STATE OF WISCONSIN

IN THE SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2021 AP 1111 - CR

AMAN D. SINGH,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

AMAN D. SINGH

Defendant – Appellant – Petitioner

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ISSUES PRESENTED

In 2004, the Dane County District Attorney prosecuted Singh for first offense operating a motor vehicle while intoxicated (OWI). Singh was convicted, a sentence was imposed and those penalties were satisfied. The following year in 2005, the prosecutor belatedly learned of a possible countable prior offense – a 2001 Implied Consent violation for refusal to submit to a blood test in Illinois. The prosecutor successfully moved to have the civil first offense OWI conviction vacated and filed new charges against Singh for criminal second offense OWI instead. Singh was convicted again and additional enhanced penalties were imposed.

The procedure followed to serially prosecute Singh was thought to be permitted under *County of Walworth v. Rohner*, 108 Wis. 2d 713, 324 N.W.2d 682 (1982) and *City of Kenosha v. Jensen*, 184 Wis. 2d 91, 516 N.W.2d 4 (Ct. App. 1994) on the assumption that a first offense conviction for an undercharged OWI was void for lack of subject matter jurisdiction. This court abrogated that reasoning in *City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738 and *City of Cedarburg v. Hansen*, 2020 WI 11, 390 Wis. 2d 109, 938 N.W.2d 463. This court has also now held that blood test refusals cannot count as prior offenses for OWI sentence enhancement in *State v. Forrett*, 2022 WI 37, 401 Wis. 2d 678, 974 N.W.2d 422.

As a result of the application of all this bad law, Singh was improperly prosecuted and convicted twice, and remains convicted of the nonexistent crime of second offense OWI premised on a prior blood test refusal. The court of appeals determined that there are no procedural avenues open to Singh anymore to vacate or even amend the judgment of conviction because he is no longer in custody under a sentence. Article I, § 9 of the Wisconsin Constitution guarantees a right to remedy. ["Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."] The court should grant review

to clarify the extent to which these developments are retroactive; and what procedural mechanisms are available to defendants affected by them to seek relief.

1) Is *Forrett* to be applied retroactively?
2) Can a prosecutor circumvent the Wis. Stat. 345.52(1) ban on successive local and state prosecutions for the same traffic violation by simply moving to vacate the first conviction and charging a defendant a second time?
3) Are these claims within the scope of the writ of *coram nobis*?
4) Are these claims within the scope of Wis. Stat. 973.13?
5) Are these claims within the scope of Wis. Stat. 806.07(1)(d), or court's inherent authority, or any other mechanism?

CRITERIA FOR REVIEW

The retroactivity of *Forrett* presents a real and significant federal constitutional question. If *Forrett* is retroactive, Singh was convicted of a crime that does not exist. In Wisconsin, a second offense OWI premised on an earlier blood test refusal is a nonexistent crime. The court of appeals opinion holding that no procedural avenues are available to Singh to seek relief based on *Forrett* conflicts with the Article I, § 9 of the Wisconsin Constitution guarantee to a right to remedy. What limits Wis. Stat. 345.52(1) places on prosecutors is purely a question of law that is likely to recur unless resolved by this court. There is need for this court to clarify and harmonize the law on remedies available to defendants who are no longer in custody under a sentence. The court has been silent on this subject for decades, and the sporadic court of appeals opinions in the interim are confusing and inconsistent and at odds with the United States Supreme Court's evolving understanding of the writ or *coram nobis*.

STATEMENT OF FACTS

In 2004, the Dane County District Attorney successfully prosecuted Singh for first offense operating a motor vehicle while intoxicated (OWI). Singh was convicted, a sentence was imposed and those penalties were satisfied. The following year in 2005, the prosecutor belatedly learned of a possible countable prior offense – a 2001

Implied Consent violation for refusal to submit to a blood test in Illinois. The prosecutor successfully moved to have the civil first offense OWI conviction vacated and filed new charges against Singh for criminal second offense OWI instead. Singh was convicted again and additional enhanced penalties were imposed.

