STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2018AP2419-CF

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANGEL MERCADO,

Defendant-Appellant-Respondent.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Review from on Review of a Decision of the Court of Appeals, District I, Reversing a Judgment of Conviction and an Order Denying Postconviction Relief, Both Entered in Milwaukee County Circuit Court, the Honorable Jeffrey A. Conen, Presiding

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ROBERT R. HENAK
State Bar No. 1016803
ELLEN HENAK
State Bar No. 1012490

HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Wisconsin Association
of Criminal Defense Lawyers

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief regarding the means by which the court of appeals is either authorized or required to review substantive claims of error in the absence of proper objection entitling the appellant to direct review. WACDL takes no position regarding whether the circuit court erred in admitting certain evidence.

ARGUMENT

Nearly fifty years ago, this Court recognized the verity that

> [i]t is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably.

Hayes v. State, 46 Wis.2d 93, 105, 175 N.W.2d 625 (1970).[1] While Wisconsin courts have not always followed that aphorism, our law has long provided the opportunity if not always the obligation to do so.

As relevant to this non-party brief, this case provides the Court an opportunity to acknowledge and reaffirm longstanding principles of Wisconsin law consistent with the ***Hayes*** *dicta*. The state seeks a change that will upend decades of reliance on settled law and procedure. The state's desired reinterpretation of the Rules of Evidence, moreover, will impact not merely criminal cases, but also civil cases where litigants whose attorneys fail to adequately preserve an objection are not protected by the right to the effective assistance of counsel.

The state's request to apply a forfeiture here also overlooks the fact that it forfeited its forfeiture argument by not raising it in the circuit court when Mercado could have responded with facts supporting an exception to forfeiture (R-App. 112 n.6).

I.

THE FORFEITURE RULE AND ITS EXCEPTIONS

A. The Forfeiture Rule

"Forfeiture is the failure to make the timely assertion of a right," with the failure forfeiting the right to appellate review of that claim. ***State v. Counihan***, 2020 WI 12, ¶25, 390 Wis.2d 172, 938 N.W.2d 530 (citation omitted).[2] The rule is intended "to

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[1] In ***State v. Taylor***, 60 Wis.2d 506, 210 N.W.2d 873 (1973), this Court abrogated a different holding in ***Hayes***.

[2] "Although cases sometimes use the words 'forfeiture' and (continued...)

enable the circuit court to avoid or correct any error as it comes up, with minimal disruption of the judicial process and maximum efficiency." ***Id.***, ¶26 (citations omitted). The rule also "gives the parties and the circuit court notice of an issue and a fair opportunity to address the objection" and prevents "sandbagging." ***Id.***, ¶27 (citations omitted).

B. Exceptions to the Forfeiture Rule

This Court has long recognized that attorneys are only human and sometimes will overlook errors, even important errors:

> "[A]ll lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise."

State v. Felton, 110 Wis.2d 485, 499, 329 N.W.2d 161 (1983) (citation omitted). *See also* ***Hormel v. Helvering***, 312 U.S. 552, 557 (1941):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Rather than make litigants suffer (or grant their opponents an unfair windfall) due to an attorney's or litigant's mistakes,

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[2] (...continued)
'waiver' interchangeably, the two words embody very different legal concepts." ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis.2d 653, 761 N.W.2d 612. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." ***Id***.

established Wisconsin law provides a number of procedural safety valves for courts to apply when appropriate. Analysis under some of these is mandatory while others are discretionary. In civil cases, these exceptions can prevent an unjust windfall and, in criminal cases, they can save judicial resources by avoiding a subsequent ineffectiveness claim and prevent delay in remedying an injustice.

When a litigant does not properly preserve an objection, however, the opportunity for and scope of appellate review turns on a number of factors. For instance, was the objection waivable/forfeitable? *See, e.g.* ***State v. Ndina***, 2009 WI 21, ¶31, 315 Wis.2d 653, 761 N.W.2d 612 (some issues not forfeitable by mere failure to object). Did the litigant affirmatively waive the issue as opposed to merely failing to properly object? Did the proper person take the action necessary to constitute waiver/forfeiture? *See, e.g.*, ***id.***; ***State v. Smith***, 2012 WI 91, ¶¶52-57, 342 Wis.2d 710, 817 N.W.2d 410 (attorney cannot waive/forfeit right to jury verdict on all facts necessary for conviction). Is the case civil or criminal? A civil litigant is not constitutionally entitled to the effective assistance of counsel. ***In re Brianca M.W.***, 2007 WI 30, ¶31, 299 Wis.2d 637, 728 N.W.2d 652. Was counsel's failure to preserve the issue unreasonable? Was the improperly preserved error plain or obvious? What impact, if any, did the forfeited error have on the result? Has the litigant who benefitted from the alleged forfeiture properly raised the forfeiture as a defense to the forfeited claim?

