STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT FOUR

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CLERK OF COURT OF APPEALS
OF WISCONSIN

State of Wisconsin,

Plaintiff – Respondent,

vs.

APPEAL # 21 AP 1111

Aman Deep Singh,

Defendant – Appellant.

APPELLANT BRIEF IN CHIEF

On Appeal From An Order Denying A Writ of Coram Nobis and a Motion To Dismiss The Repeater and Reconsideration, Entered In The Dane County Circuit Court, The Honorable Nicholas McNamara Presiding.

Aman Deep Singh

Defendant – Appellant

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ISSUES PRESENTED

1. Did the trial court err by denying Singh § 973.13 relief? The trial court answered No.
2. Did the trial court err by denying Singh a writ of *coram nobis*? The trial court answered No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Singh does not request oral argument. Singh recognizes that, as a one-judge appeal, this does not qualify for publication. Otherwise, a ruling on the retroactivity of *Forrett*[1] might have merited publication.

STATEMENT OF THE CASE AND FACTS

The facts of this case have been summarized by this court in its opinions in three pre-*Forrett* appeals: #15AP850 (*Singh I*), #17AP1609 (*Singh II*) and #18AP2412 (*Singh III*). In January 2004, Singh was convicted and sentenced for first offense operating a motor vehicle while intoxicated (OWI) by trial in Dane County. In April 2004, the State charged Singh again, this time as second offense OWI. [R136] The alleged prior was a 2001 Illinois Implied Consent blood test refusal. Singh pled no contest and was sentenced to ten days in jail, a monetary fine, and his driver license was revoked for fifteen months. [R151]

In Appeal #15AP850, this court denied relief because Double Jeopardy violations are beyond the scope of a writ of *coram nobis*. In Appeal #17AP1609, this court summarily reversed the trial court order denying Sec. 973.13 relief. Singh had argued that because second prosecution violated Wis. Stat. 345.52(1), Singh's sentence exceeded the statutory maximum and should be commuted. In Appeal #18AP2412, this court held that the *Singh II* remand mandate did not require vacating the conviction but did not otherwise clarify exactly what part of Singh's sentence had been held void in *Singh II*, nor clarify to what terms the sentence had been commuted.

On June 3, 2020, Singh filed the present motions. In one motion, Singh petitioned for a writ of *coram nobis* on the grounds that a statute of repose was violated. [R124] In the other motion, Singh asked the court to dismiss the repeater allegation under §973.13 arguing it is unconstitutional to enhance OWI sentences due to prior blood test refusals. [R123] Singh also moved to vacate the conviction on the same grounds under the rubric of *coram nobis*. After a motion hearing on

[1] *State v. Forrett*, 2021 WI App 31, 398 Wis. 2d 371, 961 N.W.2d 132.

11/09/2020, additional briefing from the parties [R159, R160], and another hearing on 1/20/2021, the court orally denied the motions but did not immediately enter any written order. After *Forrett* was decided, Singh filed a motion for reconsideration. [R164] A written order denying all motions was entered 06/22/2021. [R166] Singh appeals from this order. [R168]

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING § 973.13 RELIEF.

In his first motion, Singh alleges that the State has failed to meet its burden of proving his repeater status and seeks relief from an excessive sentence under Wis. Stat. 973.13[2]. [R123] Singh argues that the sentence should be commuted to a first offense OWI because blood test refusals cannot count as a prior offense for OWI sentence enhancement. The trial court ruled that counting blood test refusals as prior offenses is permitted, that the case law Singh relies on is not retroactive, and that Singh forfeited his right to raise such arguments. The trial court erred on all three points.

A. THIS COURT MAY HAVE ALREADY GRANTED THIS RELIEF.

As a preliminary matter, Singh now believes this court has already commuted the sentence to a first offense OWI in a prior appeal.[3] If so, Singh's current motion seeking to dismiss the repeater would be moot, and this court should remand with directions to enter an amended judgment of conviction reflecting a civil first offense OWI consistent with the previous commutation. Singh bases this on the law of this case from

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[2] WISCONSIN STAT. § 973.13 provides that, "In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings."

[3] Singh did not make this argument in the trial court. Nevertheless, this court on appeal is obligated to follow the law of the case doctrine. *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82. For the reasons explained herein, resolving this law of the case question directly impacts the court's jurisdiction. If the law of this case is that the sentence has already been commuted to a civil first offense, then this appeal of a criminal conviction brought under criminal post-conviction procedures would be jurisdictionally unsound.

