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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1834-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

ETTER L. HUGHES,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

INTRODUCTION

The court of appeals reached the right result in this case because Hughes cannot show prejudice stemming from her ineffective assistance of counsel claim. The State agrees with Hughes, however, that the court of appeals reached that conclusion through the wrong process. Hughes's claim in the court of appeals was that counsel's failure to recognize that two charges in the six-count amended information were multiplicitous caused her to give Hughes erroneous advice about the plea. Prejudice in this context is supposed to be evaluated under *Hill v. Lockhart*[1]—whether there's a reasonable probability that the defendant would have rejected the plea and insisted on going to trial if they had been correctly advised. The court of appeals sua sponte converted Hughes's claim into one that Hughes's plea was not knowingly entered, and evaluated it under this Court's precedents about whether a minor error in the plea colloquy necessitates a *Bangert* hearing, namely *State v. Cross*[2]. This was error.

The State nevertheless does not believe this case is appropriate for this Court's review because this Court does not take cases merely to correct errors in the lower courts' reasoning. Wis. Stat. § (Rule) 809.62(1g)(c). The outcome will not change if the case is analyzed under the correct legal principle; and though the court of appeals' decision in this case is authored and thus citable, it has not created any binding precedent conflicting with the established law cited above. However, the court of appeals deciding cases independent of the issues raised or briefed by either party, or opting to discuss issues unnecessary to the outcome of the

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[1] *Hill v. Lockhart*, 474 U.S. 52 (1985).

[2] *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64.

case, does pose problems. If this Court grants Hughes's petition, it should take the opportunity to remind the court of appeals that courts are neutral arbiters of the legal issues presented to them and should decide cases on the narrowest possible grounds.

STATEMENT OF THE FACTS

Tyler's Death and Hughes's Plea

On November 29, 2016, a car pulled into the ambulance bay at St. Luke's Hospital, and Etter L. Hughes jumped out, calling out that she had "an unresponsive baby." (R. 1:3.) The first victim, seven-year-old Tyler,[3] had to be physically carried into the emergency room by hospital staff. (R. 1:3.) Hughes was accompanied by another child, nine-year-old Jake. (R. 1:3.) Hughes said she was the boys' cousin and that she found Tyler unresponsive when she woke up. (R. 1:3.) Hughes passed a handwritten note to the security guard, Ikeya Thigpen. (R. 1:3.) It blamed Jake for the extensive injuries over Tyler's body. (R. 1:3.)

Tyler was admitted to St. Luke's Hospital. (R. 1:3.) He was "pulseless, unresponsive, and cold to the touch." (R. 1:3.) CPR was administered, and Tyler was intubated. (R. 1:3.) He "coded multiple times, the longest of which lasted 40 minutes" before doctors were able to get a pulse back. (R. 1:3.) A pediatric child abuse specialist documented that Tyler's body was marked with a litany of wounds on almost every body part, some old and scarred over and some fresh, including marks that indicated he had been beaten with a looped cord or belt and several ligature lacerations indicating he'd been bound at the wrists, ankles, and neck at some point. (R. 1:3–4.) Tyler was also severely malnourished, weighing only 44 pounds and with his bones prominently visible beneath his

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[3] The State uses pseudonyms for all of the children involved in this case.

skin. (R. 1:4.) The doctor concluded that Tyler's severe malnutrition and multiple patterned injuries in various stages of healing were "consistent with cruelty and torture." (R. 1:4.) Police were immediately notified due to the concern that Tyler had been the victim of prolonged and severe child abuse. (R. 1:3–4.)

Tyler was transferred to Children's Hospital of Wisconsin, but he coded again. (R. 1:3.) After significant CPR and medications were administered without success, the decision to cease life-saving measures was made. (R. 1:3.) Tyler died at 4:45 p.m., roughly five hours after arriving at St. Luke's. (R. 1:3–4.) Jake was hospitalized for life-threatening malnutrition the same day. (R. 1:2, 5–6.) He was also found to have similar injuries to Tyler over his whole body, including multiple healed and fresh wounds, ligature scars, and abundant looped cord injuries. (R. 1:5.)

