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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2021AP2116-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JAMES J. SOCHA,
Defendant-Appellant,

ON APPEAL FROM A DECISION AND ORDER DENYING A POST CONVICTION MOTION FOR SENTENCE MODIFICATION AND ANOTHER FOR RECONSIDERATION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE GLENN H. YAMAHIRO PRESIDING

REPLY BRIEF OF DEFENDANT-APPALENT

BY: JAMES J. SOCHA
Defendant-Appellant
Post Office Box 351
Waupun, WI 53963-0351

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I. THE STATE DID NOT PROVE NINE PRIOR CONVICTIONS BEFORE SENTENCING AND THE COURT'S DECISION IN THE PREVIOUS APPEAL OF THIS CASE WAS ERRONEOUS IN FINDING THAT THE APPELLANT ADMITTED TO "AT LEAST NINE PRIOR CONVICTIONS."

In the previous appeal of this case the Court found in ***State v. Socha***, Appeal No. 2013AP281-CR, that the appellant supposedly "acknowledge[d] the existence of at least nine prior convictions," and that he was properly sentenced as a tenth or subsequent OWI offender. *Id.* at ¶27. The Court's finding however was an erroneous exercise of discretion, in that it did not follow Wisconsin Supreme Court precedent, nor where many of its findings based on facts supported by the established record prior to sentencing. See ***State v. Avery***, 2013 WI 13, ¶23. (The court of appeals erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the record).

At the time of the 2011 sentencing in this case, there was no documentary evidence of prior OWI convictions in the record other than some affidavits attached to motions filed by the appellant, wherein he challenged the validity of several out-of-state convictions alleged by the State. When addressing the circuit court, Mr. Socha specifically noted that there was not ever a definitive determination as to the actual number of prior convictions eligible for enhancement, and requested "proof and applicability of prior out-of-state OWI convictions."

Though Mr. Socha had the right under ***State v. Wideman***, 206 Wis.2d 91, 108 (1996), and its companion decision in ***State v. Spaeth***, 206 Wis.2d 135 (1996), to know the particulars of each prior conviction the court was using to enhance his penalties and to challenge their existence and validity before sentencing, the court denied the request and did not make a record of the prior convictions it used to enhance sentence as a tenth or subsequent offense. (98:24-27) Instead of relying on documentary evidence of each prior conviction, the trial court illegally relied on what it considered to be judicial notice as proof of prior OWI convictions, which is why it did not make a specific record of each one at sentencing. (80:2-9; 81:2-5; 98:25-27, 31-33)

Because of insufficiencies at the trial court, this Court's previous decision was tasked with clarifying precisely what prior convictions were used to enhance penalties in this case, and if the State had competently proved them. Instead, the Court managed to further muddy the waters when only giving an indeterminate amount of "at least nine prior convictions," and specifically documenting only seven of them in its decision. The State and circuit court have now run with this Court's undefined language as to the amount of prior convictions, when citing it in their writings multiple times.

The Court erroneously adopted the State's inconclusive terminology that Mr. Socha admitted "at least nine prior convictions," without any regard for future litigation requiring a specific number and record of each. When it comes to prior convictions, and especially in this case where there were many alleged and challenged, and now an additional four have been vacated, this Court should have clearly defined each prior conviction in its opinion with particularity but did not, resulting in prejudice to Mr. Socha who was entitled to a concise record of all prior convictions used to enhance his sentence, and a detailed record pointing to where and how each was proven by the State, not just how his admissions are "sprinkled throughout the record." (113:9)

In his previous appeal, the State argued that Mr. Socha had admitted two Illinois OWI convictions via affidavits entered before he was sentenced. The Court found that the affidavits the State was relying on as admissions are not binding because they were not legally executed by signature. However, the Court then concluded that although the pre-sentencing affidavit could not be considered a valid admission, an identical signed affidavit entered post-sentencing could be. (113:7, n.4). The circuit court did not ever make a record of any Illinois OWI convictions before imposing sentence, and this Court nor the State pointed to anywhere else in the record where Mr. Socha had allegedly admitted any Illinois convictions, with specificity, before he was sentenced, as required by law.

