STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

Appeal No. 2021AP1083-CR

STATE OF WISCONSIN,
Plaintiff-Respondant,
v.
JAMES J. SOCHA,
Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING A POSTCONVICTION MOTION FOR SENTENCE MODIFICATION IN THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE MILTON L. CHILDS, SR. PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

BY: JAMES J. SOCHA
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STATEMENT OF THE ISSUES PRESENTED

The question on appeal is whether the circuit court erred when not commuting the sentence in this case pursuant to § 973.13, Wis. Stats., upon a showing that the alleged prior convictions for OWI recorded in the PSI do not actually exist, and six of its nine alleged were overturned in their original forums after the sentence was imposed in this case?

The circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case as briefing should fully develop and explain the issues presented and argued. However, the primary issue on appeal is believed to be one of first impression in Wisconsin and publication should be given consideration on that basis.

STATEMENT OF THE CASE AND FACTS

On December 26, 2004, Mr. Socha was cited for OWI in the Village of Whitefish Bay in Milwaukee County, Wisconsin. The State's criminal complaint charged him with operating while intoxicated (OWI) and alleged that he had nine prior convictions for the same offense, contrary to Wis. Stat. § 346.65(2)(e), a Class H felony. (2:1-2; App. 100-01).

On February 17, 2005, the appellant entered a plea of guilty to one count OWI, as a fifth or subsequent offense. A presentence Investigation Report (PSI) was ordered for sentencing at a later date. (12). On July 18, 2005, Mr. Socha was sentenced, and along with fines and conditions, a term of imprisonment was imposed consisting of two years initial confinement and four years extended supervision. (46:1-2; App. 102-03).

Following completion of the Department of Corrections (DOC) Earned Release Program in 2008, Mr. Socha was released from prison and his extended supervision time adjusted. (28:1-3; 29). He was reconfined later that year for all of the time remaining on his sentence, due to new charges. (32).

The DOC notified the circuit court in December of 2014 that Mr. Socha's sentence imposed in 2005 was illegal by statute. (44). The court subsequently entered an order commuting his extended supervision term from four years to three, on December 9, 2014. (45). Counsel for Mr. Socha filed a motion seeking resentencing on July 29, 2015. (52). The motion was denied on July 31, 2015. (53).

Mr. Socha motioned the circuit court on May 26, 2020 for permission to review the PSI because he had not seen it in the trial stage. (54). The court granted the motion, after determining that the record does not show that the appellant had reviewed the report. (55).

On June 24, 2020 a motion for a definitive record of prior convictions used to enhance the sentence in this case was filed by the appellant in the circuit court. (56). The court denied the motion, however, it found that the only record of alleged prior convictions was limited to the PSI. (57).

A postconviction motion seeking relief from an excessive sentence was then filed by Mr. Socha on October 12, 2020. The motion attached evidence showing that six of the nine predicate OWIs listed in the PSI by their violation dates only were vacated post-sentencing. The motion also set forth that the remaining three alleged prior convictions in the PSI did not provide conviction dates corroborating that they actually took place as mandated by law, and that therefore, the three were not eligible for enhancing penalties. Mr. Socha asked that the court commute his sentence pursuant to § 973.13, Wis. Stats., to penalties consistant with OWI-first offense. (58; 59).

Following briefing, the circuit court issued a written decision and order on March 18, 2021 denying Mr. Socha's motion for relief, in toto. (72; App. 104-10). This appeal now ensues.

ARGUMENT

I. THE EXCESSIVE PORTION OF MR. SOCHA'S ENHANCED SENTENCE IS VOID AS A MATTER OF LAW AND THE CIRCUIT COURT ERRED WHEN NOT COMMUTING IT IN ACCORDANCE WITH WIS. STAT. § 973.13 AND THE WISCONSIN SUPREME COURT'S DECISION IN STATE V. HAHN.

A. Introduction and Standard of Review.

Mr. Socha filed a postconviction motion in the circuit court seeking commutation of his sentence which is void as a matter of law because it is based on vacated and nonexistent prior OWI convictions. The court denied relief finding that the enhanced penalties are based on a correct set of facts and sound prior convictions, and that State v. Hahn, 2000 WI 118, does not offer the appellant relief even though all nine predicate convictions used to increase his penalties have been shown to be overturned or do not exist, after imposition of the sentence in this case.

The court's Decision and Order is erroneous because it failed to recognize that when a defendant brings evidence, post-sentencing, demonstrating that his enhanced sentence is founded in whole or in part on prior convictions which do not actually exist, relevant law commands that the sentence be commuted, it is not discretionary. The court's ruling depreived Mr. Socha of warranted relief from the excessive portion of his sentence. This Court should reverse the lower court's decision and commute the sentence pursuant to § 973.13, Wis. Stats.