Hughes told police that she was originally from Helena, Arkansas and decided to move her family to Milwaukee in August, 2016 to find a better job. (R. 1:5.) Hughes's second cousin, Tyler and Jake's mother, was supposed to move her family to Milwaukee as well and sent the boys ahead with Hughes. (R. 1:5.) Their mother never relocated from Arkansas, however, and Hughes's fiancé was arrested and sent back to Arkansas. (R. 1:5.) Thereafter, Hughes reached out to Mary Martinez, whom Hughes had met in prison while serving a sentence for another child homicide, for a place to stay. (R. 1:5.) Martinez allowed Hughes, Hughes's 13-year-old son Lewis, Tyler, and Jake to move into the house Martinez shared with her adult son Carlos Gonzalez. (R. 1:5–6.)

Hughes said Tyler and Jake had rampant behavior problems and these made Martinez extremely angry to the point of expressing deep hatred for them and a desire to hurt them. (R. 1:6.) Hughes said she had noticed the boys' extreme weight loss but had no explanation for it; she also said she had noticed the numerous injuries on the boys but believed

they were the result of Jake and Tyler fighting. (R. 1:6.) Hughes eventually said that she believed Martinez had been abusing the children. (R. 1:6.)

Gonzalez, however, told a very different story. He had personally witnessed Hughes beating Jake and Tyler, and Hughes had given Martinez permission to "physically discipline" them as well. (R. 1:7.) Gonzalez knew that Martinez routinely beat them, too, because he could hear her doing so from his bedroom. (R. 1:7.) Gonzalez also recalled an incident when he returned home and found the children tied up and seated on the floor behind the couch. (R. 1:7.) Martinez told him Hughes had tied them. (R. 1:7.)

The State charged Martinez and Hughes each with several crimes related to the boys' prolonged torture and Tyler's death. (R. 1:1–2.) Because initially most of the physical acts were believed to have been perpetrated by Martinez, Hughes was charged with one count of child neglect resulting in death, one count of child neglect resulting in great bodily harm, and two counts of failure to prevent bodily harm to a child. (R.1:2.) The two cases were severed shortly after both defendants waived the preliminary hearing and thereafter proceeded separately. (R. 38:2.)

At a bail hearing in March 2017, however, the State informed the court and the defense that Jake, now safe in a foster home, began making further disclosures detailing severe physical abuse of both boys perpetrated by Hughes herself. (R. 39:4.) A week before the final pretrial hearing, the State informed the defense that it intended to amend the charges against Hughes to reflect her more active participation in the abuse. (R. 92.)

Accordingly, on the morning of the final pretrial conference, the State filed an amended information. (R. 12; 43:3.) This changed count one to first-degree reckless homicide as a party to a crime for Tyler's death, count two

remained child neglect causing great bodily harm, counts three and four were the two failure-to-protect charges, and the information added two counts of repeated physical abuse of a child causing great bodily harm as a party to a crime, one for each boy. (R. 12; 43:3.) Hughes did not object to the amendment, waived reading of the charges, and entered not guilty pleas. (R. 43:3.)

A few days after the amendment, and having reviewed everything the State had sent in discovery, defense counsel noted that the strength of the State's case had "become even more apparent," and inquired if the State would consider a plea. (R. 93:5.) The parties eventually agreed that Hughes would plead no contest to the charges alleged in the original information: one count of child neglect resulting in death, one count of child neglect resulting in great bodily harm, and two counts of failure to prevent bodily harm to a child. (R. 93:1.) The two physical abuse of a child counts would be dismissed, and the State would recommend "substantial prison" but not a specific term of years at sentencing. (R. 93:1.)

The circuit court accepted the plea and ultimately sentenced Hughes to 20 years of initial confinement and 15 years of extended supervision. (R. 32:46–47; 40:16–17.)