The remaining procedural history consists of Singh's attempts to seek relief. In *State v. Singh (Singh I)*, No. 2015AP850-CR, unpublished slip op. (WI App Jan. 7, 2016), Singh petitioned for a writ of *coram nobis*. Singh argued that the *Rohner* case mentioned above was wrongly decided and should be abrogated, and as a result his conviction violated Double Jeopardy. This court denied Singh's petition to bypass on the question of whether *Rohner* should be overruled. Contemporaneously, this court granted a petition to bypass in *Booth* on the same question, and indeed held that *Rohner* be overruled. However, the court of appeals affirmed the denial of relief in Singh's appeal, holding that Double Jeopardy presented a constitutional question of law and therefore beyond the scope of *coram nobis*. Singh petitioned this court for review, which was ultimately denied over a dissent from Justice Abrahamson.

Singh tried again in *State v. Singh (Singh II)*, No. 2017AP1609, unpublished slip op. ¶¶5-11 (WI App July 26, 2018); this time proceeding under § 973.13 seeking relief from an excessive sentence because the second conviction violated the statutory bar against double prosecutions in traffic cases in § 345.52(1). The court of appeals summarily reversed as a sanction against the state for failure to file a brief and remanded for further proceedings. On remand, the circuit court entered an order, pursuant to WIS. STAT. § 973.13, "commut[ing] any sentence above the maximum penalty authorized by law." Singh moved for reconsideration, arguing that, per this court's decision in *Singh II*, the circuit court was required to vacate his judgment of conviction and refund the fine or, alternatively, allow him to withdraw his plea. The circuit court denied the motion and this court affirmed, concluding that the circuit court properly awarded the only relief available under § 973.13. See *State v. Singh (Singh III)*, No. 2018AP2412-CR, unpublished slip op. ¶¶19-24 (WI App Apr. 16, 2020). This court further deemed forfeited, and thus did not address, Singh's

argument under *Birchfield v. North Dakota*, 579 U.S. 438 (2016), and *State v. Dalton*, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, that his 2001 Illinois administrative suspension for refusing to submit to a blood test could not be used to determine the subsequent OWI penalty. However, the court of appeals and later this court soon after held in *Forrett* that blood test refusals cannot be used to enhange OWI penalties.

In 2020, Singh brought the present action. Singh moved for relief under WIS. STAT. § 973.13, on the grounds that his administrative suspension for refusing to submit to a blood test could not be used to increase his criminal penalty and so therefore the conviction should be amended to a first offense. Singh also petitioned for another writ of *coram nobis*, again alleging that his conviction violated WIS. STAT. § 345.52(1) as well as the blood test counting issue and asked for the conviction to be vacated altogether. The circuit court denied the motions and the court of appeals affirmed. Singh now petitions for review.

ARGUMENT

I. *FORRETT* IS TO BE APPLIED RETROACTIVELY.

In *Forrett*, the court held "that Wis. Stat. §§ 343.307(1) and 346.65(2)(am) are unconstitutional to the extent that they count prior revocations resulting solely from a person's refusal to submit to a warrantless blood draw as offenses for the purpose of increasing the criminal penalty." *Id* at ¶20. Whether a newly announced constitutional rule is substantive and applies retroactively also presents a significant constitutional question. "This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final." *Montgomery v Louisiana*, 136 S Ct 718, 729; 193 L Ed 2d 599 (2016). It is purely a question of law that is likely to recur since it is certain many OWI defendants had their sentences enhanced by blood test refusals and may now wish to seek to relief.

Furthermore, the *Forrett* rule certainly appears to be substantive. "Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Montgomery* at 729-730. Without the prior blood test refusal, Singh is not guilty of any crime because first offense OWIs are a civil traffic forfeiture only. A categorical rule that OWI sentences cannot be enhanced solely based on blood test refusals must be applied retroactively. Similarly, a categorical rule that under Wisconsin law, drivers who commit an OWI are not guilty of a crime solely because they have a prior blood test refusal. Any OWI under these circumstances is a civil first offense.

If *Forrett* does apply retroactively, then Singh stands convicted of a crime that does not exist. A first offense OWI is not a crime in Wisconsin and a second offense OWI cannot be premised on a blood test refusal. There surely must be a procedural mechanism open for raising this claim. Otherwise, the State will have done an end-run around the requirement that it apply *Forrett* retroactively. It cannot be the law that defendants convicted of crimes that do not exist have no procedural avenues to vacate those convictions and must suffer the collateral consequences of conviction forever. Article I, § 9 of the Wisconsin Constitution guarantees a right to remedy.

