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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1
Appeal No. 2016AP000729CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER J. LONG,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court,
The Honorable John Siefert, presiding.
Circuit Court Case No. 1998CT005997

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

I. Did the Circuit Court commit manifest error in law and fact by denying the Defendant's Motion to Reopen the case pursuant to Wis. Stats. § 973.19, based on a *new factor*?

Answered by the Circuit Court: NO

II. Did the Circuit Court committed manifest error in law and fact by dismissing the Defendant's Motion to Commute Sentence and Motion for Reimbursement?

NOT answered by the Circuit Court.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant does not request oral argument because all arguments and relevant law are set out in the parties' briefs.

STATEMENT ON PUBLICATION

The Defendant-Appellant does not request publication because this case involves the application of established rules of law to facts that are similar to those in existing cases.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of Peter J. Long, the Defendant-Appellant (hereinafter "Mr. Long"), appearing *pro se*. Mr. Long appeals the Decision and Order denying his Motion to Reopen the case and dismissing his Motion to Commute Sentence and Motion for Reimbursement dated March 24, 2016, and filed March 25, 2016, of the Milwaukee County Circuit Court, the Honorable John Siefert, presiding.

Mr. Long believes, and so proffers, that the Circuit Court has exercised unauthorized discretion and acted outside the spirit, say naught the stricture of the statutes. *Id.* Wis. Stats. § 973.19.

II. Procedural History

Mr. Long was found guilty of operating a vehicle while intoxicated as a fourth offense following a plea of no contest/guilty entered back on November 11, 1999, before the Honorable John Siefert. Upon conviction the Circuit Court imposed a consecutive sentence of eleven months at the House of Corrections with Huber privileges and ordered Mr. Long's vehicle, a 1998 Dodge Ram 2500 pickup truck, to be *seized* for forfeiture and sale at public auction. (R:21). Mr. Long subsequently completed service of this eleven month confinement term. A true and correct copy of the Judgment of Conviction for Milwaukee County Case No. 98-CT-5997 is attached hereto, marked as Appendix B – Exhibit 1, and is made a

part of this Brief as though fully set forth at length herein. (R:25; *See attached* Appendix B – Exhibit 1: Judgment of Conviction).

On February 24, 2016, the Defendant, Mr. Long, appearing *pro se*, filed a motion under section 974.06, Stats., for postconviction relief for the entry of an Order (1) to modify or commute the original sentence imposed in the above OWI 4th offense case to that which could have been imposed for a OWI 3rd offense, (2) to require the Greenfield Police Department and/or City of Greenfield to reimburse Mr. Long $14,600.00 for the seizure, forfeiture, and sale of his 1998 Dodge Ram 2500 pickup truck at public auction, and (3) to grant him such further relief as the Circuit Court may deem appropriate based upon constitutional grounds because the sentence imposed in this matter was predicated upon a prior OWI conviction from Marathon County that was obtained in violation of Mr. Long's Sixth Amendment right to counsel. (R:34). A conviction secured without the benefit of defense counsel is presumptively *defective*.

On February 25, 2016, the Court dismissed the defendant's motion, finding that the Court was without jurisdiction to proceed under section 974.06, Stats., because the defendant had completed serving the sentence in this case. (R:35; *See attached* Appendix C: Circuit Court Decision and Order Dismissing Motion for Postconviction Relief dated February 24, 2016; filed February 25, 2016).

On March 17, 2016, the Defendant, Mr. Long, appearing *pro se*, filed a motion under section 973.19, Stats., based on a ***new factor***, to *reopen* the case and for the entry of an Order (1) to modify or commute the original sentence imposed

in the above OWI 4th offense case to that which could have been imposed for a OWI 3rd offense, (2) to require the Greenfield Police Department and/or City of Greenfield to reimburse Mr. Long $14,600.00 for the seizure, forfeiture, and sale of his 1998 Dodge Ram 2500 pickup truck at public auction, and (3) to grant him such further relief as the Circuit Court may deem appropriate based upon constitutional grounds because the sentence imposed in this matter was predicated upon a prior OWI conviction from Marathon County that was obtained in violation of Mr. Long's Sixth Amendment right to counsel. (R:36; *See attached* Appendix B: Defendant's Motion to Reopen; Motion to Commute Sentence; and Motion for Reimbursement with Exhibits 1– 7 dated March 14, 2016; filed March 17, 2016). A conviction secured without the benefit of defense counsel is presumptively *defective.*

