STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP2066-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ALFONSO C. LOAYZA,

Defendant-Appellant.

PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin petitions this Court to review the court of appeals' decision in *State Alfonso C. Loayza*, No 2018AP2066-CR, 2019 WL 3949000 (Wis. Ct. App. Aug. 22, 2019) (unpublished) (per curiam). (Pet-App. 101–06.) In that decision, the court of appeals reversed a judgment convicting Loayza of operating a motor vehicle while intoxicated (OWI) as an eighth offense and an order denying his motion for postconviction relief. The court of appeals concluded that the State failed to prove one of Loayza's prior convictions, a 1990 OWI conviction in California, even though the State submitted Loayza's Wisconsin Department of Transportation (DOT) driving record which listed that conviction. The court of appeals concluded that other documents from California that the State also submitted rendered the Wisconsin DOT record unreliable and thus not competent evidence of the conviction. The court of appeals therefore reversed the judgment of conviction and remanded the case with instructions to sentence Loayza for OWI as a seventh offense.

ISSUE PRESENTED FOR REVIEW

It is well established that a DOT record is competent proof of a defendant's prior conviction and can therefore be used to enhance the defendant's sentence. It is also well established that a defendant may challenge the existence of a conviction listed on a DOT record. But currently, there is no accepted procedure for how a defendant should challenge the existence of a conviction listed in a DOT record and what burden he must satisfy to make a DOT record so unreliable that it no longer qualifies as competent proof of the conviction.

Do the lack of a judgment of conviction for a prior offense and other documents that "support the inference" that the conviction does not exist render a Wisconsin DOT driving

record that lists the conviction so unreliable that it is no longer competent proof of the conviction?

The circuit court relied on the DOT record and documents from Loayza's 1991 California OWI conviction, which indicated that Loazya had prior convictions in California in 1987, 1989, and 1990, as competent proof of his 1990 California OWI conviction.

The court of appeals reversed. It did not explain what burden Loayza was requited to satisfy to disprove his 1990 conviction. But it concluded that the absence of a judgment of conviction for the 1990 California offense and documents that it concluded supported an inference that the 1990 conviction does not exist so undermined the Wisconsin DOT record that the record was not reliable and thus not competent proof of the conviction.

This Court should grant review and reverse the decision of the court of appeals. This Court should clarify that to overcome a DOT record listing an OWI conviction, a defendant must do more than point to the absence of a judgment of conviction for that offense and evidence that supports an inference that the conviction does not exist. He or she should have to prove that the DOT record is inaccurate and that the conviction does not exist. Because Loayza did not meet that burden, the court of appeals erred in reversing the judgment of conviction and the circuit court's order denying postconviction relief.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

This case warrants review because it satisfies the criteria set forth in Wis. Stat. § 809.62(1r).

First, review is appropriate because this case presents an opportunity for this Court to establish a policy within its authority. Wis. Stat. § 809.62(1r)(b). A DOT driving record is

competent evidence of a prior conviction. There is no dispute that a defendant may challenge the conviction. But there is no established procedure for that challenge, including what burden a defendant must satisfy to disprove a DOT record listing a conviction and how a defendant can satisfy that burden.

Second, review is appropriate to develop and clarify the law regarding an issue of law that is likely to recur. Wis. Stat. § 809.62(1r)(c)3. Prosecutors routinely submit DOT driving records to prove prior offenses. The court of appeals' opinion in this case suggests that a defendant can disprove a DOT record by simply pointing to a lack of an accompanying judgment of conviction and evidence that supports the inference that the conviction does not exist, even though it is well established that the State is not required to provide a judgment of conviction in order to prove a conviction, and even if the defendant does not allege, much less prove, that the conviction does not exist.

