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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP001058-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

TERESA L. CLARK

Defendant-Respondent.

On Appeal, and Petition for Bypass, from an Order Granting a Motion Collaterally Attacking a Prior Conviction, Entered in the Ashland County Circuit Court, the Honorable John P. Anderson, Presiding.

AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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ARGUMENT

Baker appropriately protected the right to counsel when it established a burden-shifting procedure for collateral attacks of prior convictions, even with no transcript, and that procedure should not be narrowed or overturned.

The State Public Defender requested leave to file a non-party brief to address the state's request for this Court to narrowly interpret *State v. Baker*, 169 Wis. 2d 49, 76-78, 485 N.W.2d 237 (1992), or overrule the *Baker* burden-shifting procedure for collateral attacks when there is no transcript due to ordinary retention rules. This brief addresses the importance of the right to counsel, which is why it has unique treatment in the collateral attack context, and requests that the procedure set forth in *Baker* continue.

A. Collateral attacks are limited to violations of the right to counsel.

Wisconsin has a long-standing tradition of protecting the right to counsel. Sixty-four years before *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court held *all* people accused of a crime had the right to counsel. *Carpenter v. Cnty. of Dane*, 9 Wis. 249, 274, 278 (1859). "The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all

defendants stand equal before the law, and ultimately that justice is served." *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997) (citation omitted).

A denial of the right to counsel is a "unique constitutional defect" that is inherently prejudicial and use of such a tainted prior conviction for sentence enhancement "would undermine the principle of *Gideon*." *Custis v. United States*, 511 U.S. 485, 495-496 (1994). Because of this, a violation of the right to counsel is the *only* constitutional right that can be used to collaterally attack a prior conviction. *State v. Hahn*, 2000 WI 118, ¶¶17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. Therefore, violations of the right to counsel in the collateral attack context are afforded greater protection than the other constitutional rights at issue with *Bangert*[1] plea withdrawal claims.

There is a historical basis for this unique treatment "perhaps because of our oft-stated view that '[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Custis*, 511 U.S. at 495 (citation omitted). The assistance of counsel is the foundation upon which all other rights afforded an accused are built.

In *Baker*, this Court established the procedure for collaterally attacking a prior conviction based upon a violation of the right to counsel. *Baker*,

[1] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1989).

169 Wis. 2d at 76-78. In doing so, it weighed two presumptions: the presumption of regularity and the "presumption against waiver of counsel." *Id.* at 76 (citation omitted).

To overcome the apparent conflict in presumptions, this Court established a burden-shifting procedure:

> Because the defendant must overcome the presumption of regularity attached to the prior conviction, the defendant bears the initial burden of coming forward with evidence to make prima facie showing of a constitutional deprivation in the prior proceeding. **If the defendant makes a prima facie showing of a violation of the right to counsel**, the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding.

Id. (emphasis added).

Baker assigns the defense the initial burden to show there was a violation of the right to counsel before the burden shifts to the state. A transcript is *not* required to meet the initial burden. In fact, there was no transcript in *Baker* and this Court rejected the circuit court's conclusion that Baker's burden was "to show *from the record* that his right to counsel was violated." *Id.* (emphasis in original). Instead, it focused on whether the defense made a prima facie showing, which can be accomplished in different ways and will be fact-specific.

Baker relied on two affidavits presented by the defense in evaluating whether the burden should shift to the state. One affidavit was from counsel asserting they tried to ascertain the records and in the second affidavit Baker asserted "he at no time waived his right to counsel." *Id.* Baker met his burden with the affidavits and the burden shifted to the state. *Id.* at 77-78. Although *Baker* noted the transcript was lost, it did not include that fact in its analysis of whether the defense met its burden. *Id.* at 77-78.

In *Klessig*, this Court clarified what should be included in a waiver of counsel colloquy. It held the circuit court must conduct a colloquy designed to ensure the defendant: "(1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Klessig*, 211 Wis. 2d 194, ¶14. When there is an inadequate colloquy and there is a motion for new trial or other postconviction relief, the court holds a hearing to determine whether there was a knowing waiver. *Id.* at ¶15. The burden-shifting procedure used for guilty pleas is used in this context. *Id.* ¶16. The burden shift "will satisfy the State's burden of overcoming the presumption of non-waiver." *Id.*

In *Ernst*, this Court concluded a defective *Klessig* colloquy can form the basis of a collateral

attack if the defendant makes a prima facie showing that there was not a knowing waiver of counsel. *State v. Ernst*, 2005 WI 107, ¶2, 283 Wis. 2d 300, 699 N.W.2d 92. The defense must do more than "allege that 'the plea colloquy was defective' or the 'court failed to conform to its mandatory duties during he plea colloquy' to satisfy the standard for collateral attacks." *Id.* at ¶25. The defendant must point to facts that demonstrate he "did not know or understand the information that should have been provided." *Id.* (citation omitted). If there is a prima facie showing, the burden shifts to the state. *Id.*

Ernst did not meet his initial burden because he relied solely on the deficient colloquy in the transcript without otherwise alleging he did not understand what was required for a knowing waiver. *Ernst* stands for the proposition that a defective *Klessig* colloquy cannot, alone, be a justification for a collateral attack. It does not say the transcript of a defective colloquy is a prerequisite to the burden-shifting procedure delineated in *Baker*.

