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

Appeal No. 2021AP2116-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 AND ANOTHER FOR RECONSIDERATION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE GLENN H. YAMAHIRO PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

BY: JAMES J. SOCHA
Defendant-Appellant
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STATEMENT OF THE ISSUES PRESENTED

The threshhold question on appeal is whether the circuit court erred when not commuting the sentence in this case pursuant to Wis. Stat. § 973.13 upon a showing that four prior operating while intoxicated (OWI) convictions relied on to enhance penalties were overturned in their original forums after Mr. Socha was sentenced?

The Circuit Court Answered: No.

Did the circuit court err when concluding that this Court's finding of nine penalty enhancing prior OWI convictions in Mr. Socha's previous appeal is now considered law of the case and cannot be disturbed?

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 21, 2008, Mr. Socha was cited for OWI in the City of Glendale in Milwaukee County, Wisconsin. The State's amended criminal complaint charged him with OWI and alleged that he had eleven countable offenses pursuant to Wis. Stat. § 343.307(1) which could be used for enhanced penalties, contrary to Wis. Stat. § 346.65(2)(am)(7),[1] a Class F felony. The appellant was also charged with operating a motor vehicle with a prohibited alcohol concentration of more than 2% (BAC). (253:1-2; App. 100-01).

On March 10, 2011, Mr. Socha was found guilty by jury of the OWI and BAC charges. Sentencing was held on May 18, 2011 and he was sentenced on an OWI-tenth or subsequent offense. Along with fines and conditions, a term of imprisonment was imposed consisting of seven years initial confinement and five years extended supervision, consecutive to any other sentences. The BAC charge was dismissed. (44:1-2; App. 102-03).

Mr. Socha appealed his OWI sentence in 2013, arguing that the penalty enhancers were unlawfully applied because the State did not prove its eleven alleged

prior convictions, and that some were constitutionally defective. The Court of Appeals affirmed the circuit court's sentence on January 13, 2015, holding that the constitutional issues raised were either not proven and/or could not be collaterally attacked in the circuit court. The Court further concluded that prior to sentencing, Mr. Socha admitted to at least nine prior convictions for OWI, making his sentence as a tenth or subsequent offender appropriate. (Court of Appeals Decision dated January 13, 2015, Appeal No. 2013AP281-CR)(113).

On June 4, 2020, a Motion for Definitive Record of Prior OWI Convictions Used to Enhance Sentence was filed by the appellant in the circuit court. (17). The motion requested a review of the record and a definitive determination as to the particulars of each prior OWI conviction relied on to enhance the penalties in this case. The court denied the motion, finding that a record of prior convictions was established by the State at various presentencing hearings. (30).

A motion for reconsideration was filed by Mr. Socha arguing that the State's oral assertions and self-drafted sentencing document, without more, were insufficient under the law to prove prior convictions used for sentence enhancement. (34). The court denied the motion, however, it altered its position and instead of relying on the State's alleged prior convictions, turned to this Court's decision above where the Court agreed with the State's assessment that Mr. Socha admitted to at least nine prior OWI convictions that were used to support his sentence. (37).

The Appellant then requested the circuit court to amend the judgment of conviction because it inaccurately reflected that he was convicted of a twelth offense OWI, when the sentencing record did not show that the court made such a pronouncement, and this Court did not find this case to be a twelth offense either. The circuit court granted the motion and amended the judgment to read: "OWI (10th Or Subsequent Offense)." (44).

A postconviction motion followed which sought relief from an excessive sentence in the circuit court, on February 4, 2021. (45). The motion attached evidence showing that four of the predicate OWI convictions which the State alleged and the Court found reliable for enhancement in the previous appeal, were overturned void ab initio in their respective forums post-sentencing. Mr.

Socha set forth that due to the vacated convictions, his sentence is excessive by statute, and therefore, the excess portion is void as a matter of law and commutation thereof pursuant to Wis. Stat. § 973.13 is the requisite cure.

After initially holding the motion in abeyance for several months awaiting a decision in Branch 2 of the circuit court where Mr. Socha filed a similar motion, the court set a briefing schedule. Thereafter, it issued a written decision and order on October 29, 2021, wherein it denied relief. (64; App. 104-08). A subsequent motion for reconsideration was filed (65); and was denied in a written decision of December 1, 2021. (67; App. 109-10). This appeal follows.