Finally, the court of appeals' decision conflicts with opinions of this Court and the court of appeals. Wis. Stat. § 809.62(1r)(d). The sole issue that Loayza raised in his brief on appeal was, "Does the record lack sufficient proof . . . of an alleged 1990 conviction to support Mr. Loayza's conviction for OWI-8th?" (Loayza's Br. 1.) The circuit court relied on Loayza's certified DOT driving record, which is competent proof of the 1990 conviction. *State v. Braunschweig*, 2018 WI 113, ¶ 32, 384 Wis. 2d 742, 921 N.W.2d 199; *State v. Van Riper*, 2003 WI App 237, 267 Wis. 2d 759, 672 N.W.2d 156. Loayza never alleged that the DOT record is inaccurate or that he was not convicted of OWI in California in 1990. But without explaining what burden Loayza had to satisfy to disprove the conviction, the court of appeals concluded that because of the absence of a judgment of conviction and documents that "support the inference" that the conviction

does not exist, the DOT record was no longer competent proof of the conviction. The court of appeals' decision conflicts with *Braunschweig* and *Van Riper*.

STATEMENT OF THE CASE

In May 2012, officers stopped Loayza for a speeding violation. (R. 1.) During the stop, Loayza admitted he consumed "hard liquor" and had "too much to drink." (R. 1.) A preliminary breath test registered an alcohol concentration of .14. (R. 1.)

The officer ran Loayza's driving record, which showed eight "prior alcohol related convictions." (R. 1.) Given Loayza's prior convictions, he was prohibited from driving with an alcohol concentration above .02. (R. 1:1); *see* Wis. Stat. § 340.01(46m)(c). A blood test revealed a blood alcohol concentration of .165 (R. 10.) The State charged Loayza with one count of operating while intoxicated, as a ninth offense, and one count of operating with a prohibited alcohol concentration, also as a ninth offense. (R. 10.) The complaint outlined Loayza's prior convictions:

> The Wisconsin Department of Transportation records show that Loayza has eight prior convictions for operating while intoxicated as follows: three from the State of California for offenses committed on March 1, 1989, March 5, 1990, and October 12, 1991; and five convictions in Walworth County, Wisconsin, for offenses committed on October 31, 1992, March 26, 1995, March 16, 1997, December 21, 2001, and March 4, 2009.

(R. 2:2.)

Loayza later pled guilty to one count of operating while intoxicated, as a ninth offense. (R. 93:15.) But the parties made Loayza's plea contingent on the State being able to prove his number of prior convictions at sentencing. (R. 93:7–10, 15–16.)

At sentencing, the State submitted three exhibits as proof of Loayza's prior convictions. (R. 95:9, Pet-App. 118.) First, the State submitted a certified copy of Loayza's driving record from Wisconsin DOT. (R. 39, Pet-App. 153–59.) Second, the State submitted a series of documents from the Superior Court of California, County of San Mateo, sent in response to a request for records related to Loayza's 1990 California offense from the Rock County District Attorney's Office. (R. 40, Pet-App. 160–72.) The documents included the complaint, the plea questionnaire and waiver of rights form, and the criminal docket for the 1990 California offense. (R. 40, Pet-App. 160–72.) Third, the State submitted a series of documents from the Superior Court of California, County of Santa Clara, sent in response to a request for records related to Loayza's 1991 California offense from the Rock County District Attorney's Office. (R. 41, Pet-App. 173–92.) The documents included the complaint, a bench warrant, and a minutes sheet for the 1991 California offense. (R. 41, Pet-App. 173–92.)

Loayza conceded that the State offered sufficient proof for the 1991 offense but argued that the State failed to offer sufficient proof for the 1989 and 1990 offenses. (R. 95:4–6, Pet-App. 113–15.) Loayza argued that the State's submission of the "certified Wisconsin Department of Transportation record" qualified as "competent proof" of the Wisconsin violations, but it did not qualify as "confident proof with respect to the California violations." (R. 95:8, Pet-App. 117.) The State argued that the certified DOT record "alone [was] sufficient proof of the prior convictions." (R. 95:9, Pet-App. 118.)

