sincerely valid, and no matter how much the circuit court and State pray they were legitimate, they were not.

When the circuit court took Mr. Socha's plea and read the ten alleged prior convictions from the State's complaint, it asked: You agree you have all those convictions?" "Yes sir" the appellant responded. (195:10-11). Admitting that a prior conviction is of record is certainly distinguishable from admitting it is valid and actually exists. At no time did Mr. Socha admit to any prior conviction of record actually being valid, only that they were of record.

As an Example, the last date read by the court was "February 17 [no year provided], Milwaukee County, state of Wisconsin," which is believed to be the offense alleged that was pending. In addition to its ineligibility as a prior conviction because it was not sentenced, there was also not a valid "admission" becuase no said year of conviction was read by the court, and February 17th could not possibly be a true conviction date for the Milwaukee County offense because it was not sentenced by May 17, 2005, the date of sentencing in this case.

Even if the Milwaukee matter was sentenced and a valid prior conviction, it still cannot be relied on because it is not a valid admission because of the inaccurate dates alleged in the complaint. "A complaint must specify the date or dates of conviction for which the defendant was convicted." State v. Bonds, 2006 WI 83, ¶30. Although the court read an alleged conviction of record from the complaint, it was not a 'valid' conviction because of the erroneous date and failure to state a year, therefore, Mr. Socha's "admission" can not possibly be binding; whether determined before or after sentencing is irrelevant.

In State v. Hanson, 2001 WI 70; the defendant was subject to a criminal conviction and enhanced sentence after entering a plea and admitting to five prior § 346 motor vehicle convictions for the same offense. The trial court accepted his plea and sentenced him as an Habitual Traffic Offender (HTO) based on that status and his conceded prior convictions. Id. at ¶17. Hanson appealed, and our supreme court ultimately concluded that despite his admissions to both the five prior convictions and his status as an HTO which did not exist, the court was to treat him as if the priors never existed, and his sentence was found to be "in excess of that authorized by law and invalid under Wis. Stat. § 973.13." Id. at ¶2. The fact that a prior conviction does not "actually exist" trumps any and all admissions thereof.

In Lee v. State of Florida, the defendant acquiesced to and pled no contest to charge which classified him as an habitual offender despite the fact that his prior record failed to support his enhanced sentence. The Florida court of appeals held:

> [I]f a defendant who has been sentenced as a habitual offender can prove that his prior offenses do not qualify him as a habitual offender, he will have established that his sentence is illegal.... A defendant cannot authorize the trial court to impose an illegal sentence.

Lee, 731 So.2d 71, 73, 24 Fla. Law W.D. 917 (1999).

Because the State has effectively conceded that seven of the ten prior convictions used to enhance the sentence in this case do not actually exist, the questions of law turn to how exactly the nonexistant convictions have compromised the enhanced sentence Mr. Socha received; his right to be free from excessive penalties; and the appropriate post-sentencing remedy available.

The appellant does not seek to avoid all consequences of his OWI conviction, rather, only to be relieved of the excessive portion of the sentence imposed as it is founded on seven of ten prior convictions which do not exist.

The available cure is found within § 973.13 Stats., which compels relief from sentences imposed in excess of that prescribed by law. The appellant believes that this appeal presents a matter of law which can be summarily decided in his favor based on the facts and record available to this Court, as § 973.13 Stats., is intended to be carried out "without further proceedings."

Should the Court decide that § 973.13 Stats. alone does not provide Mr. Socha access to relief from the portion of his sentence that is founded on non-existant prior convictions; he submits that our supreme court's opinion in Hahn and other state and federal authorities, in tandem with § 973.13 Stats., most certainly do provide the mechanism for relief here.

Though Hahn's relevance was presentend by the appellant in the circuit court and on appeal, both the court and State have ignored it. The State is clearly reluctant to now touch Hahn, though it is central to this appeal. It makes absolutely no attempt to argue against nor reference the decision throughout the entirety of its brief, which is telling, because it is presumably aware of Hahn's significance not only here, but to all defendant's state wide who successfully attack prior convictions used to increase their sentence, after it was imposed. The State is required to only seek lawful justice, to include penalties. Here, it acts with contempt when not acknowledging the import of Hahn's bright-line rule and its gravity in this case.