State v. Aman Deep Singh, Appeal #17AP1609. This unpublished opinion is included in the Appendix.

In that prior appeal, Singh had argued that even though his sentence was well below the statutory maximum for a typical second offense OWI contained in Sec. 346.65, the peculiar circumstances of his case violated Wis. Stat. 345.52(1) so a lesser statutory maximum applied under these unique facts. This court summarized Singh's argument as follows:

> "¶3 In his motion, Singh argued "that a second offense OWI prosecution is not authorized by law after a first offense OWI trial has been completed, regardless of outcome or whether it was undercharged." Singh based his argument on WIS. STAT. § 345.52. Singh claimed that he received an excessive sentence because his prosecution for second offense OWI was invalid and, thus, any sentence would be excessive."
>
> *State v. Aman Singh*, Appeal # 17AP1609.

Citing *State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 261, 500 N.W.2d 339 (Ct. App. 1993), this court sanctioned the State for its failure to file a brief by summarily reversing the trial court order denying § 973.13 relief. *Blackdeer* instructs that a summary reversal "establishes the law of this case, which must be followed by the circuit court on remand and this court on subsequent appeals." *Id.* This means here that the law of this case is that Singh's original sentence is unlawful, that it exceeds the maximum permitted by law, and that some part of the sentence was void under §973.13.

Sec. 346.65 contains the imprisonment and fines penalty provisions for OWI convictions under Wis. Stat. 346.63(1) such as Singh's. The relevant subsections are the following:

> **(2)**
>
> **(am)** Any person violating s. 346.63 (1):
>
> 1. Shall forfeit not less than $150 nor more than $300, except as provided in subds. 2. to 7. and par. (f).
>
> 2. Except as provided in pars. (bm) and (f), shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307 (1) within a 10-year period, equals 2, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one.

Sec. 343.30 contains the mandatory driver license revocation penalty provisions for OWI convictions. The relevant subsections are the following:

> **(1q)**
>
> (b) For persons convicted under s. 346.63 (1) or a local ordinance in conformity therewith:
>
> 1. Except as provided in subds. 3. and 4., the court shall revoke the person's operating privilege under this paragraph according to the number of previous suspensions, revocations or convictions that would be counted under s. 343.307 (1). Suspensions, revocations and convictions arising out of the same incident shall be counted as one. If a person has a conviction, suspension or revocation for any offense that is counted under s. 343.307 (1), that conviction, suspension or revocation shall count as a prior conviction, suspension or revocation under this subdivision.
>
> 2. Except as provided in sub. (1r) or subd. 3., 4. or 4m., for the first conviction, the court shall revoke the person's operating privilege for not less than 6 months nor more than 9 months. The person is eligible for an occupational license under s. 343.10 at any time.
>
> 3. Except as provided in sub. (1r) or subd. 4m., if the number of convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus the total number of other convictions, suspensions, and revocations counted under s. 343.307 (1) within a 10-year period, equals 2, the court shall revoke the person's operating privilege for not less than one year nor more than 18 months. After the first 45 days of the revocation period has elapsed, the person is eligible for an occupational license under s. 343.10 if he or she has completed the assessment and is complying with the driver safety plan ordered under par. (c).

Singh's original sentence was ten days in jail, a monetary fine, and his driver license was revoked for fifteen months. [R151] None of these terms exceed the statutory maximum for second offense OWI listed in Sec. 346.65(2)(am)2. and Sec. 343.30(1q)(b)3. However, all three terms, the jail sentence, fine and license revocation, do exceed the statutory maximum for first offense OWI listed in Sec. 346.65(2)(am)1. and Sec. 343.30(1q)(b)2.

Since the terms of Singh's original sentence did not exceed the statutory maximum for second offense OWI but did exceed the statutory maximum for first offense OWI, the only way to make sense of this court's reversal of the trial court order denying § 973.13 relief is that the court tacitly determined that the repeater allegation was improper so

Singh should only have been facing first offense OWI penalties. Singh's argument there was that he should not have been prosecuted a second time after already being convicted of civil first offense OWI. If this court had instead concluded that second offense OWI penalties should apply, then it would not have reversed but summarily affirmed instead despite the State's failure to brief since Singh's original sentence plainly does not exceed the maximum for second OWI.