Relying on the documents submitted in exhibits two and three, the circuit court concluded that the State offered sufficient proof for both the 1989 and 1990 California offenses. (R. 95:14–17, Pet-App. 123–26.) Accordingly, the court

imposed sentence for operating while intoxicated, as a ninth offense. (R. 95:24.) The court sentenced Loayza to ten years of imprisonment, consisting of five years of initial confinement followed by five years of extended supervision. (R. 95:27.)

After sentencing, Loayza filed a motion for resentencing, challenging the circuit court's conclusion that the state submitted sufficient proof of the 1989 California offense. (R. 46.) Loayza argued that the documents submitted in exhibit three were insufficient. (R. 46:4–6.) The court granted Loayza's motion after a hearing. (R. 50; 96.) It amended Loayza's judgment of conviction to operating while intoxicated, as an eighth offense, and resentenced Loayza to the same length of sentence (a total of ten years of imprisonment, consisting of five years or initial confinement followed by five years of extended supervision). (R. 56; 97:9–10.)

After resentencing, Loayza filed a postconviction motion, alleging that his sentence was unduly harsh. (R. 58:1.) The court denied Loayza's motion after a hearing. (R. 61; 98:8–10.)

Loayza's appellate counsel filed a no-merit appeal, but the court of appeals rejected it. (R. 62, A-App. 165–69.)[1] The court ordered Loayza to pursue the issue of whether the State offered sufficient proof of Loayza's 1990 California offense. (A-App. 168 ("Accordingly, counsel must further pursue this issue.").) Loayza filed a postconviction motion to modify his sentence (R. 64:1–7, Pet-App. 127–33), asserting that he should have been sentenced for operating while intoxicated, as a seventh offense. (R. 64:1, Pet-App. 127.) After a hearing,

[1] The court of appeals' order denying the no-merit report is appended to Loayza's court of appeals brief.

the court denied Loayza's motion.[2] (R. 71:2; 99:6–18; Pet-App. 109, 139–51.) The court concluded that the State's three exhibits provided "more than sufficient competent evidence" to prove Loayza's 1990 California offense. (R. 99:18, Pet-App. 151.)

Loayza appealed, raising a single issue: "Does the record lack sufficient proof . . . of an alleged 1990 conviction to support Mr. Loayza's conviction for OWI-8th?" (Loayza's Br. 1.) In his brief, Loayza acknowledged that a Wisconsin DOT driving record is competent proof of a prior conviction. (Loayza's Br. 5.) But he argued that the information the State provided from California was insufficient to prove the 1990 conviction. (Loayza's Br. 6–11.)

In its response brief, the State explained that the DOT record it provided to the circuit court was competent evidence of Loayza's 1990 conviction. (State's Br. 9–12.)

In his reply brief, Loayza argued for the first time that the materials from California that the State submitted to the circuit court rendered the DOT record of his 1990 conviction unreliable. (Loayza's Reply Br. 2–3.)

The court of appeals reversed the judgment of conviction and the order denying Loayza's motion for postconviction relief. It concluded that the California materials, and in particular the absence of a judgment of conviction for the 1990 offense, rendered the Wisconsin DOT record unreliable. (Pet-App. 104–06.) It therefore remanded the case to the circuit court with instructions to sentence Loayza for a seventh-offense OWI.

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[2] The Honorable Richard T. Werner presided over Loayza's plea, sentencing, motion for resentencing, and postconviction motion alleging that his sentence was unduly harsh. (R. 93; 95; 50; 61.) The Honorable John M. Wood presided over Loayza's postconviction motion to modify his sentence. (R. 71.)

ARGUMENT

This Court should accept review to answer the important question of what a defendant must show to prove that a DOT driving record is unreliable and not competent proof of a conviction, and therefore disprove the conviction.