Pursuant to ***Wideman***, supra, the State was required to prove all its alleged prior convictions, "before sentencing." *Id.* at 95. In ***State v. Koeppen***, 195 Wis.2d 117 (1995), this Court found that penalty enhancing convictions must be established prior to imposition of sentence, it cannot be done afterwards. *Id.* at 127-30. At the time of Mr. Socha's sentencing, the signed affidavit entered postconviction which this Court relied on as a competent admission of two Illinois OWI convictions, was non-existent and not in front of the circuit court judge, and cannot be considered a part of the pre-sentencing record. Therefore, without explanation as to why it disregarded not only its own ***Koeppen*** decision, but more substantially, the supreme court's precedent set in ***Wideman*** compelling prior convictions be proved **"before sentencing,"** this Court has erroneously exercised its discretion when finding an affidavit entered postconviction can be used as a valid admission of a prior conviction. Consequently, the two Illinois convictions used to enhance Mr. Socha's sentence were not ever proven and were *inter alia* invalid as penalty enhancers.

There were also four Wisconsin OWI convictions alleged by the State, and in the previous appeal it conceded two were vacated. (State's Resp. Br. p.19, 2013AP281-CR) The State then claimed that Mr. Socha had admitted the remaining two convictions at sentencing, one in Ozaukee County with the alleged date of "February 23, 2005" and the other in Milwaukee County on "December 26, 2004." It cites "39:2" and "98:27-28" of this record as proof of the admissions. (*Id.*) The only reference to Wisconsin OWI convictions in the Court's issued

opinion related to the two which were vacated in 2010 (113:10), and only states in general that it agreed with the State's assessment that the appellant admitted to "at least nine prior convictions." (*Id.*) The Court left only murky waters once again when not specifically pointing to where in the record Mr. Socha supposedly admitted two Wisconsin convictions with particularity, including dates of violation and conviction for each. The appellant sets forth that the Court could not pinpoint such admissions of prior Wisconsin convictions from within the established record, because they do not exist.

At least three times this very assistant attorney general manipulated the record and seemingly prevailed in persuading the Court into believing that Mr. Socha admitted its remaining two alleged Wisconsin convictions. First, at 39:2 of the record, the appellant's pleading merely listed the prior violations and convictions as alleged by the State, this is not a competent admission thereof. Second, at 98:27-28, the record does not show that Mr. Socha at any time admitted prior convictions with specificity such as violation and conviction dates, and certainly not the dates alleged by the State above, as it would not be possible because they are violation and not convictions dates listed in the State's brief. Third, the State slips in the words "Wisconsin" and "OWIs" before quoting the appellant about something he was revoked for, all in an attempt to make it appear that he was referring to prior Wisconsin OWI convictions. (State's Resp. Br. p.18, 2013AP281-CR) Mr. Socha did mention being revoked, but not with specifics of precisely what for, and he certainly did not particularize any Wisconsin OWI convictions in detail as required by law. It would be pure speculation to construe Mr. Socha's remarks as pertaining to OWI revocations. "[S]uch hypothesis should not have to be resorted to when dealing with a substantial penalty enhancer. ***State v. Farr***, 119 Wis.2d 651, 657 (1984).

The supreme court in ***Spaeth***, supra, made clear that the record must contain competent documentary proof of each prior conviction, with specificity as to both violation and conviction dates, before any can be used for penalty enhancement. *Id.* at 152-53. The court also held that "[w]ithout supplemental corroborating documentation, a sentencing court has no means of verifying the assertions made in the complaint." *Id.* at 154. The record in the 2013 appeal contains no competent documentary evidence of prior Wisconsin OWI convictions, other than the two municipal matters shown to be vacated by court order in 2010.

There is also no spoken admission of alleged Wisconsin OWI convictions in the record. ***Spaeth*** found that when the record does not contain competent documentary proof of priors, a verbal admission can be obtained through direct engagement with the defense by either the State or Court, but it is no less restraining than a documentary one, in that it too must specifically include the exact violation and conviction dates for each prior conviction alleged. *Id.* at 155. There is no such direct engagement or admission of Wisconsin convictions in this record. Therefore, the Court erroneously exercised its discretion once more when in noncompliance with ***Spaeth's*** precedent, it concluded that Mr. Socha admitted two Wisconsin OWI convictions

without noting in detail where the admissions supposedly occurred in the circuit court record established before sentence was imposed.