II. WIS. STAT. 345.52(1) BARRED SINGH'S SECOND CONVICTION.

Whether Wis. Stat. 345.52(1) prevents a prosecutor from vacating a final first offense OWI conviction in order to recharge a defendant with second offense OWI is of statewide impact and likely to recur. The legislature "intends to encourage the vigorous prosecution" of OWI offenses. Wis. Stat. 967.055. The OWI counting statute, Wis. Stat. 343.307, lists many different possible prior offenses, including convictions and administrative license revocations from other states, Indian reservations and even other nations. Given the limited access a local prosecutor might have to these records from other jurisdictions, it is not uncommon that they may only come to light after a first offense OWI prosecution has been completed. Which should prevail, the

intent of vigorous prosecution of OWI, or a right to be free from repeated prosecutions under Wis. Stat. 345.52(1), is a question worthy of this court's review.

When Singh was convicted and sentenced for first offense OWI, that was plainly a judgment on the merits in a traffic regulation action that would trigger the bar on double prosecutions. It would certainly appear to violate the spirit of the law and render the statute empty if the prosecutor could simply move to have the first conviction vacated in order to be able to prosecute a defendant again.

III. THESE CLAIMS COME WITHIN THE SCOPE OF CORAM NOBIS.

The Wisconsin Supreme Court has been silent on the subject of the writ of *coram nobis* for decades, at least since *Jessen v. State*, 95 Wis.2d 207, 290 N.W.2d 685 (1980). It is ripe for reexamination. The sporadic court of appeals opinions on the writ are confusing and inconsistent and acknowledge that its understanding of the scope of the common law writ differs significantly from that of United States Supreme Court and many other states. See *State ex rel. Patel v. State*, 2012 WI App 117, 344 Wis. 2d 405, 824 N.W.2d 862. ¶¶14-18. As the court of appeals wrote in *Patel*, it is the Wisconsin Supreme Court's responsibility as the law-developing policy-making court to decide whether to follow the United States Supreme Court's interpretation or to continue charting its own path.

In recent years, there has been an explosion of collateral consequences of criminal convictions. These include consequences on immigration, employment, driver licenses, professional licensing, firearm possession, and countless recidivist sentence enhancement laws. Open records laws make the stigma of conviction there for anyone to see at a keystroke for the rest of time. In many cases, the collateral consequences can be much more severe and long lasting than the duration of the sentence. However, the typical remedies for challenging criminal convictions – direct appeal, postconviction motions and habeas corpus – are only available to defendants still in custody under a sentence. It is in reaction to all this that the United States Supreme Court's understanding of *coram nobis* has evolved.

"The writ of coram nobis is an ancient common-law remedy designed "to correct errors of fact." *United States v. Morgan*, 346 U.S. 502, 507, 74 S.Ct. 247, 98 L.Ed. 248 (1954). In American jurisprudence the precise contours of coram nobis have not been "well defined," but the writ traces its origins to the King's Bench and the Court of Common Pleas." *United States v. Denedo*, 129 S.Ct. 2213, 2220, 173 L.Ed.2d 1235 (2009). "Any rationale confining the writ to technical errors, however, has been superseded; for in its modern iteration coram nobis is broader than its common-law predecessor. This is confirmed by our opinion in *Morgan*. In that case we found that a writ of coram nobis can issue to redress a fundamental error, there a deprivation of counsel in violation of the Sixth Amendment, as opposed to mere technical errors. The potential universe of cases that range from technical errors to fundamental ones perhaps illustrates, in the case of coram nobis, the "tendency of a principle to expand itself to the limit of its logic." B. Cardozo, The Nature of the Judicial Process 51 (1921). To confine the use of coram nobis so that finality is not at risk in a great number of cases, we were careful in *Morgan* to limit the availability of the writ to "extraordinary" cases presenting circumstances compelling its use "to achieve justice." Another limit, of course, is that an extraordinary remedy may not issue when alternative remedies, such as habeas corpus, are available." *Denedo* at 2220.

Under the United States Supreme Court's evolving understanding of the scope of *coram nobis*, the errors Singh identified are of a fundamental nature. Wis. Stat. 345.52(1) barred the second offense OWI prosecution *ab initio*, and Singh is convicted of an unconstitutional nonexistent crime of second offense OWI premised on a blood test refusal. Given the substantial developments in the area of the law by the United States Supreme Court, and that this court has not spoken on *coram nobis* in decades, the subject is ripe for re-examination by this court.

