STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP000741-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAVIEN CAJUJUAN PEGEESE,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction and Written Order Denying the Postconviction Motion Entered in the Rock County Circuit Court, the Honorable Richard T. Werner and the Honorable John M. Wood, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. The plea judge's failure to (1) inform Pegeese of each of his constitutional rights and (2) verify that he understood each would be waived by his plea entitled Pegeese to a *Bangert* hearing.

A. The Court is not bound by the decisions of the court of appeals in *Hansen* and *Moederndorfer*.

The state's assertion that this court is "bound" by prior decisions of the court of appeals is simply not the case. (State Br. at 11 & n. 1). Wisconsin court of appeals decisions may have "precedential" value, but of course "this court … may withdraw or disavow language in a decision of the court of appeals." *State v. Hayes*, 2004 WI 80, 273 Wis. 2d 1, 9 & n. 9, 681 N.W.2d 203, 207.

In addition, this case involves the scope of a duty created by this court's exercise of its "supervisory powers." *State v. Bangert*, 131 Wis. 2d 246, 270, 389 N.W.2d 12, 24 (1986). Pegeese is not aware of any case holding that this court's exercise of its supervisory power can somehow be handcuffed by the court of appeals due to the doctrine of *stare decisis*. Indeed, "Article VII, Section 3 of the Wisconsin Constitution expressly confers upon this court superintending and administrative authority over all state courts. This provision is a grant of power. It is unlimited in extent. It is indefinite in character." *In re Jerrell C.J.*, 2005 WI 105, ¶ 40, 283

Wis. 2d 145, 165, 699 N.W.2d 110, 119–20 (citations, footnotes, and quotation marks omitted).

At best, the principle of *stare decisis* would apply if the plea colloquy here had been identical to the plea colloquys in the two cases referred to by the state, *State v. Hansen*, 168 Wis.2d 749, 485 N.W.2d 74 (Ct.App.1992) and *State v. Moederndorfer*, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct.App.1987). However, as discussed below, there are significant factual differences that make the decisions inapplicable.

B. There are "compelling reasons" for the court to clarify that the duty to "inform and verify" applies to each constitutional right.

To the extent that the principle of *stare decisis* does apply with respect to this court's prior explications of the scope of a plea judge's duty to "address the defendant personally and … inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights," there are "compelling reasons" to clarify that the duty applies to each constitutional right. *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Pegeese explained those reasons in his initial brief, and addresses here the specific points raised by the state in its reply.

First, requiring the court to "inform" and "verify" each constitutional right during a plea will

reduce postconviction litigation on the question of whether a defendant may withdraw a plea due to a failure to understand one of the constitutional rights being waived. Although the state tut-tuts this consideration as unwarranted "speculation," (State Br. at 20-21), the United States Supreme Court observed fifty years ago that "[b]y personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack." *McCarthy v. United States*, 394 U.S. 459, 465-466, n. 11 & 16 (1969).

The state scoffs at the notion that a defendant, having signed the questionnaire, will admit that they actually did not understand one of the rights described therein. (State Br. at 20). But if this were an invalid consideration, why hold a colloquy at all? All of the duties imposed by *Bangert* and *Brown* can be reduced to a writing signed by the defendant. However, the court has been clear that the questionnaire cannot be a substitute for a colloquy. *State v. Hoppe*, 2009 WI 41, ¶38, 317 Wis. 2d 161, 182, 765 N.W.2d 794, 804. And the state has not explained why reference to the questionnaire does not satisfy the duty to explain that the court is not bound by the parties' plea agreement, but does satisfy the duty to ensure that the defendant understands the rights waived by the plea. *State v. Hampton,* 2004 WI 107, ¶69, 274 Wis. 2d 379, 392, 683 N.W.2d 14, 20.

What the state is missing is the human element of the plea process. The decision to enter a plea is incredibly complicated. It involves assessing how 12 strangers will assess conflicting evidence, as well as complex legal questions. And the stakes cannot be higher. Adding to the stress is that many defendants cannot make bail, and have been in county lockup, away from their friends and family, for an extended period of time. Conversations with their attorney are often through a thick sheet of glass, or in a busy hallway.

So even when a diligent and conscientious defense counsel goes over the questionnaire and reviews all of the rights waived by the plea, it should not be surprising if a defendant does not truly understand each right being waived. And the reality is that not all defense attorneys are always careful to really explain the significance of each right being waived in the context of the case. *See Brown*, 2006 WI 100, ¶56 ("a court cannot rely very heavily upon mere statements from defense counsel that he or she has reviewed the nature of the charges with a defendant.")

Thus, when the court reviews each right being waived, it gives the defendant who does not understand a particular right an opportunity to speak up, and ask for additional time to consult with their attorney. For instance, explaining to the defendant that he or she has a right to force witnesses to appear at trial with a subpoena may remind the defendant of a question about a possible

friendly witness. And even if the defendant does not explicitly request time to consult with counsel, the defendant's hesitation or puzzlement may prompt the court to enquire further about the defendant's understanding of the specific right.