B. A collateral attack is not the same as a plea withdrawal claim, and thus, the rule in *Baker*, rather than *Bangert* and its progeny, applies.

The state likens collateral attacks with plea withdrawal claims to justify a new rule requiring the defense to produce transcripts before the burden can shift to the state to prove a valid waiver of counsel. The state's comparison fails for a number of reasons.

As explained earlier, violations of the right to counsel are unique because the assistance of counsel is the foundation of fair proceedings. Without counsel, it is unlikely a person will know if motions can be filed, whether there is a good defense for trial, what investigation should take place, what mitigating factors could be presented at sentencing, and whether there should be an appeal (or preservation of the record), among many other factors. In other words, the negative impact of a *pro se* litigant's lack of understanding about the criminal justice system, and all its intricacies, will snowball without counsel. Therefore, it is not surprising that violations of the right to counsel have been singled out as the only justification in Wisconsin for collateral attacks.

Despite this, the state advocates for collateral attacks to be treated the same as plea withdrawal claims. The state cites *State v. Hampton*, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, and *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, for the proposition that a transcript is a perquisite for the *Bangert* burden-shifting procedure, therefore a transcript (unless lost or unavailable due to an error from the state) is also a perquisite for *Baker* claims. The state is incorrect.

Baker did not rely on *Bangert* when explaining the burden-shifting procedure for collateral attacks premised on a violation of the right to counsel. Nor did it equate a collateral attack based on a violation of the right to counsel with plea withdrawal claims. *See Baker*, 169 Wis. 2d at 76-78.

Requiring a transcript in the *Bangert* context is logical. The same is not true for collateral attacks. First, the volume of potential plea withdrawal claims far exceed that of potential collateral attacks. The criminal justice system "is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As such, the vast majority of criminal cases resolve with pleas, which means the vast majority of criminal cases are potentially vulnerable to plea withdrawal claims.

By contrast, collateral attacks are infrequent. Only a few crimes are subject to statutorily mandated enhanced sentencing based upon prior convictions. From that small category of cases, the person must have proceeded *pro se* for the prior conviction and must allege an unknowing waiver of counsel. The end result is a small number of claims.

Second, *Bangert* plea withdrawal claims are generally raised on direct appeal,[2] where there will

[2] If a *Bangert* claim is raised outside the direct appeal, the defendant will face additional procedural hurdles. *See* Wis. Stat. § 974.06. And, although this Court addressed

be a transcript unless an error occurred. The same is not true for collateral attacks where the violation of the right to counsel is often not identified until years later when the person is represented by counsel on a subsequent case. As explained earlier, due to the foundational nature of the assistance of counsel, a direct appeal, and therefore preservation of the record, is unlikely when a person was not represented by counsel. Thus, the nature of collateral attacks, both in subject and discovery of the violation, make it likely a transcript would not be available.

Finally, unlike *Baker* claims which are premised on a single, unique, and foundational constitutional right - the right to counsel - *Bangert* claims can be premised on a defendant's failure to understand one of many rights, that do not invoke fundamental unfairness in the same way a violation of the right to counsel does.

The state also draws a distinction between "alleging" and "showing" there was not a valid waiver of counsel. It argues there is nothing in *Ernst* "suggesting that a defendant can make a prima facie showing and shift the burden by merely alleging, rather than showing, that the trial court failed to give her the required information." (State's Brief, 15). In making this argument, the state relies on the fact that *Ernst* cited *Hampton* in its discussion that more

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Bangert in *Negrete*, the claim was raised under Wis. Stat. § 971.08(2), not *Bangert*. *Negrete*, 343 Wis. 2d 1, ¶5.

than a defective plea colloquy must be alleged to shift the burden to the state.

It is true that like *Bangert* claims, collateral attacks based on a deficient *Klessig* colloquy require the defense to allege both: (1) a defect in the colloquy and (2) that the defendant did not otherwise understand the waiver of counsel. *See Ernst*, 283 Wis. 2d 300, ¶25 (citing *Hampton*, 274 Wis. 2d 379, ¶¶46, 57). The citation to *Hampton* in *Ernst* involves the second part of the rule, that the defendant did not otherwise understand the information omitted from the colloquy.

Ernst never drew the distinction suggested by the state. Thirteen years before *Ernst*, *Baker* concluded the defense can meet its initial burden, and then the burden shifts to the state, based upon an affidavit. *Ernst* did not overrule *Baker*. Ernst's claim failed because he simply relied on the defective colloquy in the transcript. *Id.* at ¶26. *Ernst* concludes, "[t]o make a prima facie **showing** a defendant is required to point to facts that demonstrate that he or she did not knowingly, intelligently, and voluntarily waive his or her right to counsel. An **affidavit** from the defendant **setting forth such facts would be necessary, in order to establish a prima facie case**." *Id.* at ¶33 (emphasis added).