Whether the record is sufficient to sustain the penalty enhancer Mr. Socha received is a question of law that this Court review de novo. See State v. Spaeth, 206 Wis.2d 135, 148 (1996).

B. The State did not meet its burden of proof to substantiate the enhanced penalties imposed.

The criminal complaint filed by the State alleges that a reliable Department of Transportation (DOT) teletype shows nine prior convictions for OWI as counted under Wis. Stat. § 343.307(1). (2:1-2; App. 100-01) However, the facts alleged in the complaint nor any attachment constitute sufficient evidence of the existence of any countable prior convictions. Other than the complaint's

general reference to nine prior convictions, it provides no evidence to support enhanced penalties. In order for the court to enhance Mr. Socha's sentence, the State was mandated under § 346.65(2), Wis. Stats., to prove that the instant conviction was a second 'within a 10-year period,' as counted under § 343.307 (1), Stats.[1]

The PSI of record also does not establish that the appellant had a countable conviction for OWI within a 10-year period, either. (15:2-3; 57:2). A PSI specifying prior conviction dates can be an official report triggering the prima facie provisions of § 346.65(2), Stats., however, like the complaint, the PSI here does not contain dates for the prior convictions alleged. At best, it only shows violation dates inaccurately purported to be conviction dates. A mere violation date without more does not expressly prove when or if a conviction occurred. The nine convictions alleged in the PSI cannot be relied on as proof that the appellant has ever been convicted of OWI. (58:4; 59:1-5).

Mr. Socha's motion cites **State v. Farr** 119 Wis.2d 651 (1984), for the proposition that in order for a PSI to be relied on as competent proof of a prior conviction, it "must specifically include the date of conviction for the previous offense ... to be acceptable." **Id.** at 658. The circuit court rejected **Farr's** relevance because of different repeater statutes, and stated that "even if the PSI did not specify the date of conviction for the nine prior OWIs, the PSI stated that the defendant was 'convicted' of each offense." (72:5; App. 108).[2] Messrs Farr and Socha were indeed sentenced under different repeater statutes, however, **Farr's** underlying logic that a PSI must contain conviction dates is a prerequisite in applying § 346.65(2), Stats., as well.

Arriving at the initial penalty enhancing subsection of 346.65(2) requires the State to prove that twice 'within a 10-year period,' the appellant was convicted of OWI or an offense under § 343.307(1), Stats. This task is unattainable when the complaint; PSI; an admission; nor anything else in the record provides conviction dates for each one alleged. Because there are no recorded dates of conviction to validate any actually occurred, and certainly not two countable within a 10-year period, it cannot be surmised that any factually do. "[S]uch a hypothesis should not have to be resorted to when dealing with a substantial penalty enhancer." **Farr**, at 657.

The State did not challenge the PSI's absence of conviction dates and conceded its import at the circuit court. (66:3). Notwithstanding, it argued that defense counsel stated that he had no changes to make to the PSI when asked, and "acknowledged the defendant's record" of nine offenses during the sentencing hearing. Further, that the "defendant did not say anything to correct any aspect of this OWI record when he spoke to the judge." And finally, that "Mr. Socha and his lawyer said nothing" when the court intimated this was a tenth offense. (66:2-3). The circuit court's decision concluded "that defense counsel's statements at sentencing amounted to an admission for purposes of imposing the enhanced penalties." (72:6; App. 109).

The State bears the burden of establishing prior convictions as the basis for the imposition of enhanced penalties under Wis. Stat. § 346.65(2), "by presenting 'certified copies of conviction or other competent proof...before sentencing.'" **State v. Wideman**, 206 Wis.2d 91, 95 (1996)(quoting **State v. McAllister**, 107 Wis.2d 532, 539 (1982)). In terms of accelerated penalties for excessive OWI offenses, our supreme court has held that "competent proof" of a prior conviction "must reliably demonstrate with particularity" the existence of each prior conviction. **State v. Spaeth**, 206 Wis.2d 135, 150 (1996). In such cases, a defendants admission, whether personally or through counsel; copies of certified judgments of conviction; or a certified copy of a defendants DOT record will suffice as proof. **Id.** at 153. "The State's burden to prove prior [OWI] convictions by competent proof is triggered: if the accused or defense counsel... remains silent about a prior offense." (citation omitted; emphasis original). **Id.** at 154.