The State argues that the Court's previous finding of "at least nine prior convictions" is law of the case and cannot be disturbed because Mr. Socha has not set forth that the Court's decision was clearly erroneous and worked a manifest injustice. (States Resp. Br. p.15) These assertions are clearly not grounded in fact however, as the appellant's circuit pleadings and his brief-in-chief devoted entire arguments to the fact that this Court violated supreme court precedent not once, but twice, when erroneously concluding that Mr. Socha had admitted two Illinois and two Wisconsin OWI convictions that were used to substantially increase his penalties. This cannot be seen as anything but a manifest injustice, because the errors by this Court directly affected the appellant's liberty interests.

This court has acknowledged that the law of the case doctrine is not absolute. When "cogent, substantial, and proper reasons exist," a court may disregard the doctrine and reconsider prior rulings in a case. See ***State v. Stuart***, 2003 WI 73, ¶24. "It is within the power of the courts to disregard the Rule of law of the case in the interest of justice." *Id.* (internal quotes and citations omitted). Accordingly, this Court can and must revisit its finding of "at least nine prior convictions," and conclude that sentencing Mr. Socha on a "tenth or subsequent offense" was not ever supported by either the record or established law. [1]

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[1] The Court's previous decision quotes a non-contextual excerpt from Mr. Socha's final pretrial conference and inaccurately asserts that he has never challenged the existence of prior convictions, only their validity. (113:10) First, in the out-of-context excerpt quoted by the Court, the appellant was not stipulating to the existence of eleven prior OWI convictions as seemingly alluded to. When taken in proper context of the the discussion leading up to this Court's quoted pre-trial language, it is plain to see Mr. Socha was hesitant to stipulate to a certain amount of prior convictions of any nature, and not just prior OWIs, due to the potential for prejudice if the jury were to hear a high total number.

The appellant specifically noted that "I don't have N.C.I.C. reports to determine how many priors I have...," and was speaking of convictions for any crimes in general, "I am not talking about necessarily the O.W.I.s." (93:4-5) The State mentioned the possibility of a "bail jumping" conviction and specifically said "we never get into the details what those prior conventions are." And, the circuit court said "this would only come up if you take the stand." (Id.) The State continued: "All he is saying that I've been convicted 11 times for whatever cases." (93:6) The court then said "you are acknowledging that the record now says you have 11 convictions." The court did not say 11 OWI convictions, only "convictions," and again stated: "if you take the stand." (93:9)

When Mr. Socha said "that's fine," he was referring to eleven prior convictions of any kind, it was not limited to only OWIs, and this is visibly apparent from the totality of the transcript. If the Court by quoting the excerpt in its decision at p.10 was implying that this was an admission of eleven prior OWI convictions, it erred. Furthermore, the entire conversation was hypothetical, not based on facts of record, and contingent on only if the appellant were to take the stand, which never happened. There was not a formal stipulation, and although the State and court continually reference that the "record" showed eleven prior convictions for "whatever" crimes, it does not. Nothing Mr. Socha said at the final pretrial hearing can be considered a competent admission of prior OWI convictions, because under Spaeth it would have had to be done with specificity as to ***each*** prior ***OWI*** conviction alleged

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

Mr. Socha presented pleadings in the circuit court and now on appeal which rely on Wis. Stat. § 973.13; this Court's opinion in ***State v. Flowers***, 221 Wis.2d 20 (1998); and, our supreme court's holding in ***State v. Hahn***, 2000 WI 118. The aforesaid statute and cases control the outcome here, because they authoritatively sanction mandated relief from the excess and void portion of the enhanced sentence originally imposed in this case.

The State argues on appeal that Mr. Socha is not entitled to relief under Wis. Stat. § 973.13 because the circuit court did not impose a maximum sentence or one in excess of that authorized by law (State's Resp. Br.9-11), when in reality, that is exactly what happened. Without citing proper legal authority, the State attempts to circumvent Wis. Stat. § 973.13's mandate by inferring that it cannot be applied retroactively when invalid prior convictions were unknowingly used to enhance sentences but are not presented to the court for relief until after such sentence founded on them is imposed.

Wisconsin law strongly opposes the State's position in its response, and commands that all enhanced criminal penalties be based on prior convictions which actually exist. When an

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Second, the Court also seems to infer in its decision that when Mr. Socha asked the circuit court at sentencing to bring the number of prior OWI convictions down to ten from twelve because of the two vacated Wisconsin convictions, he was thereby admitting to a certain amount of priors. (113:10) The Court again has taken the appellant's speech out of context. When Mr. Socha requested the court to sentence him as a 10th not 12th offense OWI offender, it was not until after the court had already concluded he had 11 priors. He was merely asking the court to deduct two priors based on the number it had already established—and this cannot be considered a concession as to a determinant amount of prior OWI convictions.

