STATE OF WISCONSIN
IN SUPREME COURT

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Appeal No. 19AP1983-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,
v.

JACOB RICHARD BEYER,

Defendant-Appellant.

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# NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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**On Certification from the Court of Appeals, District IV, on Appeal from a Judgment of Conviction, Entered in Dane County Circuit Court, the Honorable William E. Hanrahan Presiding**

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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 concerning whether appellate courts should apply the guilty-plea-waiver rule to bar defendants from raising issues following a trial on stipulated facts.

A trial on stipulated facts cannot constitutionally trigger the guilty-plea-waiver rule unless it satisfies all requirements of a guilty plea, including admission of all factual and legal elements for all counts, consent to entry of judgment on all counts, and personal and explicit waiver of statutory and constitutional trial rights in a formal plea hearing. Imposing the guilty-plea-waiver rule on anything less effectively creates a constitutionality defective, and therefore voidable, plea. Moreover, retroactively converting a trial on stipulated facts

into a "guilty plea" and deeming otherwise preserved issues "waived" mandates reversal and a new trial under ***State v. Riekkoff***, 112 Wis.2d 119, 332 N.W.2d 744 (1983).

## ARGUMENT

### Because the Guilty-Plea-Waiver is Based Upon the Waiver of Trial Rights, It Should Apply Only When Defendants Explicitly and Personally Waive Their Trial Rights in a Formal Plea Proceeding While Admitting All Factual and Legal Elements and Consenting to Entry of Judgment

Trials, not guilty pleas, are the criminal justice system our founders envisioned for resolution of criminal charges. *See* Albert S. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 5 (1979). When defendants go to trial, circuit courts do not explain their constitutional trial rights to them. In the current approximately 95% of cases in which defendants enter traditional guilty or no contest pleas, *see* ***Class v. United States***, 538 U.S. __, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting) (footnote omitted), circuit courts do explain the constitutional trial rights being waived. The system traditionally has been this binary and, in the approximately 37 years since this Court decided ***Riekkoff***, *supra*, the system has worked well. It has been straightforward and has protected defendants from the coercion inherent in plea situation.

The State here offers a solution in search of a problem. No one disputes that if defendants plead guilty in a formal plea hearing and waive their constitutional trial rights, then they limit the issues they can raise on appeal and the courts

and the parties have long known it. *See, e.g.,* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis.2d 62, 716 N.W.2d 886. Knowing with certainty when this rule applies allows the parties to regulate their conduct accordingly.

Decoupling a guilty plea from the formal plea hearing requires determining what a guilty plea actually is. A guilty plea consists of admission of "all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." ***United States v. Broce***, 488 U.S. 563, 569 (1989). But a guilty plea is more than an admission. ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969). It also is a waiver of trial rights, ***State v. Gordon***, 2003 WI 69, ¶24, 262 Wis.2d 380, 663 N.W.2d 765, and courts therefore must ensure defendants understand what they are relinquishing. *See, e.g.,* ***Boykin***, *supra*; ***State v. Bangert***, 131 Wis.2d 246, 389 N.W.2d 12 (1986); *see also* Wis. Stats. §971.08(1).

The formal waiving of rights at a hearing should fence-in the guilty-plea waiver rule that a guilty plea "'waives all nonjurisdictional defects, including constitutional claims,'" ***Kelty***, 2006 WI 101, ¶18, because the limitation of issues logically arises from the explicit waiver of rights and not merely from the admission of the factual or legal elements. Admission and judgment without knowledge of waiver results in an involuntary, unknowing, or unintelligent plea that requires appellate courts to allow defendants to withdraw their pleas. *See* ***Bangert***, *supra*. When defendants expressly and personally join their admissions with waiver of their rights,

fairness allows invoking the guilty-plea-waiver rule and finding waiver. Thus, courts logically can apply the rule to civil forfeiture proceedings in which the defendant admits, consents to judgment, and knows the rights he is waiving, *see* ***County of Racine v. Smith***, 122 Wis.2d 431, 437, 362 N.W.2d 439 (Ct. App 1984), and, without that formal waiver of rights, decline to apply the rule to concessions of the underlying facts and consent to judgment on one minor count within the trial of multiple, more serious counts, *see* ***Gordon***, 2003 WI 69.