A. How the State proves a prior conviction for sentence enhancement purposes is well established.

The penalty for a violation of OWI under Wis. Stat. § 346.63(1)(a) is determined by Wis. Stat. § 346.65(2)(am)2., which explains that the penalty depends on "the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations, and other convictions counted under s. 343.307(1)." *See also State v. Carter*, 2010 WI 132, ¶ 3, 330 Wis. 2d 1, 794 N.W.2d 213 (citing Wis. Stat. § 346.65(2) ("This Wisconsin legislature has established an accelerated penalty structure for OWI offenses in Wis. Stat. § 346.65(2). The severity of a defendant's penalty for OWI is based on the number of prior convictions under §§ 940.09 and 940.25 'plus the total number of suspensions, revocations, and other convictions counted under Wis. Stat. § 343.307(1).").

Wisconsin Stat. § 343.307(1) tells a court when an offense from another jurisdiction counts as a conviction for OWI counting purposes. Relevant here, it states:

> (1) The court shall count the following to determine the length of a revocation under s. 343.30(1q)(b) and to determine the penalty under ss. 114.09(2) and 346.65(2):
>
> . . . .
>
> (d) Convictions under the law of another jurisdiction that prohibits a person from refusing

> chemical testing or using a motor vehicle while intoxicated or under the influence of a controlled substance or controlled substance analog, or a combination thereof; with an excess or specified range of alcohol concentration; while under the influence of any drug to a degree that renders the person incapable of safely driving; or while having a detectable amount of a restricted controlled substance in his or her blood, as those or substantially similar terms are used in that jurisdiction's laws.

Wis. Stat. § 343.307(1)(d).

Wisconsin Stat. § 340.01(9r) defines the term "conviction." It provides, in relevant part:

> (9r) "Conviction" or "convicted" means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal, an unvacated forfeiture of property deposited to secure the person's appearance in court, a plea of guilty or no contest accepted by the court, the payment of a fine or court cost, or violation of a condition of release without the deposit of property, regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. It is immaterial that an appeal has been taken.

Wis. Stat. § 340.01(9r).

In short, section 343.307(1)(d) instructs a court "to count" "[c]onvictions under the law of another jurisdiction that prohibits a person from . . . using a motor vehicle while intoxicated . . . as those or substantially similar terms are used in that jurisdiction's laws." And "[c]onviction" is defined in section 340.01(9r) as "an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction . . . ."

Accordingly, a court should count "unvacated adjudication[s] of guilt" or "determination[s] that a person has violated of failed to comply with the law" of "another jurisdiction that that prohibits a person from . . . using a motor vehicle while intoxicated . . . as those or substantially similar terms are used in that jurisdiction's laws" to determine an offender's penalty under Wis. Stat. § 346.65(2). Wis. Stat. §§ 343.307(1)(d); 340.01(9r).

"The State bears the burden of establishing prior offenses as the basis for the imposition of enhanced penalties." *Carter*, 330 Wis. 2d 1, ¶ 25. For an OWI, because the prior convictions are not an element of the offense, the State must prove the prior convictions by a preponderance of the evidence. *State v. Braunschweig*, 2018 WI 113, ¶ 39, 384 Wis. 2d 742, 921 N.W.2d 199.

The State satisfies its burden when it places before the circuit court "certified copies of convictions or other competent proof." *Id.* ¶ 33 (quoting *State v. Saunders*, 2002 WI 107, ¶ 32, 255 Wis. 2d 589, 649 N.W.2d 263). Establishing prior convictions "by competent proof is not an onerous task." *State v. Spaeth*, 206 Wis. 2d 135, 1455, 556 N.W.2d 728 (1996). For proof to be competent, it "must reliably demonstrate, with particularity," the existence of each prior conviction. *Id.* at 150. But it need not be admissible at trial since "[t]here is no presumption of innocence accruing to the defendant regarding . . . previous . . . convictions; such convictions have already been determined in the justice system and the defendant was protected by his rights in those actions." *Id.* at 150–51 (alterations in original) (quoting *State v. McAllister*, 107 Wis. 2d 532, 539, 319 N.W.2d 865 (1982)).