On the other hand, the Wisconsin Court of Appeals recitation of the history of *coram nobis* flows in the opposite direction as the United States Supreme Court's – that of a writ that was once robust but has been neutered. "We start with some background information about the writ. The writ of coram nobis is a common law

remedy which empowers the trial court to correct its own record. Jessen v. State, 95 Wis. 2d 207, 212, 213-14, 290 N.W.2d 685, 687, 688 (1980). Before states began to develop statutory postconviction remedies in the late 1940s, this common law remedy was a very important means of correcting errors in trial proceedings. See generally Jeffrey T. Renz, Post-Conviction Relief in Montana, 55 MONT. L. REV. 331, 332-34 (1994). Indeed, since this writ was the main avenue to secure posttrial relief, some cases from other jurisdictions involve alleged errors which we would now see litigated in another manner, such as an allegation of race-based jury exclusion. In Wisconsin, the scope of this writ has decreased significantly from its common law origins." *State v. Heimermann*, 205 Wis.2d 376, 384, 556 N.W.2d 756 (Ct.App.1996).

The sporadic court of appeals opinions on the scope of *coram nobis* are also confusing and inconsistent. The court of appeals has concluded that a judge presiding over *coram nobis* cannot apply the Constitution. [E.g. *State v. Singh*, Appeal #15AP850, 2016 WI App 18, 876 N.W.2d 179 (unpublished) holding that Double Jeopardy is a question of law and therefore beyond the scope of the writ] Now, in the unpublished but citable one judge opinion in the present case, the court of appeals also holds that a judge presiding over *coram nobis* cannot apply any statutes either because "The application of a statute to undisputed facts is a question of law ...." ¶12.

What does a *court of law* do when prohibited from applying either the Constitution or any statutes? How does that even work? What is left of *coram nobis* if neither the Constitution nor any statutes may be consulted? And yet, in *State v. Hadaway*, 2018 WI App 59, 384 Wis. 2d 185, 918 N.W.2d 85, the court of appeals granted *coram nobis* relief and in the process appears to analyze both the Constitution and WIS. STAT 971.08. See *Hadaway* at ¶18. Furthermore, *Hadaway* permitted relief based on newly discovered evidence, but this court has previously written: "On an application for a writ of coram nobis the merits of the original controversy are not in issue and such a writ cannot be used for the purpose of obtaining a new trial on the grounds of newly discovered evidence relating to matters litigated at the trial." *Houston v. State*, 7 Wis.2d 348, 350, 96 N.W.2d 343 (1959).

The Wisconsin Supreme Court has been silent on the scope of *coram nobis* for decades. The sporadic body of law developed by the court of appeals in the interim is confusing and inconsistent with itself, with old cases from this court, and from the current case law of the United States Supreme Court on the nature of this common law writ. The subject is ripe for reexamination by this court in order to clarify develop and harmonize the law on remedies available to criminal defendants who are no longer in custody under a sentence but continue to face collateral consequences.

IV. THESE CLAIMS COME WITHIN THE SCOPE OF WIS. STAT. 973.13.

This court should accept review to clarify and develop the law on the scope of relief available under Wis. Stat. 973.13. This court has never addressed the subject directly, and the body of law developed by the court of appeals on the subject is confusing and inconsistent. In an earlier uncitable case, the court of appeals even questioned whether § 973.13 creates an independent procedural mechanism at all. State v. Karls, Appeal #2005AP2621, ¶3. In State v. Singh (Singh II), No. 2017AP1609, unpublished slip op. ¶¶5-11 (WI App July 26, 2018), the court did permit Singh to proceed under § 973.13 as an independent procedural mechanism but ruled that vacating the conviction was beyond the scope of relief permitted. In *State v. Holloway*, 202 Wis. 2d 694, 698, 551 NW2d 841 (Ct. App. 1996), the court concluded that § 973.13 permitted resentencing though the plain language of the statute does not mention it. "We therefore hold that when a sentence is commuted pursuant to § 973.13, STATS., the sentencing court may, in its discretion, resentence the defendant if the premise and goals of the prior sentence have been frustrated." Here in this case, the court concludes that "§ 973.13 does not allow for the amendment or vacation of a judgment of conviction." ¶12, fn4. But in other cases, the court of appeals grants § 973.13 relief and remands for entry of an amended judgment of conviction. See *State v. Zimmerman*, 185 Wis. 2d 549, 559, 518 N.W.2d 303 (Ct. App. 1994) *State v. Theriault*, 187 Wis. 2d 125,133, 522 N.W.2d 254, 258 (Ct. App. 1994) *State v. Wilks*, 165 Wis. 2d 102,112-113,477 N.W.2d 632 (Ct. App. 1991). And this court has previously ordered relief amending an enhanced criminal traffic conviction to a first