Postconviction Proceedings

Hughes thereafter moved to withdraw her plea, alleging that the amended charges were not transactionally related to the facts alleged in the criminal complaint and that trial counsel was thus ineffective for failing to object to the amendment. (R. 87:1–2.) She further claimed counsel was ineffective for failing to recognize that two of the six counts in the amended information were multiplicitous, amounting to counsel ineffectively giving Hughes incorrect advice about the plea. The circuit court denied the motion without a hearing. (R. 100.) Hughes appealed, raising both the transactionally-related-facts and multiplicity claims as stand-alone issues,

(Hughes's Ct. App. Br. 9–24) and arguing in the alternative that counsel was ineffective for failing to raise them prior to entry of the plea. (Hughes's Ct. App. Br. 24–28.) She made no mention of how she was prejudiced, however, and failed to explain why she would have insisted on going to trial if counsel had succeeded on either challenge.

The court of appeals reframed the entire case as questioning whether Hughes knowingly, intelligently, and voluntarily entered her plea. (Pet-App. 3–19.) It therefore dispensed with the required framework for claims of ineffective assistance of counsel during the plea process established by *Hill v. Lockhart*, 474 U.S. 52 (1985) and did not require Hughes to show that there was a reasonable probability that if counsel objected to the amended charges as not factually related to the original complaint, or moved to dismiss the two multiplicitous counts, she would have insisted on going to trial on the four remaining charges instead of accepting the plea to different ones. Instead, it looked to this Court's decision in *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64—a case about whether a *Bangert*[4] hearing was necessary for minor errors in a plea colloquy—to determine that Hughes was not entitled to withdraw her plea because the sentence she faced on the four charges that would have remained if a multiplicity challenge was made was not substantially higher than the sentence she believed she faced if convicted of all six charges. (Pet-App. 3–19.)

ARGUMENT

This case would involve only error correction of the legal rationale used to reach the ultimate decision, because Hughes could not prevail even if the court of appeals had applied the correct law on ineffective assistance of counsel to this case.

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[4] *State v. Bangert*, 131 Wis. 2d 246, 266–67, 389 N.W.2d 12 (1986).

Hughes never even made an allegation that she would have rejected the plea agreement to the original charges, which cut her sentencing exposure in half, if counsel would have made the challenges to the charges in the amended information that Hughes claimed she should have postconviction. Should this Court grant Hughes's petition even though it involves only error correction, though, it should take this opportunity to reaffirm the importance of the party presentation rule.

As both the United States Supreme Court and this Court have observed, "In our adversarial system of adjudication, we follow the principal of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020); *see also State v. Negrete*, 2012 WI 92, ¶ 80 n.20, 343 Wis. 2d 1, 819 N.W.2d 749 (Abrahamson, C.J., dissenting) ("As various members of this court have said, we should not 'reach out and decide issues' that were not presented to the court by the parties."). "[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" *Sineneng-Smith*, 140 S. Ct. at 1579 (citation omitted). "'[C]ourts are essentially passive instruments of government.' They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only the questions presented by the parties.'" *Sineneng-Smith*, 140 S. Ct. at 1579 (citation omitted).

There are good reasons for this rule. An appellant may be pursuing relief in a particular way to avoid negative consequences that could arise if analyzed under a different theory of law than the one they chose to present. *See, e.g.*, *State v. Comstock*, 168 Wis. 2d 915, 921, 485 N.W.2d 354 (1992) (holding that courts must refrain from sua sponte vacating a validly accepted guilty or no contest plea against the defendant's will, particularly where he was seeking

merely sentence modification.). Respondents are put at a distinct disadvantage if the court decides cases on grounds not raised by the appellant, as they cannot be expected to divine that the court of appeals will be deciding the case on different grounds and preemptively address them. And appellate courts take care not to "blindside trial courts with reversals based on theories which did not originate in their forum." *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶ 11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted).

By abandoning legal theories raised and argued by the parties and addressing issues on its own prerogative, an appellate court does a disservice to both the parties and to the lower courts who were never given an opportunity to pass on the question under the theories now being addressed. Moreover, addressing new or unnecessary issues may cause the court to fail to decide the case on the narrowest possible grounds or to render advisory opinions on issues that did not need to be discussed.