ARGUMEMT

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 enhanced sentence which is void as a matter of law because it is partially based on prior convictions overturned post-sentencing. The circuit court denied relief finding that the enhanced penalties in this case are based on a correct set of facts and sound prior OWI convictions, and that **State v. Hahn**, 2000 WI 118, does not entitle the appellant to relief even though four of the nine predicate prior convictions used to increase penalties have been shown to be vacated after imposition of sentence in 2011.

The court's decision and order is erroneous because it did not recognize that when a defendant brings indisputable evidence, post-sentencing, demonstrating that his enhanced sentence is founded in part on prior convictions which were vacated, relevant law commands that the excess portion of the sentence be commuted, it is not discretionary. The court's ruling deprived Mr. Socha of warranted relief from an excessive, void, and illegal sentence. This Court should reverse the lower court's decisions and commute the sentence pursuant to Wis. Stat. § 973.13.

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

B. Four predicate prior convictions relied on to enhance the sentence in this case were successfully overturned post-sentencing.

After the February 4, 2021 filing of Mr. Socha's postconviction motion seeking sentence commutation, the circuit court ordered that it be held in abeyance pending the outcome of a similar motion filed by the appellant in an unrelated case in another branch of the Milwaukee County Circuit Court.[2] The court

reasoned that the decision in its sister court "may impact a decision on the motion filed in this case." A briefing in this case was later ordered after a decision in Branch 2 of the circuit court was rendered.

The motion filed by the appellant attached evidence corroborating that four of the nine prior OWI convictions relied on to enhance penalties here were formally vacated after the sentence was imposed on March 18, 2011. (45). The motion explains that the four convictions overturned post-sentencing 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 the current Class F felony sentence for OWI-tenth or subsequent offense, originally entered by the sentencing court.

Prior to and post-sentencing in this matter the trial court has not relied on DOT records and none are included in the established record. On appeal in 2013, the State motioned for supplementation of DOT documents and this Court remanded to the circuit court to determine if they were part of the record prior to sentencing. On remand, the circuit court found that DOT records were not ever entered or relied on in imposing sentence, and denied the State's request for supplementation thereof. (4; 204:23).

The State's response to the appellant's postconviction motion acknowledges that this Court found nine prior convictions eligible for sentence enhancement in the 2013 appeal. (53:3). It then argues that if the circuit court now finds a new factor, a resentencing and not modification is the remedy, and that **State v. Wideman**, 206 Wis.2d 91 (1996) allows for its postconviction supplementation of DOT records that are dated in excess of ten years after Mr. Socha was sentenced in 2011, to prove up additional prior convictions to sustain his current sentence.[3]

The circuit court found that there "is nothing that allows the State to prove up prior offenses more than ten years after sentencing," (emphasis original), and rejected the State's claim that Wideman tolerates entry of DOT records postconviction, ruling that: "[t]he court declines the State's proposal 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." (64:4-5; App. 107-08).

The circuit court accepts that: "[t]he defendant has submitted documentation showing that four of his prior convictions...were vacated in March 2020."

(64:2; App.105). And the States's response brief acknowledges the same. (53:2). The Court's decision however does not 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 concentrates primarily on its view that **Hahn**, supra, does not "sanction" relief in this case. (64:2-4; App. 105-07).

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

The Hahn court opined that such a challenge was not constitutionally 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 themselves intended for penalty enhancement, at the enhanced sentencing proceeding, unless it invokes a defendants constitutional right to counsel:

> 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.

Hahn, Id. at ¶28.

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

> 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 its wording plain. If Mr. Socha desired to challenge a prior conviction relied on for an enhanced sentence in this or any other subsequent prosecutuion on any ground other than the denial of the right to counsel 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 adjustment to relieve the 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 on the instant sentence because this appellant was not sentenced pursuant to Wis. Stat. § 939.62(2), and did not meet his burden to prove that his four overturned convictions were done so on constitutional grounds. (64:3; App. 106).

The State and court attempt to rationalize that because the four convictions were not overturned until after sentencing they were then valid at the time the sentence was handed down, and therefore, 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) (64:4; App. 107).