The four primary fail-safes for doing justice despite forfeitures in criminal cases are ineffective assistance of counsel, plain error, interests of justice (whether statutory or under the courts' inherent authority), and the courts' discretionary power

to overlook forfeiture when deemed appropriate.[3] Other than ineffectiveness, these same fail-safes are available in civil cases.

Each of these procedures has its own requirements and application standards. Thus, ineffectiveness for failing to properly preserve an issue for appeal generally requires a showing of both deficient performance (i.e., unreasonableness) and resulting prejudice to the criminal defendant (i.e., a "reasonable probability of a different result"), ***Strickland v. Washington***, 466 U.S. 668, 688, 694 (1984), with the same standard applying regardless of whether counsel affirmatively waived a claim or merely forfeited it.

The courts also may overlook any perceived forfeiture where the error is so plain or fundamental as to affect the defendant's substantial rights. *See* ***State v. Sonnenberg***, 117 Wis.2d 159, 176-77, 344 N.W.2d 95 (1984); Wis. Stat. §901.03(4). *See also* ***Virgil v. State***, 84 Wis.2d 166, 189-93, 267 N.W.2d 852 (1978) (Reversal for plain error is appropriate where the error is "so fundamental that a new trial or other relief must be granted"). A plain error is one that is "both obvious and substantial" or "grave," ***Sonnenberg***, 117 Wis.2d at 176-77.[4] Once those requirements are met, "[t]he burden is on the State to prove that the plain error is harmless beyond a reasonable

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[3] There also are other, circumstance-specific fail-safes. *See, e.g.*, Wis. Stat. §973.13.

[4] This Court has held that "the plain error doctrine should be utilized" "where a basic constitutional right has not been extended to the accused," ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77 (citation and internal markings omitted), but has also turned that around to suggest that non-constitutional error cannot be "plain error," *e.g.*, ***State v. Romero***, 147 Wis.2d 264, 275, n.3, 432 N.W.2d 899 (1988). However, the recognition in Wis. Stat. §901.03(4) that mere evidentiary errors can be "plain error" demonstrates otherwise. *E.g.*, ***Sonnenberg***, 117 Wis.2d at 175-76; *cf.* ***United States v. Olano***, 507 U.S. 725 (1993) (applying "plain error" analysis to alleged statutory violation).

doubt." ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis.2d 642, 734 N.W.2d 115 (citation omitted).

Regardless of whether trial counsel was ineffective or whether the error was "plain," otherwise forfeited errors also may justify reversal in the interests of justice. ***Mayo***, 2007 WI 78, ¶30. Unlike the circuit courts, which may exercise this authority only on direct appeal, *see* ***State v. Henley***, 2010 WI 97, ¶63 n.25, 328 Wis.2d 544, 787 N.W.2d 350, Wisconsin appellate courts have both statutory and inherent authority to reverse convictions and grant new trials in the interests of justice. ***State v. Armstrong***, 2005 WI 119, ¶¶110-13, 283 Wis.2d 639, 700 N.W.2d 98; *see* Wis. Stat. §§751.06, 752.35. The courts' discretionary authority to reverse in the interests of justice furthers their obligation to do justice in individual cases. ***Vollmer v. Luety***, 156 Wis.2d 1, 13, 456 N.W.2d 797 (1990).

This discretion is limited, however. The court may grant a new trial only if "the real controversy has not been fully tried" or if "it is probable that justice has for any reason miscarried." *E.g.*, ***Henley***, ¶81. As examples, "'the real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial," ***State v. Maloney***, 2006 WI 15, ¶14 n.4, 288 Wis.2d 551, 709 N.W.2d 436 (citation omitted), if the jury "had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried," ***State v. Hicks***, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996), or if instructional error prevents jury resolution of the real issues in dispute, ***State v. Schumacher***, 144 Wis.2d 388, 408 424 N.W.2d 672 (1988). "A miscarriage of justice occurs if a defendant can show a substantial probability of a different outcome." ***Henley***, ¶81 (citation omitted).