On March 25, 2016, the Court dismissed the defendant's motions as untimely. The Court went on to state that:

> "A motion for sentence modification under section 973.19, Stats., must be brought within ninety days of sentencing, and the defendant's right to a direct appeal has long expired. Consequently, the court continues to lack jurisdiction to consider the defendant's motion for the reasons stated in its February 25, 2016 decision and order. There remains no valid basis to bring this motion. Any further motions of this nature may result in the assessment of costs.
>
> Dated this 24th day of March,, 2016, at Milwaukee, Wisconsin.
>
> **THEREFORE, IT IS HEREBY ORDERED** that the defendant's motion to commute sentence and motion for reimbursement is **DISMISSED.**"

(R:37; *See attached* Appendix D: Circuit Court Decision and Order Dismissing Motion to Commute Sentence and Motion for Reimbursement dated March 24, 2016; filed March 25, 2016).

Mr. Long did not file a Motion for Reconsideration due to a manifest error in law and fact based upon the Circuit Court's threat of assessing costs. It should be noted that the Circuit Court failed to even acknowledge Mr. Long's *new factor* argument as the basis from bringing his Motion to Reopen under Wis. Stats. § 973.19, and subsequent Motion to Commute Sentence and Motion for Reimbursement. Without a *new factor*, Mr. Long is well aware that a motion for sentence modification under section 973.19, Stats., must be brought within ninety days of sentencing. Mr. Long's *new factor* was not even considered by the Court.

On April 5, 2016, Mr. Long filed a Notice of Appeal (R:38) and **paid** the filing fee in full. On April 5, 2016, Mr. Long filed a Statement on Transcript. (R:39). No Motion Hearing was conducted in this matter so no transcript exists. However, there are two transcripts on file from years ago for the Motion to Suppress Hearing held on December 22, 1998, (R:40) and the Plea and Sentencing Hearing held on November 11, 1999. (R:41). The Record was filed on May 27, 2016. (R:42, App. A)

III. Statement of Facts

Mr. Long was found guilty of operating a vehicle while intoxicated as a fourth offense following a plea of no contest/guilty entered back on November 11, 1999, before the Honorable John Siefert. (R:25, App. B – Exhibit 1). Upon

conviction the Court imposed a consecutive sentence of eleven months at the House of Corrections with Huber privileges and ordered Mr. Long's vehicle, a 1998 Dodge Ram 2500 pickup truck, to be seized for forfeiture and sale at public auction. *Id.* Mr. Long subsequently completed service of this eleven month confinement term. (R:35-3, App. C – Page "P" 3).

At the time, Mr. Long's vehicle was a newer 1998 Dodge Ram 2500 pickup truck with VIN: 3B7KF22Z7WG138332 ("Vehicle"). (R:36-3). Mr. Long purchased this Vehicle new in 1997 for approximately $36,000.00 from Russ Darrow Dodge in West Bend, Wisconsin. *Id.* Mr. Long's Vehicle was seized by the City of Greenfield Police Department ("GPD") and forfeited by the Milwaukee County DA on behalf of the State. (R:21; 36-3) Mr. Long's Vehicle was sold by the GPD at the City of Greenfield's Open Public Auction in June 2003 for $14,600.00 pursuant to Wis. Stats. § 346.65(6). [1997-1998 version] (R:21; 36-3; *See attached* Appendix E: Greenfield Police Department Letter dated March 15, 2016).

