STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT FOUR

STATE OF WISCONSIN,

Plaintiff – Respondent,

APPEAL NO.

-vs-

2015 AP 850 - CR

AMAN DEEP SINGH.

Defendant – Appellant.

APPEAL FROM THE DECISION AND ORDER DENYING WRIT OF CORAM NOBIS, FILED ON MARCH 9th, 2015,

THE HONORABLE STEPHEN E. EHLKE, PRESIDING.

(Dane County Case # 04 CT 882)

DEFENDANT – APPELLANT'S REPLY BRIEF

Respectfully submitted:

Aman Deep Singh

Defendant – Appellant *pro se*

I. SINGH'S BRIEF IS ADEQUATE.

Singh hopes this court is of the opinion that, as far as *pro se* briefs go, these do a fine job of presenting the facts and issues in a straightforward and concise way. The Statement of the Case correctly cites the documents in the record and explains the procedural background clearly. Any further citations to the record in the Argument were wholly unnecessary because Singh does not allege any procedural irregularity, but rather challenges the State's authority to have commenced a criminal prosecution in the first place. These are questions of law that this court reviews *de novo*. Singh also hopes the court is of the opinion that precedent was cited and applied in the proper manner, regardless of whether the court ultimately agrees with the analysis or the relief requested.

II. WIS. STAT. 973.13 DEFEATS THE STATE'S RELIANCE ON WAIVER.

> **973.13 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.

Although § 973.13 creates a right, it does not specify a mechanism. Singh labeled his motion *coram nobis* because that appears to be the only procedure available to him to apply for §973.13 relief. Regardless of whether the court construes Singh's *pro se* motion as coram nobis, mandamus, or a '973.13 motion', Singh has an **absolute right** to relief if his conviction and sentence was in excess of that authorized by law. "In ordinary civil cases, as in pro se prisoner petition cases, we look to the facts pleaded, not to the label given the papers filed, to determine whether the party should be granted relief." *bin-Rilla v. Israel, 113 Wis. 2d 514, 521, 335 N.W.2d 384, 388 (1983).* The trial court implicitly recognized this and chose to address the motion on the merits.

In *State v. Flowers, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998)*, this court determined that Wis. Stat. 973.13 permitted challenges to faulty sentence enhancers at any time because the interest of justice overruled the interest in finality. "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 of exclusion." *Flowers* at *29*. In *State v. Hanson, 2001 WI 70, 244 Wis. 2d 405, 628 N.W.2d 759,*

the Wisconsin Supreme Court extended the reach of Wis. Stat. 973.13 to challenges that imposition of criminal penalties were not permitted by the law. "As in *Flowers*, to allow the imposition of a criminal penalty where none is authorized by the legislature, simply on the basis of waiver, would ignore the dictate of § 973.13. We thus reach the merits of Hanson's challenge and determine whether any basis existed for the imposition of a criminal sentence." *Hanson* at ¶*22*.

In Wisconsin, there is no interest in the finality of a conviction that the State lacked authority to charge in the first place.

III. DOUBLE JEOPARDY AND WIS. STAT. 345.52(1) BOTH BAR THE STATE'S PROSECUTION FOR OMVWI AFTER SINGH WAS SUCCESSFULLY PROSECUTED BY DANE COUNTY FOR OMVWI.

The State has done a disservice to the court by not offering any substantive rebuttal to Singh's arguments. This should be treated as a concession and summary disposition granted. However, the court is certain to recognize that the issues have importance beyond just this case. As a result, the State's failure to brief has placed the onus on the court to research the law from scratch and develop possible counter-arguments itself on behalf of the State.

This situation puts Singh at a great disadvantage. Singh cannot anticipate what reasoning the court may independently employ, and so has been denied a meaningful opportunity to present a reasoned reply to whatever argument might be used to deny relief here.

In *County of Walworth v. Rohner, 108 Wis. 2d 713, 324 N.W.2d 682 (1982)*, the Wisconsin Supreme Court ruled that prosecutors could not *knowingly* undercharge OMVWI offenses. *Rohner* should have no relevance to a situation like this where the prosecutor did not meet its burden of proving the existence of any prior offenses before sentencing. Both the Double Jeopardy Clause and Wis. Stat. 345.52(1) bar a second bite of the apple.