Dismissing the repeater allegation and commuting a criminal traffic violation to a civil forfeiture is certainly within the scope of Sec. 973.13. See *State v. Spaeth*, 206 Wis. 2d 135, 156, 556 N.W.2d 728 (1996) (commuting a criminal repeater OAR conviction to a civil first offense OAR). See also *State v. Hanson*, 2001 WI 70, ¶47, 244 Wis. 2d 405, 628 N.W.2d 759. Since this court summarily reversed the trial court order denying § 973.13 relief, and this court was adamant in Appeal # 18AP2412 that the sentence was not commuted all the way down to no sentence at all, then the only possible interpretation remaining is that what actually happened in the summary reversal was that the sentence was commuted back to the civil first offense penalties listed in Sec. 346.65(2)(am)1. and Sec. 343.30(1q)(b)2.

If the sentence has already been commuted to first offense OWI, then this appeal which seeks the same relief is moot. The court should simply remand with instructions to enter an amended judgment of conviction reflecting a civil OWI conviction instead.

B. BLOOD TEST REFUSALS CANNOT ENHANCE OWI SENTENCES

The trial court held that counting blood test refusals as prior offenses for OWI sentence enhancement was permitted. [1/20 Tr. 11:8 – 11:22] Subsequently however, this court has ruled in *Forrett* that doing so is unconstitutional. "Thus, revocations for warrantless blood draws, as set forth in WIS. STAT. §§ 343.307(1)(f) and 343.305(10), cannot be included in the escalating penalty structure of WIS. STAT. § 346.65(2)(am)." *Forrett* at ¶19.

The blood test refusal at issue in *Forrett* was in-state and counted under 343.307(1)(f), while Singh's refusal is from out-of-state and counted under Wis. Stat. 343.307(1)(e). However, *Forrett* at ¶6 fn.4 notes that the court saw no reason why this distinction would make any difference. "An increased penalty for the warrantless blood draw refusal revocation is an increased penalty—regardless of whether it takes place in the same proceeding or a later proceeding, it impermissibly burdens

or penalizes a defendant's Fourth Amendment right to be free from an unreasonable warrantless search." *Forrett* at ¶19.

C. *FORRETT* IS RETROACTIVE.

At the motion hearing, arguments were heard over whether *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) was retroactive. The trial court ultimately concluded that *Birchfield* is not retroactive. [1/20 Tr. 10:15 – 11:7] While *Forrett* begins its analysis with *Birchfield*, it goes even further by explicitly holding a Wisconsin criminal statute unconstitutional. Therefore, the relevant inquiry now is not whether *Birchfield* might or might not be retroactive, but rather whether *Forrett* and its new rule is retroactive. That in turn depends on whether the OWI sentence enhancement statutes ruled unconstitutional in *Forrett* are substantive or merely procedural.

Forrett narrowed the scope of the Wisconsin OWI penalty statutes by excluding the counting of blood test refusals and established a categorical rule that the class of OWI defendants with a prior blood test refusal may not face an enhanced penalty on that basis. Controlling precedent dictates new rules such as these are substantive and must be applied retroactively. "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of `an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 US 348, 351-352, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004).

"In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." Mackey, supra, at 693. Therefore, the first exception set forth in Teague should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934 (1989).

The Wisconsin Supreme Court has adopted this principle, that new substantive rules are to be applied retroactively. "Based on the Teague Court's own summary, we agree with the State that the Teague retroactivity analysis is limited to procedural rules. (citations omitted) The State concedes that Peete may have effected a substantive change in the law and that the doctrine of non-retroactivity found in Teague does not apply to substantive interpretations." *State v. Howard*, 211 Wis.2d 269, 284, 564 N.W.2d 753 (1997).

The new rule announced in *Forrett* is substantive because it narrows the scope of the OWI penalty statutes, places a certain class of offenders beyond the power of the state to punish, and announces a new statutory interpretation of the OWI penalty statutes. Therefore, it is retroactive to Singh's conviction.

D. SINGH HAS NOT FORFEITED HIS RIGHT TO RAISE THIS ISSUE.

The trial court also determined that Singh had forfeited the right to seek relief based on *Birchfield* because he did not raise it in his previous motion and appeal which was filed after *Birchfield* was decided. [1/20 Tr. 10:12 – 10:18] Singh argued that he was actually seeking relief based on the rule announced in *Dalton* instead of *Birchfield*, and this was his first post-*Dalton* motion. However, all of this is moot because Singh is now seeking relief based on the new rule announced in *Forrett* instead. [R164] *Forrett* goes further than *Birchfield* and *Dalton* because for the first time, it explicitly rules that certain Wisconsin OWI penalty statutes are unconstitutional. Based on precedent, Singh cannot be held to have forfeited the right to seek relief based on a rule like the one just announced in *Forrett*.