The circuit court utilzes the word "simply" when inferring that getting any prior conviction vacated is a routine task all defendants can easily achieve, it is not. Courts are generally not in the habit of randomly overturning their convictions as suggested by the court above, it must be done by lawful means and for valid reason. This is precisely why postconviction cures are available for defendants who are illegally sentenced using invalid prior convictions to increase penalties.

It is the circuit court who reads **Hahn** much too narrowly, and its findings are a grave mistake of law. **Hahn** in no way whatsoever limits its 'bright-line rule' and remedy to a certain repeater statute or what the other grounds for attacking a prior conviction encompass, and distinctly states that the offender "may use whatever means available under state law to challenge the validity of a prior conviction." (emphasis added) **Id.** at ¶28. The court does not point to precisely where **Hahn** holds that the 'other grounds' for challenging and procuring vacatur of a prior conviction must be of constitutional magnitude; that Mr. Socha

is burdened with proving his four convictions were vacated for constitutional reasons; nor where **Hahn** holds that it only applies to defendants sentenced pursuant to § 939.62(2), Stats.

The circuit court seemingly will not accept that vacatur removes the fact of conviction, period. It is irrelevant on what grounds a conviction is overturned. 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).

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

The prospect of invalid prior convictions alleged by the State was known to the trial court in this case from its near inception, this is nothing new. Hearings were held on potentially void convictions and **Hahn's** applicability herein, and the original trier of fact clearly understood what the successor court does not. At that time, defense counsel was in the process of getting two Wisconsin OWI convictions overturned in their original forums and the appellant later mounted collateral attacks on several out-of-state convictions intended for increased penalties.

The court held that it would not delay sentencing pending an outcome of the challenged local cases; and relying on **Hahn**, denied the collateral attacks. However, on at least to seperate occasions the court made a record which specifically instructed that if Mr. Socha were able to achieve vacatur of any penalty enhancing convictions in their original forums after sentencing in this case, the court would be obligated to reopen the enhanced sentence for adjustment thereof, pursuant to **Hahn**. (262:13-14; App. 113-14).

At the final pretrial hearing addressing **Hahn's** relevance here, the court directly engaged Mr. Socha one on one and determined that his collateral attack was impermissible; but then advised him that "[i]nstead...there is an outlet for

you, but it is not here ... 'you 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 you happen to successfully challenge [a prior conviction] sometime ... then you could come back in and get whatever sentence you might get in this case overturned." (151:21-22: App. 115-16).

Mr. Socha then went on to do exactly as instructed by the original trier of fact and our supreme court. His attorney in Wisconsin was successful in having the two local convictions vacated and they were recognized as such in his 2013 appeal of this case. His counsel in Ohio then directly attacked four alleged OWI convictions in their original forums that were used to enhance the penalties here, using lawful means available in that state and was successful in all four attacks. The appellant then applied to the circuit court as instructed to have his sentence adjusted under **Hahn** and § 973.13, Stats., by showing that four of the nine convictions were determined void ab initio and removed from his driving record, yet the successor court denied warranted relief.

In his motion for reconsideration, Mr. Socha pointed out that the court's decision did not make conclusions founded on applicable law, arguments raised, and the facts and record of this case—and did not employ stare decisis concerning previous **Hahn** rulings of record made by the original trier of fact. (65). Instead, the court's decision ignored the prior rulings and relied near upon verbatim on a decision entered by its sister court in an unrelated case with a different set of facts—as opposed to relying on the record in this case and previous findings of its predecessor.

The court denied reconsideration stating that it is not bound to uphold its predecessor's ruling on **Hahn's** applicability in this case; and that: "[t]he court was not precluded from adopting [its sister court's] reasoning to address substantially similar arguments raised in this case." (67; App.109-10). The post-conviction court unlawfully moved the goal posts established by the original trier of fact and bypassed our supreme court's 'bright-line rule' established in **Hahn**, only after Mr. Socha went through the hoops prescribed and successfully achieved postsentencing vacatur of four penalty enhancing convictions and moved for sentence adjustment.

This appeal presents a matter of first impression in Wisconsin, because, although **Hahn** promulgated a "bright-line rule that applies to all case," analo-

gous 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 prior convictions previously relied on to increase penalties.