Mr. Long purchased his own Vehicle back at the City of Greenfield's Open Public Aauction in June 2003 for $14,600.00. (R:36-3; *See attached* Appendix F: Wisconsin Certificate of Title). Therefore, fortunately, he resumed ownership of his newer, expensive, Vehicle by spending an additional $14,600.00 to the City of Greenfield, versus losing his $36,000.00 Vehicle completely. *Id.*

LAW AND ARGUMENT

I. The Circuit Court committed manifest error in law and fact by denying the Defendant's Motion to Reopen the case pursuant to Wis. Stats. § 973.19, based on a *new factor.*

II. The Circuit Court committed manifest error in law and fact by dismissing the Defendant's Motion to Commute Sentence and Motion for Reimbursement.

Because he is a *pro se* litigant, Mr. Long is held to a "less stringent standard" in crafting pleadings. ***Haines v. Kerner***, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

With all due respect, the Circuit Court committed manifest error in *law* by stating in its Decision that:

> "A motion for sentence modification under section 973.19, Stats., must be brought within ninety days of sentencing, and the defendant's right to a direct appeal has long expired. Consequently, the court continues to lack jurisdiction to consider the defendant's motion for the reasons stated in its February 25, 2016 decision and order. There remains no valid basis to bring this motion. Any further motions of this nature may result in the assessment of costs.

In the case at bar, the Circuit Court failed to even acknowledge Mr. Long's *new factor* argument as the basis from bringing his Motion to Reopen under Wis. Stats. § 973.19, and subsequent Motion to Commute Sentence and Motion for Reimbursement. Without a *new factor*, Mr. Long is well aware that a motion for sentence modification under section 973.19, Stats., must be brought within ninety days of sentencing. Mr. Long's *new factor* was not even considered by the Circuit Court.

When proceeding under Wis. Stat. § 973.19, a defendant's sentence may be modified if there is some "new factor." ***State v. Coolidge***, 173 Wis. 2d 783, 788, 496 N.W.2d 701 (Ct. App. 1993). A sentence can be modified to reflect consideration of a new factor. ***State v. Macemon***, 113 Wis. 2d 662, 668, 335 N.W.2d 402, 406 (1983). A new factor is a fact that is highly relevant to the imposition of sentence but was not known to the sentencing judge either because it did not exist or because the parties unknowingly overlooked it. ***Ibid.***; ***State v. Johnson***, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997). There must also be a nexus between the new factor and the sentence; the new factor must operate to frustrate the sentencing court's original intent when imposing sentence. ***Id.***; ***State v. Michels***, 150 Wis. 2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether a new factor exists presents a question of law that this court [Court of Appeals (COA)] reviews *de novo*. ***Id.***, 150 Wis. 2d at 97, 441 N.W.2d at 279. If a new factor exists, the trial court must, in the exercise of its discretion, determine whether the new factor justifies sentence modification. ***Ibid.***

A defendant has a due process right to be sentenced based upon accurate and valid information. *See* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352, 357 (Ct. App. 1990). To establish a due process violation, the defendant has the burden of proving by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. ***State v. Littrup***, 164 Wis. 2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). This constitutional issue

presents a question of law which we [COA] review *de novo.* ***Id.*** at 126, 473 N.W.2d at 166.

Even without the presence of a new factor, a trial court may still review a sentence to determine whether the sentencing court erroneously exercised its discretion. *See* ***State v. Ralph***, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990). The defendant must show an "unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Thompson***, 146 Wis. 2d 554, 565, 431 N.W.2d 716 (Ct. App. 1988).

Mr. Long presents a new factor justifying reopening the case and modifying or commuting the original sentence. A new factor is a fact or set of facts highly relevant to sentencing but not known to the sentencing judge at the time of sentencing, either because the fact was not in existence or because it was unknowingly overlooked. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The trial court actually relied on inaccurate information at [the original] sentencing. A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, P9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who alleges that a sentencing decision is based on inaccurate information must prove both that the information was inaccurate and that the circuit court actually relied on the inaccurate information. *Id.*, P 26.