Challenging faulty repeater enhancements through Wis. Stat. 973.13 is a right that cannot be forfeited. "We conclude that § 973.13, STATS., commands courts to declare as void all sentences in excess of that authorized by law. We determine that a repeater portion of a sentence comes within the purview of § 973.13. We further determine that neither the procedural bar in § 974.06(4) nor the public policy discussion contained in *Escalona-Naranjo* precludes criminal defendants from seeking relief from faulty repeater sentences under § 973.13." *State v. Flowers*, 221 Wis. 2d 20, 27, 586 N.W.2d 175 (Ct. App. 1998). In fact, relief in *Flowers* was granted on the defendant's fourth post-conviction motion, just as this is Singh's fourth; and there were no intervening changes in the law in that case unlike here.

Even if an *Escalona* type forfeiture applied, Singh would have sufficient reason to excuse it. This court has generally found sufficient reason to excuse possible forfeiture when new published case law changes the interpretation of substantive statutes. Statutes are presumed to be constitutional. "Every legislative enactment is presumed constitutional[.]" *Forrett* at ¶7. "A litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced." *State v. Rodriguez*, 2007 WI App 252, ¶18, 306 Wis. 2d 129, 743 NW2d 460. "To hold otherwise would require criminal defendants and their counsel to raise every conceivable issue on appeal in order to preserve objections to rulings that may be affected by some subsequent holding in an unrelated case. We do not believe that Wis. Stat. § 974.06 requires so much." *Howard* at 288.

The Wisconsin Supreme Court "considered it impractical to expect a defendant to argue an unknown statutory interpretation." *Howard* at 287. If a defendant cannot be reasonably expected to argue a new statutory interpretation, Singh certainly could not be required to have previously argued that the statute was unconstitutional altogether. "Every legislative enactment is presumed constitutional[.]" *Forrett* at ¶7.

In the context of the good faith exception to the exclusionary rule, the Wisconsin Supreme Court stated, "Even accepting arguendo Prado's contention that court decisions had muddied the status of the incapacitated driver provision, what is clear is that no court had explicitly declared it to be unconstitutional until now. It would be unreasonable to expect a police officer to synthesize the relevant case law to divine that the statute was unconstitutional when no court had clearly said so." *State v. Prado*, 2021 WI 64, ¶65, 397 Wis. 2d 719, 960 N.W.2d 869. In the context of ineffective assistance of counsel, the Wisconsin Supreme Court stated, "'[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services `outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *State v. Lemberger*, 2017 WI 39, ¶18, 374 Wis. 2d 617, 893 N.W.2d 232.

It would be incongruous to hold that neither police officers nor defense attorneys are required to recognize that a statute is unconstitutional prior to an appellate decision explicitly holding such, but that *pro se* defendants on collateral review must do so. Singh cannot be held to have forfeited his right to relief based on the new rule announced in *Forrett* prior to this court publishing the *Forrett* opinion.

E. THE REMEDY

Singh asks this court to hold that the State has not proven that Singh is a repeater and remand for entry of an amended judgment of conviction reciting civil first offense forfeiture penalties instead. After this commutation is given effect, Singh asks the court to vacate the conviction altogether. There is a two-year statute of limitations for civil traffic forfeitures in Sec. 893.93(2)(b), and there is no tolling provision. Since the amended civil conviction violates the statute of limitations, Singh asks for it to be vacated after commutation.

II. THE TRIAL COURT ERRED BY DENYING A WRIT OF *CORAM NOBIS* FOR A STATUTE OF REPOSE VIOLATION.

A. LEGAL STANDARDS - *CORAM NOBIS.*

"The writ of *coram nobis* is a common law remedy which empowers the trial court to correct its own record." *State v. Heimermann*, 205 Wis.2d 376, 381-382, 556 N.W.2d 756 (Ct.App.1996). "A person seeking a writ of *coram nobis* must pass over two hurdles. 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." *Heimermann* at 383-384. The alleged factual error must be "of such a nature that knowledge of its existence at the time of trial would have prevented the entry of judgment." *Id.* Examples of such errors include where "a trial court could possibly use the writ to correct its mistaken belief about the age of a minor child or to clarify how its discovery that a party had died affected its earlier judgment." *Id.* Additionally, there is no applicable *Escalona* type successive motion bar for *coram nobis* relief. *Heimermann* at 385.