Before taking Mr. Socha's plea, the court did not question him to ensure his awareness in the significance of alleged prior convictions, and their effect if his plea were accepted. The State indicated there would be "no specific recommendation as to sentencing," and that it remained free to discuss pertinent factors at a later time. Shortly thereafter, the court inquired: "so the penalty enhancers don't apply?" And the State replied: "Right." The appellant pleaded to the 'charge' of OWI without being informed by the court that prior convictions applied as penalty enhancers, and was adjuducated guilty. Alleged prior convictions were not ever brought up by any party at the plea hearing. A PSI was ordered by the court. (58:Plea Hearing Tr., February 17, 2005).

At sentencing, the court acknowledged reviewing the PSI and the State and defenses counsel indicated that no "corrections or changes" were needed to it. (87:2). Postconviction, the State and court suggests that the defense did not challenge the PSI, and that it was the party constrained to dispute the reports insifficiency and absence of conviction dates, on behalf of the State who maintained the burden of proof. This is of course without basis in the law.[3]

"Both the burden of production and the burden of proof remain on the State to prove prior convictions by a preponderance of the evidence whether or not a defendant raises an objection." **State v. Loayza**, 2021 WI 11, ¶44. At no time during its sentencing argument did the State even come close to uttering what offense number OWI it had alleged, much less proved; nor did it refer to any alleged prior conviction with specificity.

It is not ever a defendants burden to prove that alleged prior convictions do not exist, instead, it is <u>always</u> the State's burden to prove they do. Here, the defense remained silent about prior convictions—none were admitted with 'particularity' as is requisite. "[C]ompetent proof can be established through an admission by the defendant or counsel. A direct question from either the prosecutor or the circuit court asking whether the defendant admits to the existence of <u>each</u> prior conviction should resolve this issue." (emphasis added) **Spaeth**, supra at ¶155.[7]

The foregoing did not take place at any proceeding. For an admission to be considered 'competent," as with official reports, it "must reliably demonstrate with particularity," the existence of each prior conviction. **Id.** Defense counsel's blanket reference to nine offenses, without more, does not meet the definition of 'competent proof' as it was not done with <u>particularity</u>, and can surely not amount to a valid admission of a prior conviction.[4]

If the State was solely reliant on the PSI as proof of alleged prior convictions, it alone was tasked with confirming its accuracy and objecting to its want of conviction dates and proof that prior convictions actually exist. It is the State who alleged prior convictions and sought enhanced penalties based thereon, the defense is never compelled to prove a negative alleged by the State. "The State must carry the burden to make good the charge in the particulars. While a prior conviction is not an element of the charged offense, the prior conviction is an essential element of proof to be satisfied at sentencing <u>if the State</u>

is to secure the additional punishment it seeks." (citations omitted; emphasis original) **State v. Goldstein**, 182 Wis.2d 251, 260 (1994).

Moreover, nowhere does the record reflect that the sentencing court engaged in a direct colloquy with the defense to make certain Mr. Socha was aware that he was subject to enhancers due to prior OWI convictions if proven by the State. A specific admission with particularity was not procured by the court as to each prior conviction used to enhance penalties. There is also no showing that the appellant understood the linkage between alleged prior convictions and possible maximum penalties. See **Goldstein, Id.** at 256-57.

Ambiguity exists as to what exactly the court relied on to impose enhanced penalties, as it did not make a record; mere assertions by the State in its complaint are not adequate to meet its burden. **Spaeth**, supra, **Id.** at 150. The PSI's reliability is certainly in question due to its defects, and counsel's blanket reference to prior offenses without specificity cannot be considered an admission. The record only supports a sentence for civil OWI-first offense, and therefore, requires commutation pursuant to § 973.13, Wis. Stats.[5]

C. Six of the predicate prior OWI convictions alleged by the State and relied on to enhance the sentence in this case were successfully overturned after the 2005 sentence was imposed.

Attached to Mr. Socha's postconviction motion is evidence corroborating that six of the nine prior OWIs seemingly used to enhance his sentence in this matter were formally vacated after the sentencing took place on July 18, 2005. (58). The circuit court's decision accepts that: "[t]he defendant has submitted documentation showing that six of the prior convictions set forth in the PSI that were used to enhance his penalty were subsequently vacated by stipulation in other forums." (72:4; App. 107). The State's response brief recognizes the same. (66:2).

The appellant's motion explains that six of the nine convictions overturned post-sentencing, coupled with three others in the PSI which do not show convictions ever took place because no dates of conviction are shown, are new factors warranting sentence modification, and he invoked Wis. Stat. § 973.13 as the cure because there were never enough prior convictions to uphold his current sentence for OWI-fifth or subsequent offense, but instead only a sentence for civil OWI-first offense.