The sentence imposed in this matter on the OWI 4th offense must be modified or commuted to that which could have been imposed for an OWI 3rd offense, (same maximum jail sentence and fine exposure, but NO vehicle seizure)

because the enhance penalty imposed in this case was predicated upon a prior OWI conviction entered in Marathon County Case No.: 90-CT-526, that was obtained in violation of Mr. Long's Sixth Amendment right to counsel.

Mr. Long was convicted of three (3) prior OWI's as identified in the Criminal Complaint (R:2) and they were used to enhance Long's charge for his 4th Offense OWI for this case as follows:

Arrest Date	Conviction Date	Court Name
05-05-1989	05-22-1989	Grant County Circuit Court – Branch 2
12-01-1990	05-14-1991	Marathon County Circuit Court
01-23-1995	12-17-1996	Milwaukee County Case No. 1996-CT-500356

For purposes of the issue, the particulars of these traffic offenses do not matter. What does matter is the number of OWI's, when they were committed, and the effective dates of the changing OWI statutes. Wis. Stat. § 346.63(1)(a) prohibits an individual from operating a motor vehicle while under the influence of an intoxicant; Wis. Stat. § 346.65(2) contains the penalties for violation of § 346.63(1) and includes various penalty levels based on the number of an individual's total prior convictions as counted under Wis. Stat. § 343.307(1).

To establish Mr. Long's status as a fourth offense OWI offender, the State alleged three prior driving offenses including an offense that was committed on December 1, 1990, with a conviction date of May 14, 1991. This offense was an OWI conviction entered in Marathon County Case No. 90-CT-526. Mr. Long was not represented by counsel during the trial court proceedings that led to his OWI conviction in Marathon County Case No. 90-CT-526. A true and correct copy of

the CCAP record for Marathon County Case No. 90-CT-526 is attached hereto, marked as Appendix B – Exhibit 2, and is made a part of this Brief as though fully set forth at length herein. (R:36 – Exhibit 2, *see attached* Appendix B – Exhibit 2: CCAP record).

At the time, the significant difference in the instant case, between being convicted of an OWI 4th offense versus an OWI 3rd offense was that in the later, no vehicle seizure and forfeiture could be ordered by the Circuit Court pursuant to Wis. Stat. § 346.65(2).

The 1997-1998 version of Wis. Stats. § 346.65(2), states as follows: (R:36 – Exhibit 3, *see attached* Appendix B – Exhibit 3) (Applies to Long's 4th OWI arrest and charging date).

346.65 Penalty for violating sections 346.62 to 346.64

(2) Any person violating s. 346.63(1):

(c) Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total number of suspensions, revocations, and convictions counted under s. 343.307(1) **equals 3**, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one. (**emphasis** added)

(d) Except as provided in par. (f), shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 60 days nor more than one year in the county jail if the total number of suspensions, revocations, and convictions counted under s. 343.307(1) **equals 4**, except that suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one. (**emphasis** added)

(6)(a) 2. The court shall order a law enforcement officer to seize a motor vehicle owned by a person whose operating privilege is revoked under s. 343.305 (10) or who commits a violation of s. 346.63 (1) (a) or (b) or (2) (a) 1. or 2., 940.09 (1) (a), (b), (c), or (d) or 940.25 (1) (a), (b), (c), or (d) if the person whose operating privilege is revoked under s. 343.305 (10) or who is convicted of the violation **has 3 or more prior**

suspensions, revocations or convictions that would be counted under s. 343.307 (1). (**emphasis** added)

(6)(c) The district attorney of the county where the motor vehicle was seized shall commence an action to forfeit the motor vehicle within 30 days after the motor vehicle is seized. The action shall name the owner of the motor vehicle and all lienholders of record as parties. The forfeiture action shall be commenced by filing a summons, complaint and affidavit of the law enforcement agency with the clerk of circuit court. Upon service of an answer, the action shall be set for hearing within 60 days after the service of the answer. If no answer is served or no issue of law or fact joined and the time for that service or joining of issues has expired, the court may render a default judgment as provided in s. 806.02.