offense civil traffic forfeiture. See *State v. Spaeth*, 206 Wis. 2d 135, 556 NW2d 728 (1996), *State v. Hanson*, 2001 WI 70, 244 Wis. 2d 405, 628 N.W.2d 759.

This case law is inconsistent and confusing. This court should accept review to clarify § 973.13 does create an independent procedural mechanism, and that it is not limited to merely a commutation, but also any further proceedings necessary to effect justice, including amending the JOC, resentencing, vacating the plea, or any other measures necessary to effect justice.

V. THESE CLAIMS SHOULD COME WITHIN THE SCOPE OF SOME OTHER REMEDY AVAILABLE TO CONVICTED DEFENDANTS WHO ARE NO LONGER SERVING A SENTENCE.

If the above procedural avenues are not available to Singh, SOME procedural aveunue must be. Article I, § 9 of the Wisconsin Constitution guarantees a right to remedy. Additionally, Singh is *pro se*. He cannot be denied relief based solely on his inability to name the correct procedure as long as his pleadings show a basis for relief. *bin-Rilla v. Israel*, 113 Wis. 2d 514, 520-21, 335 N.W.2d 384 (1983) Therefore, even if this court decides that *coram nobis* and § 973.13 are beyond the scope of what Singh is attempting, it should determine if any other procedural mechanism is available. Or it should craft a remedy under Article I, § 9.

"Where an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin constitution, can fashion an adequate remedy." *D.H. v. State*, 251 N.W.2d 196, 76 Wis.2d 286 (1977); This Court found long ago that remedies can be adjusted "so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." *Von Baumbach v. Bade*, 9 Wis. 599 (1859). "Remedy may not be taken away altogether, but may be changed or modified, provided adequate remedy is left." State v. Diehl, 223 N.W. 852, 198 Wis. 326 (1929).

This court has ruled out many rules of civil procedure as avenues for relief from a criminal conviction. "We hold that neither Wis. Stat. § 805.15(1) nor § 806.07(1)(g)

or (h) are available procedural mechanisms for a convicted criminal defendant to challenge his or her conviction or sentence." *State v. Henley*, 2010 WI 97, ¶5, 328 Wis.2d 544, 787 NW2d 350. However, no court to date has decided whether relief from a void judgment under Wis. Stat. 806.07(1)(d) is permitted in a criminal case.

"A complaint which charges no offense is jurisdictionally defective and void and the defect cannot be waived by a guilty plea; the court does not have jurisdiction." *Champlain v. State*, 53 Wis. 2d 751, 754, 193 N. W. 2d 868 (1972). The complaint here is void because it charges a nonexistent crime – a second offense OWI cannot be predicated on a prior blood test refusal. So relief from a void judgment under § 806.07(1)(d) should be appropriate.

Additionally, courts have some inherent authority to correct illegal sentences. For example, "a court has the power to correct formal or clerical errors or an illegal or a void sentence at any time[.]" *State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis.2d 57, 681 N.W.2d 524. Singh's sentence is plainly illegal if the *Forrett* rule is retroactive, so the court should be able to correct the sentence under inherent authority.

VI. CONCLUSION

This court should grant review to decide the real and significant constitutional question of whether the new rule announced in *Forrett* is substantive and retroactive. If so, the court should also decide which remedy is appropriate for Singh to seek relief based on *Forrett*. Article I, § 9 guarantees SOME remedy be available and that Singh should not be subject to an unconstitutional conviction and all the collateral consequences that come with it for the rest of time.

Dated this 7th day of September 2022,

Aman Deep Singh

RE: 2021 AP 1111 – CR

State of Wisconsin v. Aman D. Singh

MOTION FOR APPOINTMENT OF COUNSEL

Aman Deep Singh, *pro se*, moves the court to appoint counsel if the court chooses to proceed on Singh's petition for review in this matter.

Dated this 7th day of September 2022,

Aman Deep Singh