The State concedes that the circuit court's reliance on inaccurate information in the PSI is a new factor that was not harmless. (66:3). It claims however that a resentencing for OWI-ninth offense is the cure and not modification or commutation. (Id.). The record as established in 2004-05 did not rely on and does not include any DOT records, but the State submitted one dated fifteen years after sentencing and cites **Wideman** as authority for allowing its use at a resentencing. (66:1-4).

The court found there is "nothing that allows the State to prove up prior offenses more than fifteen years after sentencing" (emphasis original), and rejected the State's argument that **Wideman** tolerates entry of DOT records post-conviction, ruling that: "[t]he court therefore denies the State's request to present the defendant's certified driving record at a resentencing hearing because the law does not expressly allow it, the defendant does not want to be resentenced, and the remedy is not warranted in this case." (72:9-10; App.112-13).

Prior to denying the appellant's motion, the court acknowledged that he "seeks to modify and commute his sentence, pursuant to section 973.13, Wis. Stats., and **State v. Hahn**, 238 Wis.2d 889 (2000), consistant with penalties for a first OWI." (60). However, the court's decision and order does not necessarily show that it ever actually performed a new factor sentence modification analysis or one for commutation under § 973.13, Stats. Instead, the court's decision concentrated primarily on its view that **Hahn** does not "sanction" relief in this case. (72:7-9; App. 110-12).

Our supreme court in **Hahn** was presented with the question of whether a defendant has a constitutionally protected Due Process right to simultaneously collaterally attack the validity of a prior conviction intended for sentence enhancement, on grounds other than the Sixth Amendment right to counsel, during an enhanced sentencing proceeding.

The **Hahn** court opined that such a challenge was not consitutionally guaranteed, however, concluded that considerations of judicial administration favored a 'bright-line rule' that applied to all cases. The rule held that a trial court cannot entertain collateral challenges to prior convictions intended for penalty enhancement, at the enhanced sentencing proceeding, unless it invokes a defendant's

constitutional right to counsel. **Hahn's** bench then prescribed an alternative mechanism whereby defendants can attack any other penalty enhancing convictions relied on for enhanced penalties by utilizing any and all lawful means available:

> 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. at ¶28.

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

> That is, a defendant may directly rather than collaterally challenge 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.

The above language is unambiguous and the wording plain. If Mr. Socha desired to challenge a prior conviction relied upon for an enhanced sentence in this or any subsequent prosecution on a ground other than the denial of the right to a lawyer in the previous proceedings, 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 secure an enhanced sentence. When successful, the appellant had the right under **Hahn** to petition the trial court for sentence commutation to relieve the criminal portion of his sentence which is excessive by law.

The circuit court decided that Mr. Socha reads **Hahn** too 'broadly,' as it involves a constitutional issue under a different repeater statute, and therefore, it does not permit a postconviction collateral attack of the instant sentence because this appellant was not sentenced under Wis. Stat. § 939.62(2), and did not meet his burden to show that the six overturned convictions were done so on constitutional grounds. (72:8; App. 111).

It is the circuit court, however, which reads **Hahn** too narrowly, and its finding is a mistake of law. **Hahn** in no way limits its 'bright-line rule' and cure to a certain repeater statute or what the <u>other grounds</u> for attacking a conviction encompass, and distinctly states that the offender "may use <u>whatever</u>

means available under state law to challenge the validity of a prior conviction." (emphasis added) **Id.** ¶28. The circuit court does not point to precisely where **Hahn** holds that 'other grounds' for challenging a prior conviction must be of a constitutional magnitude; that the appellant is burdened with proving his six alleged prior convictions were vacated for constitutional reasons; nor where **Hahn** holds that it only applies to defendants sentenced pursuant to § 939.62(2).

Vacatur removes the fact of conviction. See **State v. Lamar**, 2011 WI 50, ¶¶39-40, n.10. (The legal effect of vacatur is that a defendant is put back into the position he would have been in had the invalid prior conviction never been of record). The circuit court and State attempt to rationalize that because the six convictions here were not overturned until after sentencing, they were valid at the time the sentence was handed down and still apply. Furthermore, the court found that if **Hahn** compels commutation based upon post-sentencing vacatur of prior convictions, "then any defendant subject to enhanced penalties for repeat OWI can simply proceed to sentencing and then turn [their] postconviction efforts to commuting the penalty by getting the prior convictions vacated. Such a result defies logic and would contravene the purpose and intent of the graduated penalties under section 346.65(2)." (footnote omitted)(72:8-9; App. 111-12).

The circuit court utilizes the word "simply" when inferring that getting any prior conviction vacated is a routine task all defendants can easily achieve, it is not. Courts do not randomly overturn their convictions, it must be done by lawful means and for valid reasons. This is precisely why postconviction cures are available for defendants who are unlawfully sentenced using invalid prior convictions to increase penalties.