In addition, requiring plea judges to "inform" and "verify" each constitutional right avoids the messy question of whether the plea court sufficiently incorporated the constitutional rights section of the plea questionnaire. Ironically, the state repeatedly quotes the observation in *Hansen* that the difference between merely determining that the defendant read and understood the questionnaire, but also knew that he or she was waiving the constitutional rights in the questionnaire, is "a subtle, but important, requirement." (State Br. at 11, 13, 18, *quoting Hansen*, 168 Wis.2d at 756).

What the state's position does not appreciate is that in practice, the requirement is often too "subtle." This case illustrates the point. The plea court asked Pegeese if he understood and had any questions about the plea questionnaire, then confirmed with defense counsel that he reviewed the questionnaire with Pegeese, and then asked Pegeese if he understood the rights he was giving up *without explicitly referring to the questionnaire*. Thus, the state's argument rests on the proximity of the court's question about constitutional rights to the prior questions about the questionnaire as somehow making clear to Pegeese that the court was referring to the constitutional rights section of the plea

agreement. There would be no need to resort to parsing whether the court's reference to the questionnaire was sufficient if the rule is simply that the court must inform and verify each constitutional right.

Another reason to clarify that the duty to inform and verify applies to each constitutional right is to bring uniformity to the state. The court of appeals has given inconsistent rulings on whether the duty to "inform and verify" currently applies to each constitutional right. (Pegeese Br. at 21-22). The state claims that Pegeese's reference in his brief – but not his petition for review – to certain unpublished opinions of the court of appeals runs afoul of Wis. Stat. § 809.23(3), which provides that "[a]n unpublished opinion may not be cited in any court of this state as precedent or authority" but that certain unpublished opinions may be cited for their "persuasive value." (State Br. at 17-19).

However, the unpublished cases were not cited "as precedent or authority": Pegeese is not claiming that any court is bound by the unpublished decisions. Nor are the cases cited for their "persuasive value." Peegese is not arguing that this court should adopt the reasoning used in the cases. Instead, Pegeese cited the cases to illustrate the point that the current rule has caused some confusion in the courts below, and the court should use its supervisory power to clarify the rule.

Another compelling reason is that going over each individual right gives both the defendant and the public at large confidence that the conviction is the product of a fair process, and is not a rush job. After all, "[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969).

But perhaps the most compelling reason to make clear that the duty to "inform" and "verify" applies to each constitutional right is the low opportunity cost. In other words, Why not?

The state does not dispute that it would add only a few minutes to a plea colloquy. While the state correctly points out that four of the states cited in Pegeese's petition allow the use of a form in lieu of a colloquy in all cases, and a fifth state allows use of a form for misdemeanors, that still leaves the courts in 37 states, plus all of the federal courts, requiring that the plea judge inform and verify that the defendant understands each constitutional right waived by a plea. There is no reason that Wisconsin judges cannot follow suit.

II. The circuit court incorrectly held that *Moederndorfer* controlled.

The state argues that *Moederndorfer* and others create a clear rule that "when a court relies on

a plea questionnaire to obtain a waiver of rights, the court must determine that the defendant has reviewed the rights on the form, understands them, and knows that he is waiving them by his plea." (State Br. at 9).

The colloquy here does not satisfy this test, because the court did not endeavor to verify that Pegeese understood that the questionnaire included constitutional rights, and that Pegeese understood that with his plea he was waiving the rights described in the questionnaire.

Here, the court asked the defendant if he understood the contents of the plea questionnaire, then asked his attorney if he thought Pegeese understood the questionnaire, and then went back to Pegeese asking about his constitutional rights, without referring to the questionnaire. (45:3-4; App. 111-12). The court then moved on to give Pegeese the immigrations warnings without referring to the questionnaire again. (*Id*.)

The *Moederndorfer* judge, in contrast, specifically referred to the constitutional rights in the questionnaire, and verified that the defendant had reviewed and initialed each right. *Id.* at 828-829, n.1. The court's failure to do so here violates the state's own articulation of the appropriate test.

III. The Court Should Reject The State's Tacit Invitation To Replace *Bangert* With A Harmless Error Test.

Although the state does not come out and say it, its request that the court apply a harmless error test in lieu of remanding for an evidentiary hearing is a request to overturn the two-step process created in *Bangert*. The overture should be rejected for several reasons.

First, the second-step of the *Bangert* test *is* essentially a harmless error test, but applied after the court has had an opportunity to consider all of the relevant evidence. Generally speaking, in criminal cases an "error is harmless if the [state] proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115 (citation and quotation marks omitted). The burden on the state at a *Bangert* hearing is actually lower: the state must "show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." *Bangert*, 131 Wis. 2d 246, 274.