Competent proof includes an accused's admission to the prior offense. *State v. Wideman*, 206 Wis. 2d 91, 105, 556 N.W.2d 737 (1996) ("If an accused admits to a prior offense that admission is, of course, competent proof of a prior offense

and the State is relieved of its burden to further establish the prior conviction."). And it includes "copies of prior judgments of conviction" or "a teletype of the defendant's Department of Transportation (DOT) driving record." *Spaeth*, 206 Wis. 2d at 153. A certified DOT record is sufficient competent evidence to prove a prior OWI conviction. *Braunschweig*, 384 Wis. 2d 742, ¶ 40; *State v. Van Riper*, 2003 WI App 237, ¶ 2, 267 Wis. 2d 759, 672 N.W.2d 156. In fact, a certified DOT record is sufficient to prove an OWI conviction beyond a reasonable doubt. *Van Riper*, 267 Wis. 2d 759, ¶ 21. A certified Wisconsin DOT record is competent proof even if the prior conviction occurred in another jurisdiction. *Id.* ¶ 19 ("That one of Van Riper's convictions occurred in Minnesota does not change our decision.").

B. This Court should accept review to establish how a defendant can challenge a DOT record listing a conviction and what burden the defendant must satisfy to disprove the conviction.

This Court has established the procedures for proving a conviction, including the burden the State must satisfy to prove it. The State need only prove a prior conviction by a preponderance of the evidence, *Braunschweig*, 384 Wis. 2d 742, ¶ 39, and it satisfies its burden when it places before the circuit court "certified copies of convictions or other competent proof." *Id.* ¶ 33 (citation omitted).

After the State proves a conviction, the defendant "must have an opportunity to challenge the existence of the prior offense." *Wideman*, 206 Wis. 2d at 105. "[E]ven a certified copy of a judgment of a document establishing a prior conviction may be rebutted." *State v. Saunders*, 2002 WI 107, ¶ 30, 255 Wis. 2d 589, 649 N.W.2d 263.

It is unclear, however, how a defendant challenges the existence of a conviction proved by a DOT record and what burden the defendant must satisfy to disprove the conviction. The issues of how a defendant challenges a DOT record and what burden he must satisfy are likely to recur. Prosecutors routinely submit DOT driving records to prove prior offenses. A defendant can challenge the existence of the convictions in any case. This Court should accept review to establish a policy or procedure that is within its authority that answers those questions.

C. The court of appeals' decision in this case demonstrates the need for this Court to clarify what procedures apply in disproving a prior OWI conviction.

That a clear rule is needed to establish the procedures for a defendant to challenge a prior conviction is evidenced by the court of appeals' decision in this case.

The State presented a certified copy of Loayza's Wisconsin DOT driving record that lists a conviction for "OWI-Operating While Intoxicated" in California, with a "violation" date of "03-05-1990" and a "conviction" date of "05-11-1990." (R. 39:6, A-App. 107.) A DOT record is easily sufficient to satisfy the State's burden of proving a conviction by a preponderance of the evidence—it is proof of a conviction beyond a reasonable doubt, *Van Riper*, 267 Wis. 2d 759, ¶ 21.

The DOT record makes clear that Loayza was *convicted* of the 1990 California offense. (R. 39:6, A-App. 107.) Accordingly, the 1990 California offense qualifies as a "conviction," as that term is defined under the statute. Wis. Stat. § 340.01(9r) ("'Conviction' or 'convicted' means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction . . . .").

California and Wisconsin's laws prohibit substantially similar conduct—operating while under the influence of an intoxicant. California's offense of operating while intoxicated fits squarely within Wis. Stat. § 343.307(1)(d). The circuit court correctly recognized that the DOT record is competent proof of Loayza's 1990 California OWI conviction, and that the conviction counts to enhance the sentence for Loayza's current OWI.