Hahn stands for exactly what the circuit court contends it does not. Under the court's inerpretation of **Hahn** and repeater sentencing law in general, no postconviction remedy exists for defendants who are wrongly sentenced using unproven or overturned prior conviction relied on for enhancement; there is no turning back once a sentenced is imposed. The circuit court shows no regard for at stake liberty interests and the fact that defendants sentenced on inaccurate information can be exposed to multiple years of excessive incarceration.

Mr. Socha did just as instructed by our supreme court. His attorney's in Wisconsin and Ohio directly attacked six prior convictions that were unsound

and erroneously used to enhance this sentence. The attacks were done in their original forums using lawful means available under state law, and were successful. The Appellant then applied to the circuit court as set forth in **Hahn** to have his sentence adjusted under § 973.13, Stats., and the court denied relief.

This appeal presents a matter of first impression in Wisconsin, because, though **Hahn** promulgated a "bright-line rule that applies to all cases," analogous to § 973.13, Stats., "[i]n any case," and encourages defendants, where applicable, to attack penalty enhancing convictions in their original forums—there is no subsequently published Wisconsin case from which to extrapolate the mechanism an offender must engage to procure relief from an excessively enhanced sentence, after successfully achieving post-sentencing vacatur of some or all prior convictions wrongly relied on to escalate penalties.

Multiple other juriscdictions have addressed postconviction vacatur of penalty enhancing convictions, and their effect on the legality of a sentence imposed that was founded on them. The Supreme Court of Hawai'i resolved this question in their state, of whether a defendant is entitled to relief when prior convictions used to support enhanced penalties are overturned or do not actually exist after a sentenced is imposed. The Hawiian court cited Wisconsin's **Hahn** decision along with **Custis v. United States**, 511 U.S. 485 (1994), which was the case **Hahn** primarily relied on in its opinion:

> A defendant is entitled...to move for correction of an enhanced sentence once the defendant has successfully attacked a prior conviction on which the sentence was based in whole or in part because that conviction no longer constitutes a proper basis for increased punishment for a subsequent offense.

State of Hawai'i v. Kido, 109 Hawai'i 458, 467 (1996).

Other relevant state court examples include, **Garcia v. Superior Court**, 14 Cal.4th 953 (1997)(stating that, after successfully attacking a prior conviction, a defendant "may obtain a reduction of a sentence that was imposed on the basis of that invalid conviction.") (citation omitted); **State v. Prince**, 781 S.W.2d 846, 851 (Tenn. 1989)(Holding that once a prior conviction has been invalidated in the proper forum, the defendant, "then exposes the enhanced sentence on the subsequent conviction to...attack as well.")(citation omitted).

In **Lee v. State of Florida**, the defendant pled no contest to a charge which classified him as a 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).

Federal courts have not been silent on the effect a vacated conviction has on an enhanced sentence. The 11th circuit found in **United States v. Walker**, 198 F.3d 811 (11th Cir. 1999):

> Since Custis was decided in 1994, seven other circuits, all of which have considered the issue, have also held, or indicated without expressly deciding, that pursuant to...habeas corpus, a [t]rial court may reopen and reduce a [subsequent] sentence, once a...defendant has...successfully attacked a prior...conviction, previously used in enhancing the...sentence. We agree and follow suit.

Id. at 813-14 (citations omitted; internal...and brackets are original).

Federal courts have opined that to deny relief to an offender who's enhanced sentence was based on prior convictions obtained in violation of constitutional law, could itself be a constitutional violation. See **Gonzalez v. United States**, 135 F.Supp.3d 112, 126 (D. Mass.2001).

The United States Supreme Court Court in **Johnson v. United States**, stated:

> Our cases applying [the enhanced provision of the federal Sentencing Guidelines and the Armed Career Criminal Act, 18 U.S.C. § 924(e)] assume ... that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated.

Id. 544 U.S. 295, 125 S.Ct. 1571 (2005)(internal parallel citations omitted).

Wisconsins **Hahn** court stopped short of prescribing the precise cure available to defendants who successfully challenge prior penalty enhancing convictions in their original forums, post-sentencing. However, there is a plethora of law available from other state and federal jurisdictions to find as they have, that a defendant is entitled to relief from an enhanced sentence, when it is shown later to be based on a prior conviction proven to not actually exist.

D. A new factor has been established but is not necessarily needed to grant Mr. Socha's relief from his excessive sentence because Wis. Stat. § 973.13 is the compelled remedy.