Finally, the Court is mistaken when saying in its decision that the appellant "has never argued that the convictions do not exist." (93:10) To the contrary, early on when Mr. Socha originally entered a plea which was later withdrawn, he said: "I understand that I am pleading guilty to the offense, not that it is my twelfth [conviction]. Not that it is my twelfth." (81:5) At another hearing, the trial court acknowledged that Mr. Socha had not admitted any prior convictions when having to correct the State's claim that he had admitted prior OWI convictions. "Alright. Just to clarify, for the plea, he pled to the action charged. He did not admit to the number of times he had done it and been convicted of it. This is a serious dilemma." (84:11-12) Mr. Socha continually challenged both the existence and validity of prior convictions and the totality of the record shows this.

What seems to be lost in the shuffle when the State and the courts extraneously claim that the appellant has never challenged the existence only the validity of prior convictions, is that the bottom line is it was the State who alleged eleven prior convictions, and it alone was burdened with proving their existence before sentencing. It was at no time Mr. Socha's presentencing obligation to claim and/or prove that prior OWI convictions did not exist. Rather, it was the State's burden to prove that they do exist, and it failed miserably in adequately accomplishing the task.

enhanced sentence is found to be reliant on invalid, nonexistent, and unproven prior convictions, which were wrongly used to escalate penalties beyond that allowed by statute, it is excessive, and claims for relief are governed by Wis. Stat. § 973.13. It simply makes no difference if the nonexistent and unproven prior convictions are made known to the court after the sentence founded on them is imposed. In fact, it is its purpose as a postconviction remedy:

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

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

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

Nowhere does Wis. Stat. § 973.13, ***Flowers***, or any other germane law hold as contended by the State, that a defendant cannot seek postconviction relief under the statute when penalty

enhancing convictions are not found to be invalid until after sentencing; nor that any infirmity in this context requiring relief had to occur before a sentence was imposed. Contrarily, relevant law says the opposite when using the qualifiers "any" and "all" sentences in excess of a statutes term are void as a matter of law and subject to commutation when based on prior convictions that do not "actually exist." *Id.*

State v. Mikulance, 2006 WI APP 69, ¶18, is cited by the State as supporting that Mr. Socha does not raise a proper claim for sentence commutation. (State's Br.9-10) "Section 973.13, as it pertains to sentencing a repeat offender, applies only when the State fails to prove the prior conviction necessary to establish the habitual criminal status (by proof or by admission) or when the penalty given is longer than permitted by law for a repeater." *Id.* (citations omitted).

Mikulance, as cited above, favors Mr. Socha over the State. The former wording cited does not preclude this challenge because the State could not possibly have obtained a valid, competent, admission of prior convictions proven not to exist. And, under the latter wording above, Wis. Stat. § 973.13 is a proper claim and remedy here because "the penalty given is longer than permitted by law for a repeater." The appellant was sentenced under the wrong statute with higher maximum penalties than those he was truly exposed to.

The State claims that it proved at least nine prior convictions and that this Court's previous opinion confirmed so, therefore, the issue is considered law of the case and cannot be disturbed. However, as shown earlier, this Court's decision can and indeed needs to be revisited as it failed to maintain precedent when relying on *postconviction proofs* of two Illinois convictions alleged, and did not *pinpoint* where in the record admissions of two alleged Wisconsin OWI convictions were made with particularity of dates for each conviction, as required by ***Spaeth***—nor where documentary evidence of the same lies in the record to support a competent admission. The State pushes away the fact that in addition to the two Wisconsin convictions vacated in 2010, four more Ohio convictions alleged were vacated *void ab initio* in 2020, and that the remaining two Wisconsin and two Illinois priors alleged were additionally not ever lawfully admitted or substantiated to exist. This totals ten prior convictions that were wrongly used to enhance this sentence.