Hahn's bench created a "bright-line rule that applies to all cases." Id. at 2000 WI 118, ¶28.

> We therefore hold that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction.
>
> The court continued:
>
> Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence.

Id.

Several months later the supreme court decided State v. Peters, 2001 WI 74; and stated the following when referring to Hahn's passage above:

> That is, a defendant may directly rather than collaterally challange a prior conviction used to enhance a subsequent sentence, and if successful, apply to the court to have the enhanced sentence adjusted.

Id. at ¶16.

Our supreme court's above language is unambiguous and its wording plain. If Mr. Socha desired to challenge a prior conviction relied upon for an enhanced sentence in a subsequent prosecution on any ground other than the denial of the

right to a lawyer in the previous proceeding, he could pursue such a challenge under any remedy available by law in a forum other than that of the current prosecution where the State seeks to use the alleged prior conviction to obtain an enhanced sentence. When successful, he has the right to petition the circuit court for sentence commutation if applicable.

The appellant did exactly as instructed by the supreme court. His attorneys in Wisconsin and Ohio directly attacked six alleged prior OWI convictions that were used to enhance the sentence in this case in their original forums using lawful means available and was successful in all six attacks. He then applied to have his sentence adjusted under Hahn and § 973.13 Stats., by showing that six convictions were determined void ab initio and removed from his drivers record, and that another alleged by the State in its complaint was invalid as well. The circuit court denied relief, though he did as instructed.

If § 973.13 Stats. is not a stand alone postconviction mechanism, and the compelled procedural cure here, it certainly should be in conjunction with Hahn. Hahn would then be the vehicle to get back into the circuit court after successfully having one or more prior convictions overturned that were relied on for enhanced penalties. The next logical progression would be for the court to determine precisely how many penalty enhancing convictions in the established record "actually exist," and if found to not be enough to sustain the current sentence, it should be determined in excess of that prescribed by statute as a matter of law, the excess portion declared void, and commuted under § 973.13 Stats. to the maximum term available by law.

As set forth in Mr. Socha's brief-in-chief, it is twenty years after Hahn and Peters were decided, and there is still no subsequent Wisconsin case law, published or not, which discusses exactly what avenue a defendant must take and how a circuit court is mandated to proceed when a defendant applies to have his enhanced sentence adjusted after successful vacatur of a penalty enhancing conviction that deems his sentence excessive by law.

Many other state and federal jurisdictions have decided this issue as cited by the appellant previously, but Wisconsin has not and needs to so all parties are well informed on how to proceed now and in the future. This is precisely why Mr. Socha believes this is a matter of first impression in this state which needs to be resolved and published, as he and possibly others have spent years of time, energy, and funds on attorney fees, only to be stuck at a dead-end of clarity in the law. Because this is an error correcting court which follows precedent when available, whether this needs to be resolved by our supreme court is certainly a valid question, as that is the court that did not expand on its holding in Hahn at paragraph 28 of its opinion.

III. A NEW FACTOR HAS BEEN ESTABLISHED BUT IS NOT NECESSARILY NEEDED FOR THIS COURT TO GRANT RELIEF.

Mr. Socha's postconviction pleadings was titled as a "Motion for Sentence Modification (New Facror)," and asked the circuit court to "modify and commute" the OWI sentence originally entered because of "new factors" umknown to the court at the time of the original sentence." (158:1). The motion and supporting

documentation demonstrate that seven of the ten convictions relied on to enhance his felony OWI sentence were void ab initio and/or ineligible for consideration; so he urged the court to commute pursuant to § 973.13, consistant with penalties applicable to misdomeanor OWI-forth offense. (Id. at 5).