The appellant's postconviction pleading was titled as a 'motion for new factor sentence modification,' and asked the circuit court to 'modify and commute' the OWI sentence imposed because of 'new factors' unknown to the trial court at the original sentencing. (58:6). The motion and supporting documentation demonstrate that six of the nine prior convictions seemingly relied on to enhance Mr. Socha's felony OWI sentence were void ab initio, and three others in the PSI were shown to not exist as recorded. The appellant urged the court to commute his sentence pursuant to § 973.13, Wis. Stats., consistant with penalties for civil OWI-first offense. (58:6).

Mr. Socha's attack on the illegitimacy of the prior convictions alleged in the PSI was denied by the circuit court. (72:6; App. 109). It further denied relief based on the six vacated convictions, stating that **Hahn** does not allow for overturned but still 'constitutionally sound' prior convictions previously used for § 346.65(2) penalty enhancement to be presented "to the postconviction court as a new factor for sentence modification purposes." (72:8; App. 111). The court reasoned that "[t]he defendant's prior convictions were valid at the time of sentencing in this case." (Id.).

The above was the extent of the court's new factor sentence modification analysis, it placed all of its eggs in **Hahn**'s basket when denying relief. The court, and the State for that matter, do not explain as contended, how a void ab initio prior conviction, prejudicially of record, was ever 'valid' to begin with, nor, how a vacated conviction can remain 'constitutionally sound.' Common sense dictates that when a conviction is overturned, much less void ab initio, it never actually existed. The assertion that a vacated conviction was ever valid or can still carry constitutional soundness, is simply untenable. Though the State concedes a new factor exisits (66:3), the circuit court did not act on it.

"Sentence modification involves a two step process in Wisconsin. First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence." (citation omitted) State v. **Franklin**, 148 Wis.2d 1, 8. If the reviewing court finds a new factor exists, it "must undertake the second

step in the modification process and determine whether the new factor justifies modification of the sentence." Id.

Whether a fact or 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 independently of a circuit courts decisions. Id. Determinations of whether a new factor justifies sentence modification is of the circuit courts discretion, and is reviewed under the erroneous excersise 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 existence, it was unknowingly overlooked by all of the parties." Rosado v. State, 70 Wis.2d 280, 288 (1975).

The six vacated convictions here are void ab initio and/or were reported to the DOT 'in error,' they never actually existed. The remaining three alleged convitions in the PSI were not substantiated as existing as they do not have conviction dates affixed as mandated, and the State has proclaimed that the PSI's inaccurate information that was relied on by the sentencing court is a new factor. (66:3). The aforesaid 'set of facts' is not contested by either the court or the State, and are significant facts 'not known to the trial judge [or anyone] at the time of the original sentencing.' "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).

The first prong of the test has been satisfied. The established new factor then justifies modification or commutation because the PSI's alleged convictions are confirmed as defective and were unlawfully employed to enhance this sentence. When a defendant satisfies the two-prong test as set forth above and in an enhanced sentencing scenario, modification is the appropriate remedy only if it can be done within the confines of the current statute and subsection the offender was sentenced under. In the instant case, commutation pursuant to Wis. Stat. § 973.13 is the cure, and not modification or resentencing, because due to the overturned and nonexistent convictions erroneously relied on to enhance penalties here, the sentence is in excess of that allowed by the subsection of Wis. Stat. § 346.65(2), which the appellant is sentenced under.

The appellant notes above that a new factor need not necessarily be found for this Court to grant relief, as § 973.13, Stats., sentence commutation, not modification or resentencing is the constrained remedy. The three remedial acts aforementioned 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 independant of one another and are executed based on the laws and individualized circumstances presented in each case.

In resentencing, "the court imposes a new sentence after the initial sentense 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 considered a discretionary act. **Hegwood**, supra, **Id.** at 546. So long as sentence is modified within statutory minimums and maximums, a court finding a new factor does not invalidate the original sentence, it merely modifies it, preserving the original integrity of the total sentence imposed. "[T]he proper procedure to modify a valid judgment is to amend the judgment and not to vacate it." **Hayes v. State**, 46 Wis.2d 93, 107 (1970). "The amending of a valid judgement by order or judgment rather than vacating it and resentencing avoids questions of double jeopardy and of credit for prior time served." **Id.** The 'reopening' of a sentence to modify or commute, is not a resentencing.

The cure sought here from the begining was commutation via § 973.13, Stats. When the circuit court read the appellant's new factor sentence modification motion with claims and supporting evidence of nonexistent prior convictions wrongly used to enhance penalties, and saw that the requested corrective measure was commutation pursuant to § 973.13, it should have at least acknowledged and addressed said statute in its decision, but did not. Even if the court found that the PSI was not subject to attack, Mr. Socha is still entitled to commutation of his sentence to a OWI-forth offense, in light of the six overturned convictions. "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 circuit court did not <u>per se</u> have discretion to modify this sentence, nor was the State's request for a resentencing permissible by law without commutation occurring first. This is because the sentence has now been shown to be

excessive by statute, as there is not a sufficient amount of prior convictions to sustain the five year sentence imposed, rather, only a civil forfieture.