The State's claim that ***State v. Finley***, 2016 WI 63, ¶74, mandates that relief under Wis. Stat. § 973.13 applies only when a court "imposes a maximum penalty," is offered out of context and is easily refuted. (State's Resp. Br. p.9). Of consequence here is that due to his showing after sentencing that invalid, nonexistent, and unproven, alleged prior convictions were unlawfully used against him, Mr. Socha was therefore sentenced under a statute with higher maximum penalties than he is rightfully exposed to. As a result of being sentenced under an improper statute, "the court impose[d] a maximum penalty in excess of that authorized by law," because a

felony sentence with higher maximum penalties cannot apply here. (See § 973.13, Wis. Stats., and ***Flowers***, supra).

Second, in contending that Wis. Stat. § 973.13 is inapplicable, the State at the circuit court and on appeal argues that resentencing and not commutation is the cure, as "the circuit court could not simply modify the sentence for a fifth offense—a felony—to make it appropriate for a first offense—a civil forfeiture." (State Resp. Br. p.18). However, the State conveniently ignores our supreme court's holding in ***State v. Hanson*** which is tantamount to this situation in holding that criminal penalties for motor vehicle offenses most certainly can be commuted to a civil forfeiture, and a resentencing is not appropriate when a postconviction showing of invalid prior convictions is found to exist, and the defendant is sentenced under the wrong statute.

In ***Hanson***, 2001 WI 70, the defendant was subject to criminal penalties after entering a plea and wrongly admitting up to five prior section 343 motor vehicle convictions for the same offense. The trial court sentenced Mr. Hanson as an Habitual Traffic Offender (HTO) and imposed enhanced criminal penalties. On appeal, our supreme court concluded that despite Mr. Hanson's admission to prior convictions and HTO status, the record did not support enhanced penalties and found his sentence to be "in excess of that authorized by law and invalid under Wis. Stat. § 973.13." *Id.* at 2. This pokes holes right through the State's assertion that a criminal sentence cannot be commuted to a civil forfeiture.

The State's concessions and arguments for resentencing are nothing more than a furtive attempt to get a second bite at the apple in terms of providing evidence to uphold Mr. Socha's sentence, because it did not and could not do it at the original sentencing. The State's ship to prove penalty enhancing prior convictions has sailed long ago however; and the circuit court's order found that it was illegally attempting to prove up prior convictions "more than ten years after sentencing," and that resentencing as a "remedy is not warranted" in this case. (64:4-5)

Resentencing in this case could only be appropriately considered *after* Mr. Socha's original sentence is commuted to the maximum permitted by law pursuant to the correct subsection of Wis. Stat. § 346.65(2) that he is appropriately exposed to. (See ***State v. Holloway***, 202 Wis.2d 694 (1996), wherein this Court found that resentencing may be appropriate in some instances, but only after the original sentence is commuted under § 973.13 to "within that permitted by law." *Id.* at 701. See, also, ***State v. LeBlanc***, 2021 WI App 63 (unpublished), where this Court agreed with the State's argument based on ***Holloway*** "that where an excessive sentence is imposed, the court has no discretion but to commute the sentence to the maximum penalty "authorized by law'" under § 973.13; and that resentencing afterward is optional. *Id.* at ¶12). Mr. Socha's sentence as initially imposed was for a Class F felony with maximum penalties in excess of that permitted by law because due to vacated, invalid, nonexistent, and unproven prior convictions, he is subject to penalties under a lesser statute with lesser maximum penalties.

Should the Court decide that Wis. Stat. § 973.13 alone does not provide Mr. Socha access to relief from the portion of his sentence that is founded on prior convictions that do not actually exist; he submits that the Wisconsin Supreme Court's opinion in ***State v. Hahn***, 2000 WI 118, and other state and federal authorities, in tandem with Wis. Stat. § 973.13, surely do provide the mechanism for relief from his illegal sentence.

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

> We therefore hold that a circuit court may determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction.

The court continued:

> Instead, the offender may use whatever means available under state law to challenge the validity of a prior convocation on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence.

Id.

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

> 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.

Our supreme court's above language is unambiguous and its wording is plain. If Mr. Socha desired to challenge a prior conviction relied upon for an enhanced sentence in a subsequent prosecution on any ground other than the denial of the right to a lawyer in the previous 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 obtain an enhanced sentence. When successful, he has the right to petition the trial court for sentence commutation.

The appellant did exactly as instructed by our supreme court. His attorneys in Wisconsin and Ohio directly attacked six prior OWI convictions that were used to enhance the penalties in this case in their original forums using whatever lawful means available and were successful in all six attacks. He then applied to have his sentence adjusted under ***Hahn***, ***Peter's***, and Wis. Stat. § 973.13, by showing that prior convictions were vacated *void ab initio* and removed from his driving record, and that others alleged by the State were not proven and invalid as well. The circuit court denied relief.