The court of appeals acknowledged that a DOT record is competent proof of a prior conviction. (Pet-App. 103.) The court did not set forth the burden that Loayza was required to satisfy to "challenge the existence of the prior offense." *Wideman*, 206 Wis. 2d at 105. But it apparently determined that Loayza met that burden. It concluded that the DOT record showing Loayza's 1990 California conviction was rendered unreliable, and therefore not competent proof of the conviction, by the absence of a judgment of conviction and by other documents that the State submitted. (Pet-App. 103, 106.)

The court of appeals concluded that the documents from California "cast doubt on whether any conviction occurred in that case, and, if it did, that it was for OWI." (Pet-App. 104.) The court put great weight on the absence of a judgment of conviction in the California materials. It said that when events are normally recorded if they have occurred, "the absence of such an event from the record supports the inference that the event did not occur." (Pet-App. 106.) The court added that, "In our experience, convictions are very likely to be recorded in court records if they have occurred." (Pet-App. 106.)

But while it may be true that judgments of conviction are likely to be recorded, the absence of a judgment of conviction in a court record nearly 30 years later is not proof that the conviction did not occur. As the circuit court

recognized in this case, "a lot of times when we see these collateral attacks of old convictions we run into problems where certain jurisdictions don't keep documents forever." (R. 99:17, Pet-App. 150.) A document from the Superior Court of California indicates that in California, "all misdemeanor records ten (10) years and older may be purged and destroyed." (R. 40:2, Pet-App. 161.)

As the court of appeals has recognized, in Wisconsin, court records in OWI cases are often destroyed long before 30 years have passed:

> The Supreme Court's Record Retention Rules provide a limited "shelf life" for court records that will be needed to counter collateral attacks of prior drunk driving convictions: (1) court reporter's notes are destroyed after ten years, SCR 72.01(47); (2) traffic forfeiture case files and related documents are destroyed after five years, SCR 72.01(24), (24a) and (24m); and (3) misdemeanor case files and related documents are destroyed after twenty years, SCR 72.01(18), (19) and (20).

State v. Drexler, 2003 WI App 169, ¶ 11 n.2, 266 Wis. 2d 438, 669 N.W.2d 182. The court of appeals noted in *Drexler* that because records are destroyed after a period of time, in cases in which a defendant is charged with OWI as a third or subsequent offense, it is "conceivable" that "there will be no court records to support his or her conviction for the first offense—traffic forfeiture records are destroyed after five years—or the second and subsequent offenses—misdemeanor records are destroyed after twenty years." *Id.*

There is a very real chance that even if Loayza's 1990 conviction were for a Wisconsin OWI rather than one in California, there would be no judgment of conviction in the record. But that would not make the DOT record listing the conviction unreliable. Contrary to the court of appeals' conclusion, the absence of a judgment of conviction for

Loayza's 1990 California OWI does not render the DOT record that shows the conviction unreliable.

The court of appeals also relied on documents from Loayza's 1990 case that include a complaint alleging OWI, operating with a prohibited alcohol concentration (PAC), and two counts of operating after suspension or revocation (OAR), and a plea from for one of the OAR charges. (Pet-App. 105.) The court concluded that "the plea form supports an inference that, if there was a conviction in May 1990 as reported by the DOT record, it was not for OWI, but only for operating after suspension and revocation." (Pet-App. 105.)

The court did not explain what burden Loayza faced when he challenged the existence of his 1990 conviction, or how he met that burden by pointing to the absence of a judgment of conviction—which is not required to prove a conviction, *Braunschweig*, 384 Wis. 2d 742, ¶ 40—and a document that merely "supports an inference" that the conviction does not exist.