B. LEGAL STANDARDS – STATUTES OF REPOSE / LIMITATIONS.

A statute of limitation bars a legal proceeding once a certain period of time passes after the original injury. A statute of repose bars a legal proceeding after some other event has occurred. Statutes of repose and statutes of limitation are functionally equivalent under

Wisconsin law. See *Landis v. Physicians Insurance Co.*, 2001 WI 86, 245 Wis.2d 1, 628 N.W.2d 893, *Wenke v. Gehl Co.*, 2004 WI 103, 274 Wis. 2d 220, 682 NW2d 405. "We discussed historical definitions of statutes of repose and statutes of limitation and observed that statutes of limitation and repose share common objectives including notice to a potential defendant of when it will be required to defend a suit." *Wenke* at ¶17. "[W]e noted in *Landis* that the legislature has never denominated a period of limitation in the Wisconsin Statutes as either a "statute of repose" or a "period of repose." Instead, the legislature has lumped statutes of repose together with other temporal limitation statutes under various "limitations" headings. *Landis* concluded that the term "statute of repose" is largely a judicial label for a particular type of limitation on actions." *Id* at ¶18. "*Landis* also observed that "the phrase `statute of repose' is judicial terminology and is not featured in legislative lingo." When the legislature uses the term "statutes of limitation," it generally contemplates all limitation statutes, including statutes of repose." *Id* at ¶28.

The expiration of a criminal statute of limitation/repose is a fact that prevents the entry of a judgment of conviction. "We conclude that the running of the statute of limitations does not preclude the jury from reaching a verdict convicting the defendant of a crime; it rather precludes the trial court from entering a judgment of conviction on the finding of guilt." *State v. Muenter*, 138 Wis. 2d 374, 384, 406 N.W.2d 415 (1987). WIS. STAT. 345.52 is a statute of repose.[4] By its terms, § 345.52(1) bars a circuit court from entering a judgment of conviction in a state prosecution for OWI after a judgment on the merits has been entered in a local traffic ordinance action for the same OWI.

C. THE *CORAM NOBIS* CRITERIA ARE MET HERE.

Singh argues that the criteria for the issuance of a writ of *coram nobis* are met here as follows:

1) Singh is no longer in custody.
2) Singh has no other remedy for challenging the conviction.

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[4] 345.52 No double prosecution. (1) A judgment on the merits in a traffic ordinance action bars any proceeding under a state statute for the same violation. A judgment on the merits in an action under a state statute bars any proceeding under a traffic ordinance enacted in conformity with the state statute for the same violation.
(2) The pendency of an action under a traffic ordinance is grounds for staying an action under a state statute for the same violation. The pendency of an action under a state statute is grounds for staying an action under a traffic ordinance enacted in conformity with the state statute for the same violation.

3) While Singh did previously apply for *coram nobis* relief on different grounds (a constitutional Double Jeopardy in *Singh I*), there is no successive motion bar to prevent a second motion on new grounds (a § 345.52 statute of repose violation). See *Heimermann* at 385-386.
4) Sec. 345.52(1) is a statute of repose which would bar entry of a judgment of conviction in this second offense OWI prosecution following a previous judgment on the merits in a first offense OWI proceeding.
5) The trial court has never previously been called upon to resolve this issue. The question of whether a § 345.52(1) violation requires vacating the conviction was determined to be beyond the scope of Sec. 973.13 in *Singh II* and *Singh III*. In any event, the *coram nobis* case law seems to only require that the factual error not be raised prior to the entry of the original judgment, which in this case it was not.
6) Resolving a statute of repose is within the scope of *coram nobis* because it is a question of fact, not of law. There is no statutory interpretation involved, not any application of constitutional provisions. It is a purely factual question of timing. Did this second prosecution commence after a judgment on the merits in a prior traffic ordinance OWI proceeding? The answer is yes. Singh was convicted at trial and sentenced for first offense OWI months before the criminal complaint was filed here.
7) Finally, Singh has never expressly waived this defense. "*Pohlhammer* suggests that the statute of limitations defense may be waived; however, this must be an express waiver." *Muentner* at 382.