Multiple other jurisdictions have addressed postconviction vacatur of penalty-enhancing convictions, and their effect on the legality of a sentence imposed which 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 a prior conviction used to support enhanced penalties is overturned and/or found to not actually exist after a sentence is imposed. The Hawaiian 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 forming 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 sentence.

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 therein that after successfully attacking a prior conviction, a defendant "may obtain a reduction of a sentence that was imposed on the basis of that prior 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 tp 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 [trial] 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 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 in **Johnson v. United States**, stated:

> Our cases applying [the enhanced provicion 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).

Wisconsin's **Hahn** court stopped short of prescribing the precise cure available to defendants who successfully challenge a prior penalty enhancing conviction in its original forum, post-sentencing. However, this Court has a plethora of law available from other state and federal jurisdiction from which to find as they have, that a defendant is entitled to relief from an enhanced sentence, when it is later shown to be based on prior convictions proven to not actually exist and/or have been overturned after imposition of the original sentence.

Of importance, is although the four convictions were not formally vacated until after the sentencing in 2011, they were ordered vacated <u>void ab initio</u>, which logically concludes that they never actually existed. The vacating orders themselves were just formalities. Any argument that theses convictions were lawfully valid when the sentence was imposed in this case, is simply moot.

C. A New Factor has been established but is not necessarily needed to grant Mr. Socha 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;' advised that it was brought pursuant to Wis. Stat. § 973.13 and **State v. Hahn**; and moved the circuit court to 'modidify and commute' the OWI sentence originally entered in this case because of 'new factors' unknown to the court at the time sentence was imposed. (45). The motion and supporting documentation demonstrate that four of the nine prior convictions alleged by the State and seemingly relied on to enhance this felony OWI-tenth or subsequent offense sentence were overturned void ab initio post-sentencing. Mr. Socha urged the court to commute his sentence under § 973.13, Stats., to no more than permitted by statute.

The circuit court refused to grant relief based on the four vacated convictions, stating that **Hahn** does not allow for 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." (64; App. 104-08). The court reasoned that: "[t]he defendant's prior convictions were valid at the time he was sentenced in this case." (Id:4; App. 107).

The above was the extent of the court's new factor analysis, it placed all of its eggs in **Hahn's** basket when denying relief. The court, and State for that matter, do not explain as argued, just 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 and the law dictate 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.

"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 (1998). 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 set of facts highly relevant to the imposition of sentence, but not known to the trial judge at 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 four vacated convictions are void ab initio and never actually existed. The aforesaid 'set of facts' is not contested by either the State or circuit court, and are significant facts 'not known to the trial judge [or anyone] at the time of 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 on upon by the trial court." **State v. Smet**, 186 Wis.2d 24, 34 (1994).

The first prong of the test has been satisfied. The established new factor then justifies modification or commutation because the four overturned convictions are confirmed as defective and were unlawfully used to enhance this sentence past the maximum penalty exposure. 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 § 973.13, Stats., is the cure, and not modification or resentencing, because due to the vacated and nonexistent convictions erroneously relied on to increase penalties, the sentence is in excess of that allowed by the subsection of 346.65(2), Stats., which the appellant is currently sentenced under.

Mr. Socha notes above that a new factor need not necessarily be found for this Court to grant relief, as § 973.13 sentence commutation, and not modification or a resentencing, is the constrained remedy. The three remedial acts above are not tantamount, and are often "muddled" in case law and pleadings. See **State v. Wood**, 2007 WI App 190, ¶¶7-10,. By law, commutation, modification, and resentencing, are all independant of one another and are executed based on the laws and individual circumstances presented in each case.

In resentencing, "the court imposes a new sentence after the initial sentence has been held invalid." **State v. Carter**, 208 Wis.2d 142, 154 (1997). The resentencing court is in effect starting over. See **Id.** at 157. The purpose of new factor sentence modification is to allow a circuit court to correct a sentence, and is considered a discretionary act. **Hegwood**, supra, at 546. So long as a sentence is modified within statutory confines, 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 judgment 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 either 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 supporting evidence of overturned 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 but did not until it was raised again on reconsideration. "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 per se have discretion to modify this sentence; nor was the State's request for a resentencing permissible by law without commutation ocurring first. This is because the sentence has now been shown to be excessive by statute, as there are not enough penalty enhancing convictions to sustain the current twelve year sentence imposed under § 346.65(2)(am)(7), rather, only a civil forfeiture pursuant to § 346.65(2)(am)(1).