The court recognized six convictions as vacated but refused to accept their legally binding force for misguided reasons, and denied the motion insisting that the vacated convictions "are not new factors," and "even if the disputed convictions are new factors they do not warrant a resentencing." (172). The court avoided and did not address the validity of the seventh ineligible Milwaukee County offense. Mr. Socha considers the decision erroneous, and maintains that a new factor was indeed distinguishable. (Socha's Br. 14).

Whether a set of facts presented by the defendant constitutes a new factor is a question of law. State v. Hegwood, 113 Wis.2d 544, 547 (1983). This Court reviews questions of law independantly of a circuit courts decisions. Id. Determinations on whether a "new factor" justifies sentence modification is of the circuit court's discretion, and is reviewed under the erroneous exercise of discretion standard by this Court. Id. at 546. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in exitence, it was unknowingly overlooked by all of the parties." Rosado v. State, 70 Wis.2d 280, 288 (1975).

The six vacated convictions are void ab inition and/or were reported to the DOT in error, they never "actually existed." The evidence proffered verifies that the six were vacated and do not show on Mr. Socha's drivers record. Furthermore, the Milwaukee County offense illegally recorded in the State's complaint did not exist. The aforesaid "set of facts" is not contested by the court or the State. The six predicate prior convictions were always void ab initio in the background, but the vacating orders themselves were not formally "in existence" until after sentencing in this case. These are significant facts "not known to the judge [or anyone] at the time of the original sentencing," and are undeniably "new factors." See Id.

"Erroneous or inaccurate information used at sentencing may constitute a "new factor" if it was highly relevant to the imposed sentence and was relied upon by the trial court." State v. Smet, 186 Wis.2d 24, 34 (1984). Here, the court relied on existent but unknown information, i.e., void ab initio prior convictions. Seven of the ten prior convictions used to enhance Mr. Socha's sentence did not actually exist when sentenced. The court did not know in 2005 that six were invalid, but has been shown in 2021 that they are. This evinces "erroneous and inaccurate information used at sentencing" which was "highly relevant to the imposed sentence," but was unknown to the judge at the time.

The existence of a new factor has been demonstrated by clear and convincing evidence. State v. Franklin, 148 Wis.2d 1; 8-9 (1989). Both prongs of the test have been met. Seven of ten prior convictions alleged by the State and used for enhancement in this case did not actually exist when the sentence was imposed, and the trial court was unaware of it. This new factor was highly relevant to the imposition of sentence and justifies adjustment thereof

because without the seven convictions proven to be ineligible for enhanced penalties, the maximum term of imprisonment Mr. Socha is exposed to is one year as opposed to the six currently handed down.

The State contends in its brief that "Socha has not shown a new factor that warrants resentencing." (State's Br. 14). Supposedly, because on appeal he did not argue that a new factor warrants modification, thus, "he has abandoned his new factor claim entirely. (Id. at 15). The appellant disagrees. In his brief, he "maintains to date that new factors do exist," he just believes commutation is the correct avenue of relief and does not want to waiste this Court's time with arguments previously fully developed. (Socha's Br. 14). All of his arguments for and against sentence modification and the court's decisions thereon have been made and are of record. "We see no reason why an inmate may not bring a motion seeking sentence reduction on multiple grounds, invoking seperate powers of the circuit court at the same time." State v. Stenklyft, 2005 WI APP 71, ¶61. The appropriate mode of relief due the appellant at this juncture, rests with this Court.

Mr. Socha's brief notes that a new factor need not necessarily be found for this Court to grant relief, because § 973.13 sentence commutation, not modification or resentencing, is the proper cure here. The three remedial acts above are not tantamount, and are often "muddled" in case law and pleadings. See State v. Wood, 2007 WI App 190, ¶¶7-10. By law, commutation, modification, and resentencing, are all independent of one another and are executed based on the individualized circumstances presented. The appellant himself has entwined commutation & modification mistakenly in his initial filings, and the circuit court and State have done the same with resentencing and modification.