In other words, *Ernst* concludes an affidavit can establish a prima facie showing. Although the affidavit needed in *Ernst* involved whether he understood the waiver of counsel despite a deficient

colloquy, the Court still recognized an affidavit with sufficient allegations as a prima facie "showing."

The state also notes similarities between the *Klessig* and *Bangert* colloquies. However, the state fails to acknowledge the *Baker* burden-shifting procedure for collateral attacks was not based upon the *Klessig* colloquy. *Baker* predated *Klessig*. It focused on the actual violation of the right to counsel, a unique constitutional right. The fact that *Klessig* clarified the colloquy that should be used to ensure a valid waiver of counsel, and *Ernst* incorporated the *Klessig* colloquy into the *Baker* burden-shifting procedure, does not change the fact that the burden-shifting procedure established in *Baker* was not predicated on the need for a transcript. Simply because the defendant *can* meet its burden by alleging a deficient *Klessig* colloquy and that he did not otherwise understand, does not mean that is the only way for the defense to meet its burden. *See State v. Bohlinger*, 2013 WI App, ¶18, 326 Wis. 2d 549, 828 N.W.2d 900.

The state also differentiates between a lost transcript and a transcript unavailable due to retention rules. It suggests the latter is the defendant's fault but ignores the fact a *pro se* defendant, who did not knowingly waive counsel, would not understand the need for a direct appeal or preserving the record. The foundational issue – lack of counsel – permeates all subsequent consequences of conviction, including the lack of a transcript.

The state argues that the reasoning in *Baker* is consistent with *Parke v. Raley*, 506 U.S. 20 (1992) - which is true - but then misinterprets *Parke* as providing justification for either its narrow reading of *Baker*, or if this Court disagrees with its narrow interpretation, the state cites *Parke* as justification for its proposed change to the collateral attack procedure established in *Baker*.

The state's confusion stems from the following quote: "it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." (State's Brief, 27); *Parke*, 506 U.S. at 30. It reads the quote without the appropriate context.

The issue in *Parke* involved whether due process required the government to carry the *entire* burden on a collateral attack when there was no transcript. *Id.* at 28. Meaning, the defense would not carry *any* burden when there was no transcript. Not even the burden of production to overcome the presumption of regularity, as is required in Wisconsin by *Baker*.

The procedure at issue in *Parke* involved: (1) the government proving a prior judgment, (2) then the presumption of regularity attached and the burden of production shifted to the defense to refute the presumption of regularity, and (3) if that burden was met the burden again shifted to the state. *Id.* at 24. The defense argued this violated due process

because with no transcript waiver of rights cannot be presumed. *Id.* at 29. The Court disagreed. It held a state court is not prohibited "from presuming, **at least initially**, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained." *Id.* at 30 (emphasis added).

The procedure approved of in *Parke* is consistent with *Baker*, in that *Baker* requires the defense to meet a burden of production before the burden shifts to the state. The defense can meet its burden with a sufficiently alleged affidavit if there is no transcript. *Parke* does not hold that the burden cannot shift to the state when there is not a transcript, but the defense can otherwise meet its burden with an affidavit.

Notably, the defendant in *Parke* would not have been able to meet his burden of production in Wisconsin because: (1) the claim did not involve a violation of the right to counsel and (2) the defendant could not remember whether he was told about his rights before he waived them. *Id.* at 24.

C. The state has the opportunity to meet its burden by questioning the defendant or presenting other evidence.

The state suggests it cannot meet its burden once the burden shifts, and therefore, requiring a transcript before the burden shifts is necessary. This is incorrect. When the burden shifts to the state, it can call the defendant to testify. *Ernst*, 283 Wis. 2d 300, ¶30. And, the circuit court can draw the

reasonable inference that the state has met its burden if the defendant refuses to testify. *Id.* at ¶35. The state can ask the defendant, under oath, about what he understood about the right to counsel, his memory of the proceedings, prior cases where he had counsel, or any other sources of knowledge about counsel. Such questioning is commonplace at *Bangert* hearings and the state is often able to meet its burden, despite a transcript showing a defective colloquy.

It is also important to note that many collateral attack claims are not raised – even though the person was not represented by counsel for the prior conviction – because the person cannot remember what transpired regarding the waiver of counsel. In that circumstance, the defense could not meet its initial burden.

Thus, even without a transcript, the state has a method to meet its burden. In the winnowed down number of cases, where the defendant can allege an invalid waiver of counsel and meet the initial burden, the burden should continue to shift to the state as required in *Baker*.

CONCLUSION

For these reasons, the Court should decline the state's invitation to narrowly interpret or overrule *Baker*.

Dated this 11th day of June, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 2,999 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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 11th day of June, 2021.

Signed:

KATIE R. YORK
Appellate Division Director