D. THE TRIAL COURT ERRED IN DENYING THE WRIT.

In orally denying relief, the trial court first questioned whether Singh's claim of error was legal in nature, not factual. [Tr. 16:8 – 18:15]. In an abstract sense, every question a court is called upon to resolve requires applying the law. A *coram nobis* proceeding is no different. *Coram nobis* requires a court to resolve whether an alleged factual error "would have prevented the entry of judgment." *Heimermann* at 384. This is obviously a legal determination; it requires the court to apply the law to determine whether a new fact if raised earlier would have barred the entry of the judgment of conviction. *Coram nobis* necessarily requires courts to determine the legal significance of alleged new facts.

So when *coram nobis* case law recites that the writ only addresses errors of fact not errors of law, the distinction is whether a petitioner is actually bringing forth facts that were not part of the original record or merely seeking another opportunity to raise new legal challenges based on the same facts that already appear on the record. In this case, it is undisputed that the trial court was never called upon to determine the significance of Singh's previous first offense OWI conviction prior to the

entry of the judgment of conviction. Therefore, the existence of this prior conviction is a new fact, a factual error of omission in the original record. To then make the legal determination of whether it would have prevented entry of the judgment is what the scope of *coram nobis* is.

The trial court's primary justification for denying the writ was that it was not equitable to vacate the conviction. [1/20 Tr. 18:16 – 21:16] However, the State cannot have an interest based in equity for preserving a conviction that it lacks legal authority to prosecute because it has unclean hands in such a scenario. "Under the clean-hands doctrine, a party who "has been guilty of substantial misconduct" of the matters in litigation such that the party "has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction shall not be afforded relief when he [or she] comes into court." "Before a court may deny a plaintiff relief in equity upon the `clean hands' doctrine, it must clearly appear that the things from which the plaintiff seeks relief are the fruit of [his or her] own wrongful or unlawful course of conduct."" *State v. Kaczmarski*, 2009 WI App 117, ¶8, 320 Wis. 2d 811, 772 N.W.2d 702 (citations omitted).

The State bears the responsibility for inadequate investigation before originally prosecuting Singh for a first offense OWI. The State bears the responsibility for then violating § 345.52(1) by prosecuting Singh a second time. The State has advanced no good cause to excuse its wrongdoing, let alone a persuasive argument for why it should be overlooked by a court of equity.

In fact, the State made no claims for equitable relief at all, not in any of its written submissions or at any time orally during the motion hearings. The trial court simply invented an argument for equitable relief on behalf of the State and then adopted it. The general rule is that a court should not abandon its neutrality to develop arguments on behalf of a party. It is one thing for a court to resolve some straightforward legal question without input from the State, but developing an entire argument based in subjective equity on behalf of the State seems very inappropriate.

E. ALTERNATE GROUNDS FOR ISSUANCE OF THE WRIT

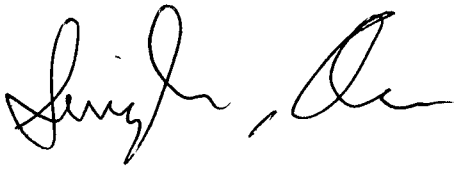
In his motion for a writ of *coram nobis*, Singh proposed an alternate ground for relief. The alternate alleged factual error was that Singh's charged prior offense was due to a blood test refusal. [R124] The court reporter notes of the original proceedings have long since been destroyed consistent with Supreme Court Rules. However, Singh submitted documentary evidence and testified at the January 20, 2001

hearing that it was never brought to the court's attention during the original sentencing that his alleged prior Illinois Implied Consent conviction was for refusing a blood test, and that this Illinois offense was in fact for refusing a blood test. Under *Forrett*, blood test refusals cannot count as a prior offense for OWI sentence enhancement, so it would be a fact that would bar the entry of a judgment of conviction for criminal second offense OWI here. Whether Singh refused a blood test or some other kind of chemical testing is plainly a factual question, not a legal one. And Singh's testimony and documents establish that the trial court was never called upon to decide on the significance of this fact prior to entry of the judgment of conviction.

CONCLUSION

Singh asks this court to reverse the trial court order denying relief and reconsideration. Singh asks the court to remand with instructions to enter an amended judgment of conviction reciting civil first offense forfeiture penalties, and to then vacate this amended judgment of conviction for violating the statute of limitations for civil traffic forfeitures. Alternatively, Singh asks the court to remand with instructions to grant a writ of *coram nobis* vacating the conviction.

Dated this 15th day of September 2021,



Aman Deep Singh