This Court also has long recognized the discretionary power of the appellate courts to review otherwise forfeited claims independent of the standards for plain error or interests of justice review. *E.g.*, ***State v. Penigar***, 139 Wis.2d 569, 579-80, 408 N.W.2d 28 (1987). As this Court recently explained, "[t]he forfeiture rule is a rule of judicial administration, and thus a reviewing court may disregard a forfeiture and address the merits of an unpreserved issue in an appropriate case." ***Counihan***, 2020 WI 12, ¶27.

The United States Supreme Court has long recognized a similar power. ***Singleton v. Wulff***, 428 U.S. 106, 121 (1976) (Whether to overlook a forfeiture is matter of appellate court discretion); ***Helvering***, 312 U.S. at 557. That Court also has rejected the need for more specific standards beyond requiring that discretion "to be exercised on the facts of individual cases." ***Exxon Shipping Co. v. Baker***, 554 U.S. 471, 487 (2008) ("[W]e have previously stopped short of stating a general principle to contain appellate courts' discretion and we exercise that same restraint today").

C. Mandatory Versus Discretionary Review

While courts in their discretion may choose whether to apply some of those procedures, two are mandatory in the sense that the litigant is entitled to a decision unless it is rendered unnecessary due to some other court action. As an independent constitutional claim, a court must review an ineffectiveness claim on its merits unless it is rendered irrelevant. Likewise, although at one point the Court suggested that plain error review is discretionary, ***Neely v. State***, 97 Wis.2d 38, 55, 292 N.W.2d 859 (1980), it more recently has recognized that "a defendant is *entitled* to a new trial where unobjected-to error is 'plain error.'" ***State v. Beauchamp***, 2011 WI 27, ¶38, 333 Wis.2d 1, 796 N.W.2d 780 (footnote omitted; emphasis added); *see*

Sonnenberg, 117 Wis.2d at 176 ("There must be a review and a reversal of conviction if 'plain' error was committed.").

D. The Available Remedies Are Alternative, Not Exclusive

Although this Court's language has sometimes been misconstrued as requiring one procedure or another to overcome a claim of forfeiture, those procedures are not exclusive. *E.g.*, ***Mayo***, 2007 WI 78 (analyzing forfeited claims under plain error, interests of justice, and ineffectiveness standards); ***Penigar***, 139 Wis.2d at 579-80. For instance, in ***State v. Erickson***, 227 Wis.2d 758, ¶14, 596 N.W.2d 749 (1999), this Court observed that "the normal procedure" for assessing forfeiture in criminal cases "is to address [the claim] within the rubric of the ineffective assistance of counsel." However, as ***Erickson*** acknowledged, ***id.***, ¶¶13-15, the "normal procedure" is optional, not exclusive. *See* ***Ndina***, 2009 WI 21, ¶33, n.8 (rejecting theory that ***Kimmelman v. Morrison***, 477 U.S. 365 (1986), mandates exclusive use of ineffectiveness analysis given a forfeiture). The ***Erickson*** Court merely exercised its discretion *not* to overlook the forfeiture in that case absent a finding of ineffectiveness. 227 Wis.2d at ¶¶13-15.

Yet, some courts and judges misinterpret ***Erickson's*** language as suggesting that ineffectiveness is the sole remedy for forfeiture based on attorney oversight. It is not. *E.g.*, ***State v. Wilson***, 2017 WI 63, ¶¶51-53 & n.7, 376 Wis.2d 92, 896 N.W.2d 682 (exercising discretion to consider forfeited claim on merits despite dissent's claim ineffectiveness required under ***Erickson***); ***State v. Long***, 2009 WI 36, ¶¶43-44, 317 Wis.2d 92, 765 N.W.2d 557. *See also* ***Hicks***, *supra* (choosing interests of justice analysis over ineffectiveness); ***State v. Cuyler***, 110 Wis.2d 133, 327 N.W.2d 662 (1983) (reversing in interests of justice despite counsel's failure to preserve objection); ***Logan v. State***, 43 Wis.2d

128, 168 N.W.2d 171 (1969) (same).

E. Forfeiture of Forfeiture

According to the court of appeals, the state in this case first raised its forfeiture argument on appeal and "did not argue forfeiture in response to Mercado's postconviction motion" in the circuit court. (R-App. 112 n.6).