If the court were to hold that a signed questionnaire renders any error in the plea harmless, that would effectively wipe the *Bangert* hearing out of existence. A defendant would not be able to explain why, despite signing the questionnaire, he or she did not understand the rights being waived. Indeed, here

Pegeese was barely 16 years old when he signed the questionnaire. If he had signed a contract to buy a car, it would be voidable under the "infancy doctrine," which presumes that minors do not have the mental wherewithal to enter into binding agreements. *Halbman v. Lemke*, 99 Wis. 2d 241, 245, 298 N.W.2d 562, 564 (1980); Wis. Stat. § 990.01(20). The state's proposed application of the harmless error doctrine because he signed the questionnaire would deprive Pegeese of the opportunity to explain why he did not understand the rights being waived.

Second, this court rejected application of a harmless error test for *Bangert* claims in *State v. Taylor*, 2013 WI 34, ¶¶40-41 & n. 10-11, 347 Wis. 2d 30, 55, 829 N.W.2d 482, 494. The court observed in *Taylor*, and in *State v. Cross*, 2010 WI 70, ¶ 29, 326 Wis. 2d 492, 509, 786 N.W.2d 64, 72, before it, that a failure to understand "the precise maximum punishment is [not] a per se due process violation[.]" *Taylor,* 2013 WI 34, ¶ 33 (q*uoting Cross*, 2010 WI 70, ¶ 33). A *Bangert* hearing was not required in *Taylor* and *Cross* because the "defect" regarding the maximum penalties were "insubstantial." *Taylor*, 2013 WI 34, ¶ 34; *Cross*, 2010 WI 70, ¶ 32. In other words, even if the defendant understood the maximum penalties to be what the court had represented during the plea, the plea was still knowing, intelligent, and voluntary.

Here, however, we are dealing with Pegeese's understanding of the constitutional rights waived by the plea, not his understanding of the penalties he

faced. Without question, if Pegeese did not understand a constitutional right waived by his plea, then his plea was not knowing, intelligent, and voluntary and was in violation of his right to due process. *McCarthy v. United States*, 394 U.S. 459, 465-466, n. 11 & 16 (1969) (collecting cases). Thus, an evidentiary hearing is necessary to determine whether, in fact, Pegeese understood the rights he was waiving.

The state's reliance on *State v. Reyes Fuerte*, 2017 WI 104, ¶ 37, 378 Wis. 2d 504, 527, 904 N.W.2d 773, 784, is unavailing. *Reyes Fuerte* involved the immigration warning statute, Wis. Stat. § 971.08(1)(c), which sets up its own plea withdrawal standards for failing to abide by its terms. Specifically, the statute provides that if the plea court fails to read the warnings articulated in the statute, and the defendant shows that he or she is facing deportation as a result of the conviction, the defendant "shall" be entitled to withdraw the plea. The court clarified that despite the legislature's use of the word "shall," there may be instances where the failure to read the precise wording in the statute is harmless, such as when the reason for the immigration action is not related to the defect in the warning. *Id.*, ¶ 40. At no point does the Court mention *Taylor* or *Cross*, or otherwise suggest it was abandoning the *Bangert* framework.

Finally, the state's comparisons to the application of harmless error doctrine in other jurisdictions is inapt, because they depend on the

vagaries of the postconviction process in the respective jurisdictions.

For example, under the Federal Rules of Criminal Procedure, prior to sentencing the defendant may withdraw a plea for any "fair and just reason," but after the court imposes sentence a "plea may be set aside only on direct appeal or collateral attack." Fed. R. Crim. P. 11(d)-(e). The federal case relied upon by the state, *United States v. Driver*, 242 F.3d 767, 771 (7th Cir. 2001), involved a direct appeal of a plea where the defendant did not move to withdraw a plea prior to sentencing. The court noted that while the denial of a plea withdrawal motion would have been reviewed for harmless error, because no such motion was filed the record was reviewed for the plain error. *Id*. at 769-770. The defendant could later file a collateral attack motion under 28 U.S.C.A. § 2255.

However, under Wisconsin law, a post-sentencing plea withdrawal must be made first in the circuit court, before an appeal to the court of appeals. Wis. Stat. § 809.30. Under the second-step of the well-established *Bangert* process, the circuit court then holds an evidentiary hearing on whether the plea was actually knowing, intelligent, and voluntary. Failure to raise the issue in the circuit court would result in waiver, and the defendant cannot raise the issue through collateral attack. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157, 157 (1994).

The state has simply failed to provide compelling reasons to jettison the two-step *Bangert* plea withdrawal process.

CONCLUSION

For the reasons stated above and in his initial brief, Pegeese respectfully requests that the case be remanded to the circuit court for an evidentiary hearing under *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Dated this 20th day of March, 2019.

Respectfully submitted,

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CERTIFICATIONS

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. The length of this brief is 2929 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 20th day of March, 2019.

Signed:

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