In **State v. Leblanc**, this Court addressed whether commutation or resentencing is required when both components of a bifurcated sentence exceed the maximum term permitted by law, as is the situation 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." **Id.** 2021 WI App 63, ¶12 (unpublished)(App. 117-22).

> 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)(emphasisi 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 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 Hanson as if they never existed, and his sentence was determined as "in excess of that authorized by law and invalid under Wis. Stat. § 973.13." **Id.** at ¶2.

II. THE STATE DID NOT PROVE NINE PRIOR CONVICTIONS ELIGIBLE FOR ENHANCED PENALTIES.

In the previous appeal of this case the Court agreed with the State's allegations that Mr. Socha admitted to the existence of at least nine prior convictions and affirmed his sentence as an OWI-tenth or subsequent offense. The Court itself only references seven prior convictions in its decision with specificity, not nine or more, and the appellant can show that prior to sentencing, there was not a valid admission of nine prior convictions as found.

First, the State alleged that Mr. Socha admitted two Illinois OWI convictions via affidavits entered in the circuit court before sentencing. (2013AP281-CR, State's Br. p.19). However, this Court on appeal pointed out that although "the State repeatedly references it, the affidavit is unsigned," and thus invalid. After ruling on the unreliability of the affidavit entered pre-sentencing, the Court instead decided that a signed affidavit submitted post-sentencing was suffieient in affirming the two Illinois convictions. (2013AP281-CR, January 13, 2015, Decision, p.7, n.4)(113).

The Court's decision above, however, directly contadicts **Wideman**, supra, wherein it held that the State must establish 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.'" Id. 206 Wis.2d 91, 95 (emphasis added)(quoting **State v. McAllister**, 107 Wis.2d 532, 539 (1982)).

The post-sentencing affidavit the Court relies on as an admission was obviously not a part of the record prior to imposition of sentence, which leaves to question how exactly it can be recognized as a conclusive admission under **Wideman** if it was not ever before the sentencing judge. Mr. Socha maintains that because the affidavit was not in the record before the trial court imposed sentence, it could not be considered postconviction as a valid admission, and therefore, the two Illinois convictions alleged by the State were not proven to exist and are ineligible as enhancers under **Wideman.**[4]

Second, the Court's decision references only seven penalty enhancing prior convictions with specificity, but stated that "we agree with the State's assessment that Socha admitted to at least nine prior convictions..." (Id. at 10.). It is not necessarily clear from where the Court derives the other two admissions to total "at least nine," as it only made a record of seven. It is clear that the State's brief contends that Mr. Socha "had four Wisconsin convictions," and then it concedes that two of them were vacated. (2013AP281-CR, State's Br.19). The State then argues that "Socha admitted to two countable Wisconsin convictions" at the May 18, 2011 sentencing hearing, with alleged dates of "February 23, 2005" and "December 26, 2004." (Id.; App. 111).

When analyzing the absoluteness of an admission to an alleged OWI conviction intended for accelerated penalties, our supreme court held that "competent proof" of a prior conviction "must reliably demonstrate with particularity," the indisputable existence of the prior conviction. **Spaeth**, supra, 206 Wis.2d 135, 150 (emphasis added).

The totality of the record here including the sentencing transcript as alledged by the State, does not reflect that the appellant ever made a specific admission to a Wisconsin OWI. "Particularity," as compelled by **Spaeth** inevitably necessitates a deliberate concession with actual dates of conviction to be valid.

Mr. Socha at no time uttered the dates above as being convictions, nor were they ever officially documented via competent proof by the State. This is because convictions for OWIs in Wisconsin with the dates alleged above do not exist, and therefore, could not ever have been logically admitted.

The four OWI convictions alleged above by the State were never lawfully substantiated as actually existing, and as a result, lessens the Court's conclusion of "at least nine" prior convictions, to five. Evidence brought in 2021 established that four of the five Ohio convictions alleged were overturned void ab initio, and Mr. Socha concedes that one Ohio OWI with a conviction date of January 9, 1991 remains of record as of the date of this writing.