Just as any other litigant may forfeit the right to raise a particular claim of error, that litigant's opponent may lose the opportunity to claim forfeiture by failing to timely raise its own objection. ***Ndina***, 315 Wis.2d at ¶38 (reaching the merits of a claim where "both parties failed to make objections in a timely manner"). Absent a timely forfeiture objection, the litigant and court are unable to assess the facts and application of any possible exceptions to forfeiture. *Cf.*, ***State v. Van Camp***, 213 Wis.2d 131, ¶¶25-26, 569 N.W.2d 577 (1997) (rejecting state's challenge to sufficiency of motion where it's failure to raise alleged defects in circuit court denied defendant opportunity to cure;).

II.

IMPACT OF WIS STAT. §901.03 ON FORFEITURE

Although it failed to preserve its objection to Mercado's forfeiture in the circuit court (R-App. 112, n.6), the state asks this Court to overlook its forfeiture and to deny Mercado the benefit of the same exemption it seeks for itself.

Nearly 50 years after its enactment, the state asks this Court to interpret Wis. Stat. §901.03 as carving out a special rule barring the court of appeals from exercising the discretionary authority it otherwise has to overlook a forfeiture in an appropriate case. Section 901.03 was created by this Court, Sup.

Ct. Order, 59 Wis.2d R1, R9 (1973), and should not be interpreted to support that awkward and unnecessary result. *See* Wis. Stat. §901.02 (Evidence rules "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

Section 901.03(1)(a) merely restates the existing principle that, absent proper objection, a party forfeits appellate review of errors as of right. However, §901.03 also recognizes that, despite the seemingly absolute language of §901.03(1)(a), and of the forfeiture rule in general, exceptions to that rule still apply. Section §901.03(4) clarifies that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."). Moreover, the Judicial Council Committee's Notes to this provision indicate that §901.03 was not intended to prevent application of other existing exceptions to the forfeiture rule, stating that the rule also is "consistent with" reversal in the interests of justice under the statute that is now Wis. Stat. §751.06.[5]

Indeed, this Court has not limited itself to plain error review when addressing forfeited evidentiary issues. *See* ***State v. Gray***, 225 Wis.2d 39, ¶45 n.7, 590 N.W.2d 918 (1999) (exercising discretion to overlook forfeiture on relevance issue); ***State v. Wedgeworth***, 100 Wis.2d 514, 528, 302 N.W.2d 810 (1981) (same; "Although objections which have been waived are not reviewable as a matter of right, this court may consider such objections if it chooses."); ***State v. Romero***, 147 Wis.2d 264, 275, 432 N.W.2d 899 (1988) (reviewing forfeited evidentiary issue under interests of justice exception). *See also* ***Sonnenberg***, 117

[5] The court of appeals and Wis. Stat. §752,35 were created by 1977 Wis. Laws ch. 187, and did not yet exist in 1973.

Wis.2d at 176, n.6 (Although applying plain error analysis, Court acknowledges that "[w]e can in any case, irrespective of any objection, in our discretion elect to review an alleged error in respect to the admission of evidence." (Citation omitted)).

Unlike §901.03, the statutory language at issue in ***State v. Schumacher***, 144 Wis.2d 388, 424 N.W.2d 672 (1988), was absolute. *See* Wis. Stat. §805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."). Plain error review was not permitted; only statutory interests of justice review or this Court's inherent authority could overcome the statutorily required "waiver." ***Schumacher***, 144 Wis.2d at 401-02, 404-08.

Nothing suggests §901.03 was intended to carve out such a broad and unbendable exception to standard appellate procedure. Nor is there any apparent reason to deny discretionary review of evidentiary issues by the court of appeals while permitting all other conventional exceptions to the forfeiture rule.

CONCLUSION

WACDL therefore asks that the Court preserve the longstanding ability of the court of appeals to disregard forfeiture and review otherwise forfeited evidentiary issues when deemed appropriate in its discretion.

WACDL further asks that the Court reaffirm the fact that courts may apply any of the established fail-safe exceptions to the forfeiture rule that may be applicable in a particular case and are not limited to ineffectiveness review.

Dated at Milwaukee, Wisconsin, August 13, 2020.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.

Robert R. Henak
State Bar No. 1016803
Ellen Henak
State Bar No. 1012490

P.O. ADDRESS:
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300
henaklaw@sbcglobal.net

RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,975 words.

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 13th day of August, 2020, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

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