Again, the State agrees with Hughes that the court of appeals erred in jettisoning the ineffective assistance of counsel framework on which Hughes's claim was preserved and argued in both the circuit court and the court of appeals, and instead addressing a claim Hughes never raised by applying a line of case law that dealt with an entirely different issue: the burden-shifting framework of *Bangert* and when a circuit court must hold a hearing after a faulty plea colloquy. These are distinctly different issues, and accordingly the legal analysis required under each is different. Moreover, neither party was given a full opportunity to brief this issue. The court of appeals requested supplemental letter briefs—to be filed in a very short timespan and both to be submitted at the same time—on "what, if any, impact the case of *Cross* . . . has on this case," and told to "analyze how *Cross* does or does not apply to the circumstances presented." (Order dated June 28, 2022.) It never informed the parties that it had recast the

entire case to analyze whether the plea was knowingly and intelligently entered rather than to determine if counsel performed deficiently and whether Hughes was prejudiced.

And importantly, *both parties* in their letter briefs explained that *Cross* dealt with the tension between the mandatory *Bangert* hearing procedure and a demonstrably harmless error, meaning it was too far afield from the ineffective assistance claims raised here to have any impact on this case, and that it should not apply—which is why neither party briefed it initially. The court of appeals, however, opted to decide this ineffective assistance case based on *Cross*'s discussion of the *Bangert* procedure, anyway.

The court of appeals has taken this approach—either deciding cases based on a legal reframing of an issue or discussing unnecessary ones—in several recent cases. *See, e.g.*, *State v. Rejholec*, 2021 WI App 45, ¶¶ 28–35, 398 Wis. 2d 729, 963 N.W.2d 121 (reversing and remanding for plea withdrawal based on a *Miranda* waiver invalidation issue not raised or briefed by either party); *State v. Von Jackson*, No. 2019AP2383-CR, 2021 WL 6132278, ¶¶ 62–88 (Wis. Ct. App. Dec. 29, 2021) (Reilly, J., dissenting) (unpublished) (urging to reverse and remand a case based on arguments the appellant abandoned in the circuit court and did not raise on appeal); *State v. Abbott*, 2020 WI App 25, ¶¶ 43–48, 392 Wis. 2d 232, 944 N.W.2d 8 (recognizing that the court was bound by this Court's prior precedent on a burden of persuasion issue but nevertheless engaging in a lengthy discussion of why it did not find the arguments about it persuasive); *State v. Hineman*, No. 2020AP226-CR, 2021 WL 5498719, ¶¶ 49–52 (Wis. Ct. App. Nov. 24, 2021) (unpublished) (abandoning the interest of justice framework under which the defendant's request for an in camera inspection of therapy records was raised, analyzing the issue on a stand-alone merits basis, and granting a request based on an unclear record of how the

victim gained his sexual knowledge, untethered from the *Shiffra/Green* framework).

To reiterate, the State does not believe this case warrants this Court's review because it would serve only to correct the faulty legal rationale under which the court of appeals nevertheless reached the correct conclusion. If this Court does take the case, though, it should address the party presentation rule and take the opportunity to remind the court of appeals of its importance.

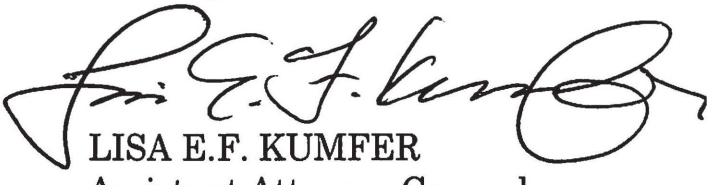
CONCLUSION

This Court should deny the petition for review.

Dated this 13th day of December 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,938 words.

Dated this 13th day of December 2022.

LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 13th day of December 2022.

LISA E.F. KUMFER
Assistant Attorney General