In **State v. Leblanc**, 2021 WI App 63 (unpublished; App. 114-19), this Court addressed whether commutation or resentencing is required when both components of a bifurcated sentence exceed the maximum term permitted by statute, as is the situation here. "The State argues that WIS. STAT. § 973.13 and **Holloway** 'command[]' a circuit court to commute an excessive sentence and that resentencing is optional. 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." (citation omitted) Id. at ¶12.

> 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 interests 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.... 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.

State v. Flowers, 221 Wis.2d 20, 29 (1989)(emphasis original).

In **State v. Hanson**, 2001 WI 70, the defendant was convicted of a Wis. Stat. § 343 motor vehicle offense and his sentence was enhanced based on admitted prior convictions and a Habitual Traffic Offender (HTO) status which was subsequently found to not 'actually exist' post sentencing. Id. at ¶17. On appeal, our supreme court held that despite Hanson's admissions to the nonexistent prior convictions and HTO status, the circuit court on remand was compelled to treat them as if they never existed, and his sentence was determined "in excess of that authorized by law and invalid under Wis. Stat. § 973.13." Id. at ¶2.

The circuit court in this case unknowingly relied on prior convictions which were never proven and do not actually exist. Mr. Socha's sentence is as a result enhanced beyond its maximum penalty exposure. "When a court imposes a sentence

greater than that authorized by law, § 973.13 voids the excess." Spaeth, supra, Id. at 155.[6]

CONCLUSION

The excess portion of the Defendant-Appellant's sentence is void as a matter of law because it was based on prior convictions proven to not actually exist. Wisconsin law holds the remedy in § 973.13, Wis.. Stats. This Court has the authority to commute without remand to the circuit court, other than for it to amend the currently entered judgment of conviction. Mr. Socha moves the Court to commute the sentence in this case to a civil OWI-first offense forfeiture.

Dated this 26th day of January, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c). The amount of words is unknown but the brief's number of pages does not exceed the amount allowed.

Dated this 26th day of January, 2022.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a seperate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and contains portions of the record essential to an understanding of the issues raised.

Dated this 26th day of January, 2022.

James J. Socha
Defendant-Appellant, pro se.

1 All Statutes (2004); § 346.65(2)(b), Wis. Stats., requires that in order for the circuit court to utilize this subsection for enhanced penalties on an OWI offender convicted under § 346.63(1)(a), the State is mandated to prove that the offender's "number of suspensions, revocations and other convictions counted under s. 343.307(1) within a 10-year period, equals 2..." (emphasis added).

2 The circuit court decided that the appellant's PSI argument was procedurally barred by **State v. Escalona-Naranjo**, 185 Wis.2d 169, 178 (1994). (72:6; n.1; App. 109). However, Escalona-Naranjo does not bar Mr. Socha's attack on the reliability of the PSI because he is challenging the enhanced portion of his sentence for being void as a matter of law and excessive by statute, and has invoked § 973.13, Stats. Applying the restrictions of Wis. Stat. § 974.06 to deny relief would limit the otherwise broad relief intended by § 973.13, and would subject the express relief offered by § 973.13 to a procedural rule or exclusion. See **State v. Flowers**, 221 Wis.2d 20, 29 (1998).

3 The circuit court's decision infers that Mr. Socha somehow admitted prior convictions alleged in the PSI by not disputing that he had nine prior convictions when sentenced (72:5; App. 108); and it further assumes that "defense counsel reviewed the PSI and acknowledged its accuracy" when not asking for corrections or changes to be made to it. (72:6, App. 109). The court is misguided. First, it was the State's burden at all times to prove its nine alleged prior convictions exist, it is never on the defendant to utter or dispute that they do not exist, and silence on behalf of the defense keeps the burden on the State to prove its allegations. (**Spaeth**, supra, at 150). Second, defense counsel said that he did not want changes made to the PSI, that is a far cry from acknowledgement of its 'accuracy' as the court suggests. Once again, the State alleged the nine prior convictions, if it believed changes or corrections were needed to the PSI to support its allegations, it alone was the party to request them. The defense is never charged with proving the State's case for them, it is their responsibility.