Even if Loayza's showing could be considered sufficient to meet his burden, the court failed to consider other documents that the State submitted that, as the circuit court recognized, prove the existence of the 1990 OWI conviction. And the court of appeals failed to consider the documents for Loayza's 1991 OWI conviction which, as the court of appeals recognized, provided "more than an abundance of reliable information" supporting the existence of Loayza's 1990 OWI conviction. (R. 99:14, Pet-App. 147.)

The circuit court relied on a 1991 felony minutes sheet from Santa Clara County, signed by a judge, which indicates that Loayza pled guilty to felony OWI in 1991, and admitted to three prior OWI convictions. (R. 41:18–19, Pet-App. 190–91; 99:13, 14, Pet-App. 146, 147.) The complaint in the 1991 case alleges the three prior OWI convictions, including the 1990 OWI at issue in this case. (R. 41:6–9, Pet-App. 178–81.)

It also alleges the OAR conviction for which the plea form is included in the record. (R. 41:8, Pet-App. 180.) The felony minutes sheet was signed by a judge who "certif[ied] that the foregoing is a true and correct record of the proceedings had before me this date in said case." (R. 41:18–19, Pet-App. 190–91.) In addition, the record contains a sentencing document which indicates that Loayza was sentenced for "Felony DUI w/3 + priors" in 1991. (R. 41:3, Pet-App. 175.)

Taken together, the complaint, felony minutes sheet, and sentencing document show that when Loayza pled guilty to felony OWI in 1991, he admitted to having three prior OWI convictions, including the 1990 conviction at issue here, and the 1990 OAR conviction. The court of appeals did not mention the 1991 Santa Clara County documents or address the circuit court's reliance on those documents as proving Loayza's 1990 OWI conviction.

Finally, regardless what burden a defendant must satisfy to challenge the existence of a conviction and render a DOT record listing that conviction unreliable, Loayza did not satisfy that burden. Loayza did not even allege that he was not convicted of OWI in California in 1990. Instead, he admitted the existence of the conviction. Before Loayza challenged the proof of his 1990 OWI conviction, he collaterally attacked his 1989, 1990, and 1991 OWI convictions in California. (R. 18; 24, Pet-App. 193–96, 197–98.) In the collateral attack motion, Loayza's counsel noted that Loayza was challenging those convictions on the ground that "the pleas in those cases were entered without a valid waiver of counsel. (R. 18:1, Pet-App. 193.) Loayza filed an affidavit in support of his motion in which he said that he "does not recall whether he was represented in court at the time of sentencing" for his "California DUI/OWI Convictions from 1989, 1990, and 1991. (R. 24:1, Pet-App. 197.)

The court of appeals' decision is unpublished and unauthored. But it is publicly available, and it will likely result in defense attorneys challenging prior OWI convictions on the same ground—the absence of a judgment of conviction proving again what the DOT record has already proved. Under the court of appeals' reasoning, a defendant can show that a DOT record that is sufficient to establish a conviction is unreliable simply by alleging the absence of a judgment of conviction and providing other documents that "support the inference" that a conviction does not exist. If a defendant made that claim at or shortly before trial, and did not provide other documents that prove the conviction, the prosecution might be unable to timely obtain other documents, like the 1991 Santa Clara County minutes sheet in this case, that support the DOT record. In such a case a defendant might escape sentence enhancement, even if like Loayza, he does not even allege that the conviction he is challenging does not exist.

This Court should grant review to clarify how a defendant can challenge the existence of a conviction the State has proved, to clarify what burden a defendant must satisfy, and to reverse the court of appeals' opinion that incorrectly concluded that the DOT record in this case was so unreliable that it no was no longer competent evidence proving Loayza's 1990 conviction.

CONCLUSION

This Court should grant this petition for review.

Dated this 20th day of September 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 4967 words.

_____
MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b)and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 20th day of September 2019.

_____
MICHAEL C. SANDERS
Assistant Attorney General