(6)(e) If, upon default or after a hearing, the court determines that the motor vehicle is forfeited to the state, the law enforcement agency that seized the motor vehicle shall dispose of the motor vehicle by sealed bid or auction sale following the procedure under s. 342.40 (3) (c), except as provided in par. (em). ...

A true and correct copy of the 1997-1998 version of Wis. Stats. § 346.65(2) is attached hereto, marked as Appendix B – Exhibit 3, and is made a part of this Brief as though fully set forth at length herein. (R:36 – Exhibit 3, *see attached* Appendix B – Exhibit 3: 1997-1998 version of Wis. Stats. § 346.65(2)).

In Wisconsin, it is well-established that an OWI sentence that is enhanced based on prior convictions cannot rest on a predicate offense that was obtained in violation of the accused's right to counsel. ***State v. Ernst***, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92; ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 898, 618 N.W.2d 528. To vindicate this right a defendant in Mr. Long's position is entitled to raise in the sentencing court a collateral challenge to the denial of the right to counsel in the prior case. ***Hahn***, at 898, ¶ 17; ***Ernst***, at 317.

A conviction secured without the benefit of defense counsel is presumptively *defective*. Wisconsin courts have long recognized that to rebut this

presumption the court record must affirmatively demonstrate that the accused knowingly and voluntarily waived the right to counsel.

> [T]he record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. Unless the record reveals the defendant's deliberate choice and his awareness of these facts, a knowingly and voluntary waiver will not be found.

Pickens v. State, 96 Wis. 2d 549, 563-564, 292 N.W.2d 601 (1980); ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997); ***State v. Ernst***, 283 Wis. 2d at 306.

As set forth in the attached affidavit, Mr. Long indicates that he was not represented by counsel and that he did not knowingly and voluntarily waive his right to counsel in Marathon County Case No. 90-CT-526. At the time Mr. Long could not afford to hire an attorney. Moreover, he had to travel from the Platteville area where he was finishing college to Wausau just to appear for court. During the course of the very brief court proceedings in this Marathon County case, Mr. Long was never advised by the trial court of the difficulties and disadvantages of self-representation. Feeling pressure to resolve the matter quickly, at that time Mr. Long was not aware of all of the implications of this conviction and did not appreciate the difficulties and disadvantages of settling the case without the aid and advice of counsel. Please note that Mr. Long's affidavit was signed by him on August 7, 2006, because it was originally drafted and used in a *successful* collateral challenge Motion for an OWI 5th offense in Waukesha County Case No. 00-CF-611. A true and correct copy of the Affidavit of Peter J.

Long is attached hereto, marked as Appendix B – Exhibit 4, and is made a part of this Brief as though fully set forth at length herein. (R:36 – Exhibit 4, *see attached* Appendix B – Exhibit 4: Affidavit of Peter J. Long).

Consistent with the procedural outline set forth in ***State v. Ernst***, 283 Wis. 2d at 306, 318-319, to establish a *prima facie* case of the denial of his right to counsel in Marathon County Case No. 90-CT-526, Mr. Long has submitted an affidavit alleging specific facts to support his contention that he did not knowingly and voluntarily waive his right to counsel. In addition, as in ***State v. Baker***, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), Mr. Long has secured an affidavit from the court services supervisor from Marathon County, ArDonna Mathwich, to confirm that the court records in Marathon County Case No. 90-CT-526 have been destroyed, and thus, any transcripts or court records from this Marathon County case can no longer be secured. Please note that the Affidavit of ArDonna Mathwich was signed by her on August 4, 2006, because it was originally drafted and used in a successful collateral challenge Motion for an OWI 5th offense in Waukesha County Case No. 00-CF-611. A true and correct copy of the Affidavit of ArDonna Mathwich is attached hereto, marked as Exhibit 5, and is made a part of this Brief as though fully set forth at length herein. (R:36 – Exhibit 5, *see attached* Appendix B – Exhibit 5: Affidavit of ArDonna Mathwich).