This should all be straightforward. Unfortunately, in the final paragraph of *Rohner*, the court did say "Because the complaint is to be dismissed for want of subject-matter jurisdiction, there could not have been a valid proceeding against

Rohner. There has been no valid adjudication and no jeopardy attached." *Id* at *722.*[1] Singh argues any reference to subject matter jurisdiction was unnecessary dicta.

The United States Supreme Court has cautioned against blind adherence to jurisdictional citations without considering the context. "Our recent cases evince a marked desire to curtail such "drive-by jurisdictional rulings," ibid., which too easily can miss the "critical difference[s]" between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160-61, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010).* "We have often said that drive-by jurisdictional rulings of this sort have no precedential effect." *Steel Co. v. Citizens for Better Environment, 523 U. S. 83, 90 (1998).*

Wisconsin courts have acknowledged misuse of jurisdictional terminology. "We recognize that the terms, "competence" and "jurisdiction," have been inconsistently used and defined by courts and commentators across the country." *In the Interest of B.J.N. and H.M.N., 162 Wis. 2d 635, 656, n.17, 469 N.W.2d 845 (1991).* "We agree with the State that the jurisprudence concerning subject matter jurisdiction and a circuit court's competence to exercise its subject matter jurisdiction is murky at best." *State v. Bush, 2005 WI 103, ¶ 16, 283 Wis.2d 90, 699 N.W.2d 80.*

State courts across the country have acknowledged the same carelessness. "Idaho courts are not alone in their tendency to lapse into jurisdiction terminology when they are not really referencing either subject matter jurisdiction or personal jurisdiction." *State v. Armstrong, 146 Idaho 372, 375, 195 P.3d 731, 734 (Ct.App.2008).* "Similarly, our own Supreme Court has noted that "`[t]he term "subject matter jurisdiction" is often confused with a court's "authority" to rule in a particular manner,'" leading to "`improvident and inconsistent use of the term.'" Indeed, a "court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order."" *State v. Peltier, 176 Wash. App. 732, 737, 309 P.3d 506 (2013).* "Attorneys and judges alike frequently characterize a claim of procedural error as one of jurisdictional dimension.... Thus, while we might casually say, "Judge Flywheel assumed jurisdiction," or "the court had jurisdiction to impose a ten-year sentence," such statements do not have anything to do with the law of jurisdiction, either personal or subject matter." *K.S. v. State, 849 N.E.2d 538, 541 (Ind. 2006).* "Therefore, when the term "void" is used in a

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[1] Rohner was an appellant who succeeded in vacating his conviction on appeal. This should have been the reason why jeopardy did not attach in that case. Reliance on jurisdiction was unnecessary.

judicial opinion it is necessary to resort to the context in which the term is used to determine precisely the term's meaning." *People v. Davis, 156 Ill.2d 149, 155, 189 Ill.Dec. 49, 619 N.E.2d 750 (1993)*

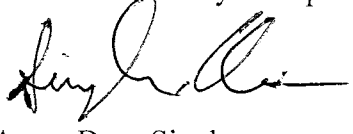
Rohner was simply an example of this phenomenon. A judgment of the supreme court limiting prosecutorial discretion has no effect on the court's jurisdiction. Since Singh was not *knowingly* undercharged, *Rohner* is irrelevant to this case. The reference to subject matter jurisdiction in *Rohner* should be treated as dicta.

IV. PRIOR OUT OF STATE ADMINISTRATIVE SUSPENSIONS CANNOT BE USED TO STATUTORILY ENHANCE OMVWI OFFENSES.

Under *Apprendi v. New Jersey, 530 U.S. 466 (2000)*, every fact used to statutorily enhance a criminal sentence must either be an element of the crime or a prior conviction. Prior out of state administrative Implied Consent suspensions are not an element of § 346.63 OMVWI. See *State v. McAllister, 107 Wis.2d 532, 539, 319 N.W.2d 865 (1982)*. Therefore, the only question is whether such suspensions can be considered a prior conviction under *Apprendi*.

At a very minimum, a prior conviction under *Apprendi* requires some proceeding in an actual court of law. A purely summary administrative suspension is too lacking in a judicial record, substantial procedural safeguards, and significant indicia of reliability to comport with *Apprendi* Due Process protections. Since Singh's prior out of state administrative Implied Consent suspension was neither an element of the cime nor a prior conviction, the fact cannot be used to statutorily enhance a criminal sentence.

Dated this 30th day of September 2015,



Aman Deep Singh

Defendant-Appellant *pro se*