The record of OWIs evinced in this case consists of the 1991 conviction in Ohio, and the instant one in 2011. Because the convictions did not occur "within a ten year period," under § 346.65(2)(am)(2), Stats., Mr. Socha was not subject to criminal penalties, rather, a maximum civil forfeiture of $300 pursuant to § 346.65(2)(am)(1). The enhanced penalty including imprisonment currently imposed under § 346.65(2)(am)(7), for an OWI offender with ten or more prior convictions cannot be sustained, and the excess portion imposed is void as a matter of law. "When a court imposes a sentence greater than that authorized by law, § 973.13 voids the excess." **Spaeth**, supra, Id. at 155.

This Court holds the authority to commute this sentence under § 973.13, Stats., without remand to the circuit court, other than for entry of an amended judgment of conviction. Mr. Socha sets forth that the record supports only a sentence for the maximum permitted by statute for an OWI-first offense under Wis. Stat. § 346.65(2)(am)(1) (2008).

CONCLUSION

For all of the reasons set forth above, the defendant-appellant, respectfully moves the Court to reverse the lower court decisions denying relief, and to commute the sentence in this case without further proceedings.

Dated this 4th day of February, 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 its number of pages does not exceed the amount allowed.

Dated this 4th day of February, 2022.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a seperate document or as part of the 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 4th day of February, 2022.

James J. Socha
Defendant-Appellant, pro se.

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1 All Wisconsin statutes 2008.

2 The other motion pending was before the Honorable Milton L. Childs, Sr., in Branch 2. It also sought commutation of an excessive sentence for OWI in Case No. 2004CF7137. (Appeal No. 2021AP1083-CR).

3 The State's response brief in this case is nothing more than a slightly edited version of the one it filed in the other Milwaukee County case above. It erroneously claims that the appellants primary basis for relief is founded on **State v. Koeppen**, 195 Wis.2d 117 (1995). (53:1).

However, Mr. Socha did not cite **Koeppen** as his main foundation for relief. The case is instead cited as a pillar upholding that the State is not permitted to prove up its alleged prior OWI convictions postconviction by submitting DOT documents more than ten years after sentencing. **Id** at 127-31. **Koeppen** is grounded on well established cannons of repeater sentencing law in general, and the State is wrong when asserting it only applies to repeater sentences under § 973.12, Stats.

The State claims at the circuit court that the "defendant has eleven prior OWI offenses on his record that could and do enhance the penalty in this case." (53:1). But in the previous appeal it detailed only nine prior OWIs it claims are eligible for enhanced penalties in its brief, and stated that: "[i]n total, Socha admitted to nine prior convictions."(Appeal No. 2013AP281-CR, State's Br. p.19; App. 111). This Court agreed with the State's concession as to nine penalty enhancing convictions in its decision. (Appeal No. 2013AP281-CR, Decision, January 13, 2015, p. 10; App. 112). Where the additional two come from is unknown.

Moreover, the State conceded that "[i]t is clear that the driving records were not admitted into evidence and are not included in the appellate record." (State's Brief, supra, Id.; App. 112). The State is fully aware that on remand from this Court in the previous appeal, the circuit court rejected its request for supplementation of DOT records. (4:1). The State has acted with contempt when in deliberate defiance of a court order, it submitted DOT records dated in excess of ten years after sentencing took place, and after explicitly being told by the circuit court they were not admissible.

4 **Koeppen** as referenced above plays a role here as well. All prior convictions intended for sentence enhancement must be substantiated and in the record prior to imposition of sentence, and it is the State who carries this burden. "At the time of the postconviction [motion], the sentencing was obviously completed. Whether the gap in the sentencing proof was sought [via post-sentencing affidavits] or by the State's production of the certified [DOT records], the proof came to late." **Id.** at 128-29. The State and this Court cannot rely on postconviction proofs, not of record before sentencing. "[W]e know of no authority which permits the court to use such a proceeding to reopen the sentencing proceeding in order to supply additional and essential proofs necessary to sustain the original sentence." (emphasis added) **Id.** at 130. An affidavit entered post-sentencing cannot be relied on as an admission of the Illinois convictions, it would be akin to reopening sentencing, and is not allowed.