As previously mentioned, on October 27, 2006, Mr. Long filed a collateral challenge Motion in Waukesha County Case No. 00-CF-611 (originally an OWI 5th offense case) based on the denial of his right to counsel in the prior case:

Marathon County Case No. 90-CT-526. During these appellate proceeding Mr. Long was represented by Assistant State Public Defender, Donald T. Lang. A Motion Hearing was conducted, the Honorable Patrick L. Snyder presiding, and the Circuit Court granted Mr. Long's collateral challenge Motion and ordered that the original judgment of conviction shall be amended to reflect a conviction for a fourth offense of operating a vehicle while intoxicated. A true and correct copy of this Circuit Court Order for Waukesha County Case No. 00-CF-611 is attached hereto, marked as Exhibit 6, and is made a part of this Brief as though fully set forth at length herein. (R:36 – Exhibit 6, *see attached* Appendix B – Exhibit 6: Circuit Court Order).

Subsequently, in Winnebago County Case No. 06-CF-222, the Honorable William Carver, former Circuit Court Judge for Branch 5 in Winnebago County, also "set aside" the defective conviction from Marathon County Case No. 90-CT-526.

Subsequently, during sentencing in Winnebago County Case No. 08-CF-151, the Honorable Bruce K. Schmidt, former Circuit Court Judge for Branch 6 in Winnebago County, also "set aside" the defective conviction from Marathon County Case No. 90-CT-526. The Sentencing Transcript for Mr. Long's Sentencing Hearing for Winnebago County Case No. 08-CF-151, provides as follows: (Mr. Goldin = Defense Counsel) (Mr. Levin = ADA)

MR. GOLDIN: ... , I think that the State is agreeing that legally this would be considered a 6th.

MR. LEVIN: 7th.

MR. GOLDIN: Well, we had a motion to set aside the prior conviction. The Court indicated previously that we would be able to take that up at the sentencing. The motion is supported, Your Honor. It's my understanding that the prior conviction from Marathon County had been set aside.

THE COURT: Is that the one that was set aside by Judge Carver?

MR. GOLDIN: My client indicated that that's accurate. It was set aside by a Waukesha County judge and Judge Carver recognized that ruling.

THE COURT: Okay. Well then since two other judges have recognized it, I'll recognize it as well, which would make then this a 6th conviction. Is that correct?

MR. LEVIN: Right.

A true and correct copy of relevant excerpts from this Sentencing Transcript for Winnebago County Case No. 08-CF-151 are attached hereto, marked as Exhibit 7, and are made a part of this Brief as though fully set forth at length herein. (R:36 – Exhibit 7, *see attached* Appendix B – Exhibit 7: Sentencing Transcript excerpts).

In accordance with ***Ernst***, Mr. Long has met his burden of establishing a *prima facie* case that the prior OWI conviction secured in Marathon County Case No. 90-CT-526, was obtained in violation of his right to counsel. In particular, Mr. Long has submitted an affidavit alleging that he was not represented by counsel, has alleged specific facts demonstrating that he did not knowingly and voluntarily waive his right to counsel, and has made a good faith effort to find records of the prior proceedings but was unable to secure these records. Accordingly, the burden now shifts to the State "to prove by clear and convincing evidence" that Mr. Long's "waiver of counsel" in the Marathon County case "was

knowingly, and intelligently and voluntarily entered." ***State v. Ernst***, 283 Wis. 2d at 306, 320.

Unless the State affirmatively proves that Mr. Long knowingly, intelligently and voluntarily waived his right to counsel in Marathon County Case No. 90-CT-526, the sentence imposed by the Circuit Court in this matter is void because it exceeds the maximum penalty to which Mr. Long should have been exposed. In accordance with Wis. Stat. § 973.13, Mr. Long's sentence must be commuted to not exceed the maximum sentence authorized by law at the time for a third offense conviction for operating a vehicle while under the influence. *See* ***State v. Hanson***, 2001 WI 70, 244 Wis. 2d 405 ¶¶ 19-22, 628 N.W.2d 759 (rejecting the claim that the imposition of a penalty not authorized was somehow waived by defendant's plea). In 1998, the maximum penalty to which Mr. Long should have been exposed did not include a vehicle seizure and forfeiture.