4 The circuit court found that defense counsel's blanket reference to nine prior offenses amounted to an "affirmative" admission of the alleged prior convictions. (72:6; App. 109). The court's conclusion however is not only erroneous because referencing prior offenses without particularity cannot be considered a competent admission under **Spaeth**; but also, because counsel referred to nine "offenses," and not convictions, which are distinguishable. (87:6). Black's Law Dictionary defines 'offense' as: "A violation of the law," whereas 'conviction' is defined as: "The act or process of having been found guilty of a crime; the state of having been found guilty." Just as the PSI's violation (offense) dates cannot be equated to the appellant actually being convicted of OWI; either can counsel's blanket reference to "offenses" be equated to actual convictions for OWI. Offenses and convictions are unequivocally not one in the same.

5 The circuit court relies on the admission of prior convictions in **Wideman** as analogous to this case. In **Wideman**, "[t]he complaint although not evidence, when coupled with the circuit court's direct inquiry at sentencing and defense counsel's concessions, was sufficient to inform the defendant of the prior offenses for purposes of sentencing." **Id.** at 109. The supreme court found that

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Wideman's admission of prior convictions was marginally acceptable. Id. at 110. The complaint in **Wideman** listed the conviction dates for the three priors alleged by the State, not so with the complaint or PSI in the instant case. Furthermore, the circuit court in **Wideman** directly engaged in a colloquy with both counsel and the defendant and described the three prior convictions alleged in detail and then only "marginally" received a valid admission before proceeding to sentencing. The aforesaid did not occur in the case at bar. The facts concerning admissions of penalty enhancing convictions alleged in **Wideman** and those alleged in this case are not remotely close to being the same. There were no conclusive admissions of prior convictions made by the defense in this case.

6 The appellant seeks commutation of his sentence pursuant to § 973.13, Stats., consistant with penalties for OWI-first offense under § 346.65(2)(a). However, should the Court find that the State proved its alleged prior convictions found in the PSI, Mr. Socha submits he is entitled to commutation of his sentence to penalties applicable to OWI-forth offense pursuant to Wis. Stat. § 346.65(2)(d), because of the six convictions-overturned post-sentencing which render the current sentence under § 346.65(2)(e) excessive by statute.

7 The Wisconsin Supreme Court held in **Wideman**, supra, that counsel may admit penalty enhancing prior convictions on behalf of OWI offenders sentenced under § 346.65(2); which is contrary to repeat offenders sentenced under § 973.12(1), who must admit prior convictions personally. The court reasoned that because of the large amount of OWI cases and the contrast in length of sentences imposed under §§ 973.12(1) and 346.65(2), the efficient administration of justice allows for different sentencing proofs in establishing prior offenses under the two statutes, as "the enhanced penalties under § 346.65(2) are penalties for misdemeanors, with relatively short periods of incarceration and moderate fines." Id. at 206 Wis.2d 106. It is now beyond time for this archaic conclusion to be revisited.

The OWI penalty statute 346.65(2) has been significantly modified since 1996 when **Wideman** was decided. Offenders sentenced under said statute are no longer exposed to only misdemeanor sentences capped at one year, and minimal fines. Felony OWI sentences ranging from six months to twelve and one half years of imprisonment now exist, dependant on the amount of an offenders prior countable occurrences pursuant to § 343.307(1), Stats. These are not trivial penalty accelerations. Mr. Socha's six year felony term initially imposed under § 346.65 (2), exceeds what many repeat offenders sentenced under § 973.12(1) are exposed to, yet those defendants are bestowed superior protections.

Our supreme court's rationalization that because of the nature and amount of OWI cases, those offenders should be afforded less protection than repeat offenders sentenced for different crimes under § 973.12(1), can no longer be justified due to the considerably increased felony penalty schemes implemented under § 346.65(2), after issuance of the Court's opinion. If a repeat felony offender exposed to many years in prison under § 973.12(1) must make a direct and specific personal admission of penalty enhancing prior convictions, the standard should be

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no less for repeat OWI offenders exposed to similar felony penalties under § 346.65(2), or prejudice exists and implicates equal protection considerations. The character of felony crime—sheer amount of cases—and the want of assembly line expediency in OWI courts; cannot be put before the requirements of a valid and personal admission by a defendant as to penalty enhancing offenses, when it involves a long term sentence.

Though the defense did not ever make a direct and specific admission to any alleged prior conviction in the instant case, **Wideman** does not permit counsel in this circumstance to admit penalty enhancing prior convictions on behalf of the appellant, because he was not subject to "penalties for misdemeanors, with relatively short periods of incarceration and moderate fines," as was Wideman. **Id.** at 107. Instead, Mr. Socha was subject to and received a felony six year initially imposed term of imprisonment, with fines in excess of 4000.00, which is visably distinguishable from a short sentence and small fine as set forth by **Wideman.**