If Wis. Stat. § 973.13 is not a stand alone postconviction mechanism, and the compelled procedural remedy here, it certainly should be in conjunction with ***Hahn*** and ***Peters***. These cases would then provide the vehicle to get back into the circuit court after successfully having one or more prior convictions vacated that were incorrectly relied on to increase penalties. The next logical progression would be for the court to determine precisely how many penalty enhancing prior convictions in the established record actually exist as proven by the State, and if found to not be enough to sustain the current sentence, it should be determined in excess of that prescribed by statute as a matter of law, the excess portion declared void, and commutation under Wis. Stat. § 973.13 to the maximum term available by law immediately implemented.

The State contends that ***Hahn*** "did not say that a defendant who successfully challenges his conviction is entitled to commutation of his sentence or sentence modification." (State Resp. Br. p.11) And further claims that only resentencing is appropriate here. (*Id.* at 12-13) The State's assertions however directly contradict ***Hahn's*** conclusions and ***Peters'*** subsequent clarifying opinion holding that after a defendant attacks prior convictions in their original forums, he can "if successful, apply to the court to have the enhanced sentence adjusted." The supreme court did not use language which compels or allows a circuit court to resentence a defendant when prior convictions are successfully overturned after the original sentence is imposed. To the contrary, the court directed only that the sentence be "***adjusted***." Adjustment of a sentence is not a resentencing, and is more inline with Wis. Stat. § 973.13's relief from an excessive sentence, then an actual resentencing as claimed by the State.

It has been twenty years since ***Hahn*** and ***Peters*** were decided, and there is to date no subsequent Wisconsin case law, published or not, which discusses exactly what avenue a defendant must take and how a trial court is mandated to proceed when a defendant such as Mr. Socha applies to have his enhanced sentence adjusted after successful vacatur of a penalty enhancing conviction(s) which deem his sentence excessive by statute.

Many other state and federal jurisdictions have decided this issue as cited by the appellant previously, but Wisconsin has not and needs to so all parties are well informed on how to proceed now and in the future. This is why Mr. Socha believes this is a matter of first impression in this state which needs to be resolved and published, as he and possibly others have spent years

of time, energy, and money on attorney fees, only to be stuck in an illegal sentence and at a dead-end of clarity in the law. The available remedy here is found within Wis. Stat. § 973.13 which compels relief from sentences imposed in excess that are prescribed by law.

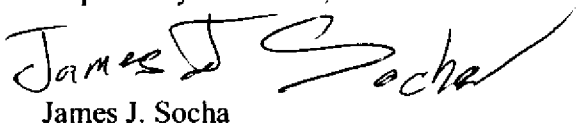
Finally, both the circuit court and State claim that Mr. Socha is barred by ***State v. Escolana-Narajno***, 185 Wis. 2d 169 (1994), and Wis. Stat. § 974.06(4). However, Mr. Socha's post-conviction motion invoked Wis. Stat. § 973.13, and brings a faulty repeater claim. This Court has acknowledged "that neither the procedural bar of Wis. Stat. § 974.06(4) nor the public discussion contained in ***Escolano-Narajno*** precludes criminal defendants from seeking relief from faulty repeater sentences under Wis. Stat. § 973.13." ***State v. Mikulance***, 2006 WI APP 69, ¶14. (relying on ***State v. Flowers***, 221 Wis.2d 20, 22-23). Pursuant to ***State v. McAllister***, 107 Wis.2d 532, 535, the OWI penalty enhancer Mr. Socha was sentenced under "is structured similar to a repeater statute." Accordingly, ***Mikulances'*** reliance on ***Flowers*** applies here.

CONCLUSION

For the foregoing reasons, and those raised in the Defendant-Appellant's brief-in-chief, he respectfully moves the Court to grant the requested relief.

Dated this 27th day of June, 2022.

Respectfully submitted,



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CERTIFICATION AS TO LENGTH/FORM

I hereby certify that this brief meets the requirements as to length/form and does not exceed the amount of words or pages and use a proper font under Rule 809.19(8)(b)&(c).

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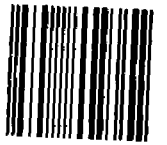

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