To reiterate, A Motion Hearing *was conducted*, the Honorable Patrick L. Snyder presiding, and the Court granted Mr. Long's collateral challenge Motion and ordered that the original judgment of conviction shall be amended to reflect a conviction for a fourth offense of operating a vehicle while intoxicated. Effectively, this made Mr. Long's 5th OWI, actually his 4th OWI for Waukesha County Case No. 00-CF-611. Subsequently, in Winnebago County Case No. 06-CF-222, the Honorable William Carver, former Circuit Court Judge for Branch 5 in Winnebago County, also "set aside" the defective conviction from Marathon County Case No. 90-CT-526. Effectively, this made Mr. Long's 6th OWI, actually

his 5th OWI. Subsequently, during sentencing in Winnebago County Case No. 08-CF-151, the Honorable Bruce K. Schmidt, former Circuit Court Judge for Branch 6 in Winnebago County, also "set aside" the defective conviction from Marathon County Case No. 90-CT-526. Effectively, this made Mr. Long's 7th OWI, actually his 6th OWI. **Three** Circuit Court Judges have *granted* Mr. Long's collateral challenge Motion based upon the *same argument* made in the instant case in which Mr. Long seeks to make his 4th OWI, actually his 3rd OWI.

If Mr. Long's prior attorneys somehow waived his right to challenge the use of the OWI conviction from Marathon County to establish his fourth offense OWI status, Mr. Long was denied his state and federal constitutional rights to the effective assistance of counsel. There can be no strategic reason for failing to pursue a valid collateral attack upon a prior conviction that not only exposed the accused to an increased mandatory minimum jail sentence, but also erroneously exposed him to the seizure and forfeiture of his $36,000.00 Vehicle.

CONCLUSION AND RELIEF REQUESTED

Because the fourth offense operating while intoxicated sentence imposed in this matter was improperly enhanced based on a prior OWI conviction entered in Marathon County Case No. 90-CT-526 that was obtained in violation of Mr. Long's right to counsel, the sentence imposed in this matter must be modified or commuted to a sentence which includes the same eleven month jail sentence, the

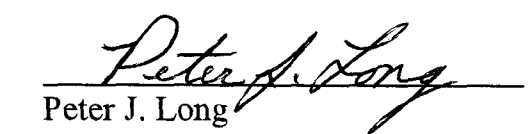
same fine and court costs, and ***no*** **vehicle seizure and forfeiture,** that which could have been imposed for a third offense OWI.

WHEREFORE, based on the aforementioned facts, statutes, and controlling precedent, a manifest error in law and fact has occurred because the Circuit Court was required to grant Mr. Long's Motion to Reopen the case based on a *new factor* and subsequently grant his Motion to Commute Sentence and Motion for Reimbursement filed March 17, 2016.

Therefore, the Defendant, Peter J. Long, respectfully request that the Court of Appeals reverse and remand this matter to the Circuit Court with instructions to reopen the case based on the *new factor* presented by Mr. Long and subsequently grant his Motion to Commute Sentence and Motion for Reimbursement based on the legal merits of both arguments presented by Mr. Long. Mr. Long should be awarded costs for this appeal pursuant to § § 809.25 and 814.04, Wis. Stats.

Dated this 14th day of June, 2016.

Respectfully Submitted By:



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Attachment: Appendix

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font: Times New Roman – 13 point.

The length of this brief is 5,391 words with a proportional serif font.

Date: June 14, 2016

Sincerely,

Peter J. Long
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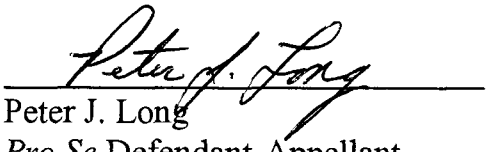
CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on June 14, 2016. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

Date: June 14, 2016

Sincerely,



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APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Date: June 14, 2016

Sincerely,

Peter J. Long

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