In resentencing, "the court imposes a new sentence after the initial sentence has been held invalid." State v. Carter, 208 Wis.2d 142, 154 (1997). The resentencing court is in effect starting over. See Id. at 157. The purpose of new factor sentence modification is to allow a circuit court to correct a sentence, and is a discretionary act of the court. Hegwood, supra, at 546. So long as a sentence is modified within statutory maximums a court finding a new factor does not invalidate the original sentence, it merely modifies it, preserving the courts original integrity of the total sentence imposed. "[T]he proper procedure to modify a valid judgment is to amend the judgment and not vacate it." Hayes v. State, 46 Wis.2d 93, 107 (1970). "The amending of a valid judgment by order or judgment rather than vacating it and resentencing avoids questions of double jeopardy and credit for prior time served." Id. The "reopening' of a sentence to modify or commute, is not a resentencing.

The remedy sought here from the start was commutation via § 973.13 Stats. (158:5-6). Again, Mr. Socha's pleadings did mistakenly conflate the words modify and commute on occasion, but all court's are to liberally construe pro se pleadings. When the circuit court read his new factor motion for sentence modification/commutation, and saw his claim and supporting evidence of void prior convictions, and that the corrective measure requested was commutation under § 973.13 Stats. relief from an excessive sentence, it should have at the very least acknowledged and addressed § 973.13 Stats., and performed an analysis, but did not.

Throughout the entirety of the court's decisions it only looked at sentence modification, consistantly referring to it as "resentencing," though the appellant's motion directly invoked § 973.13 Stats. from the start when seeking commutation, and not resentencing. (158:5-6 & n.1). The court only took notice of the six vacated convictions and would not acknowledge and address the reality that a seventh invalid conviction exists. The seventh ineligible conviction is the linchpin between the court being able to consider and deny a discretionary motion for sentence modification, or being compeled by law to commute under § 973.13 Stats., because the sentence is excessive by statute. If the court was unaware of this, it was brought to its attention in Mr. Socha's reconsideration motion, where he claimed it was a mistake of law by the court when it did not invalidate the Milwaukee County matter from consideration, and did not perform an analysis under § 973.13 Stats.

The circuit court never had the discretion to either modify or resentence the appellant, only to commute, because the sentence imposed has now been shown to be excessive by law, as there are not enough prior convictions to uphold the current six year felony sentence, only a misdomeanor sentence of one year. In **State v. Lablanc**, 2021 WI App 73 (unpublished) (Reply App. 101-107), this Court addressed whether commutation or resentencing is required when both components of a bifurcated sentence exceed the maximum term permitted by law, as is the situation with this appellant. "The State argues that WIS. STATS. § 973.13 and Holloway "command[]" a circuit court to commute an excessive sentence and that resentencing is optional. [citation omitted] We agree that where an excessive sentence is imposed, the court has no discretion but to commute the sentence to the maximum penalty "authorized by law." Sec. § 973.13" Id. at ¶12.

There can be no question that Mr. Socha is entitled to relief from his excessive and illegal sentence. There are simply not enough prior convictions to sustain it.

CONCLUSION

For the foregoing reasons and others presented elsewhere, the Defendant-Appellant, James J. Socha, respectfully asks the Court to grant the requested relief required.

Dated at Waupun, Wisconsin this 22 day of December, 2021.

Respectfully submitted,

James J. Socha
Defendant-Appellant, pro se.

CERTIFICATION AS TO FORM/LENGTH

I hereby certifiy that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The total amount of words is unknown but the brief is within the alloted number of pages.

Dared at Waupun, Wisconsin this 22 day of December, 2021.

James J. Socha
Defendant-Appellant, pro se.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a sepreate document or as part of this brief, is an appendix that complies with sec. 809.19 (2)(a) and that contains, at a minimum,: (1) a table of contents; (2) the findings or opinion of the circuit court; and portions of the record showing essential to an understanding of the issues raised.

Dated at Waupun, Wisconsin this 22 day of December, 2021.

James J. Socha
Defendant-Appellant, pro se.