This view comports with the historical significance of the constitutional trial rights being waived. The key method for resolving criminal cases originally was by trial. Until approximately the middle of the nineteenth century, the American judiciary generally discouraged guilty pleas. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. at 5. Both the United States Constitution and the Wisconsin Constitution explicitly refer to criminal trials, and ensure rights to criminal defendants facing trial, including the rights to the effective assistance of counsel, to confront witnesses against them, to compel the appearance of witnesses, to a speedy trial, and to an impartial jury. U.S. Const. amend. vi; Wis. Const. art. I, §7. In addition, the constitutions provide defendants with the right not to be compelled to testify against themselves, and the right to due process of law, which includes the right to be found guilty beyond a reasonable doubt. U.S. Const. amend. v; Wis. Const. art. I, §8(1); *see also*

***Sullivan v. Louisiana***, 508 U.S. 275, 277–78 (1993) Yet neither constitution mentions guilty pleas.

Unsurprisingly, given the initial suspicion of plea bargaining and guilty pleas, see Alschuler, 79 Colum. L. Rev. at 6- 13, "[s]pecial scrutiny of guilty pleas resulted from a judicial recognition of the serious nature and dire consequences of the defendant's act." *See* ***United States v. Robertson***, 698 F.2d 703, 707 (5th Cir. 1983). Wisconsin engages in that special scrutiny.

The Wisconsin Legislature requires courts to "[a]ddress the defendant personally and determine" that the plea is voluntary, that the defendant understands the charges, and that the defendant knows the maximum possible penalty. Wis. Stats. §971.08(1)(a). In addition, the legislature requires courts to inquire sufficiently that the court is satisfied "that the defendant in fact committed the crime charged," *id*. §971.08(1)(b), and to provide warnings about potential deportation, *id*. §971.08(1)(c).

Although courts accepting a plea may use a guilty plea questionnaire, *see* ***State v. Brandt***, 226 Wis.2d 610, 621, 594 N.W.2d 759 (1999), courts also must:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;

> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) 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;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

***State v. Pegeese***, 2019 WI 60, ¶23, 387 Wis.2d 119, 928 N.W.2d 590.

The knowing and voluntary waiver of rights made explicit when entering a guilty plea therefore is intrinsic to the

plea. The United States Supreme Court in ***Brady v. United States,*** 397 U.S. 742, 748 (1970), explained that "the plea is more than an admission of past conduct; it is the defendant's consent that a judgment of conviction may be entered without a trial" and thus is "a waiver of his right to trial before a judge or a jury." The constitutional rights being waived, especially the defendant's Fifth Amendment right not to be compelled to give testimony against himself and Sixth Amendment right to a trial, is what requires that the waiver "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." ***Id.*** (footnote omitted).

The waiver therefore underpins the guilty-plea-waiver rule. As this Court explained in ***Riekkoff***, 112 Wis.2d at 122-23, the genesis of the rule in Wisconsin was the statement in ***Hawkins v. State***, 26 Wis.2d 443, 448, 132 N.W.2d 545 (1965), that

> [i]t appears to be the general rule that a plea of guilty, *voluntarily and understandingly made*, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea.

(emphasis added; footnote omitted).

This emphasis on the voluntary and knowing nature of the plea recognizes the link between the waiver of rights and the application of the guilty-plea-waiver rule. Due process requires that waiver of a constitutional right be "an intentional relinquishment or abandonment of a known right or

privilege." ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). This linkage makes sense because guilty plea procedures then ensure that defendants know the rights they are waiving,[1] causing the guilty-plea-waiver rule to comport with due process.

***Riekkoff,*** *supra*, neither supports nor requires uncoupling the guilty-plea-waiver rule from the guilty plea hearing. It involved a formal guilty proceeding but with agreement that the defendant was not waiving a particular evidentiary issue. The question therefore was not whether the guilty-plea-waiver rule should apply to a stipulation outside of a formal plea but, instead, whether the state and defendant's agreement could alter the guilty-plea-waiver rule.

Holding that agreement could not alter the guilty-plea-waiver rule did not extend it outside the setting of a formal plea as the use of the traditional remedy for an invalid, unknowing, and involuntary guilty plea demonstrates. This Court did not simply apply the guilty-plea-waiver rule. Instead, the Court remanded the case to allow Riekkoff the option to withdraw his plea. 112 Wis.2d at 129-130.

This Court's decision in ***Gordon***, 2003 WI 69, ¶5, reinforces this notion that the guilty-plea-waiver rule applies to a formal plea, not stipulations. ***Gordon*** rejected the idea that

[1] Because a guilty plea waives constitutional trial rights, not Sixth Amendment rights or the due process rights that protect the guilty plea proceeding itself, entering a guilty plea does not bar appeals on those grounds. ***Kelty***, 2006 WI 101, ¶43; *see generally* ***Tollett v. Henderson,*** 411 U.S. 258, 266-267 (1973).

a trial court should treat the defendant's admission to all factual elements of the crime of disorderly conduct, even when coupled with defense counsel's admission in closing to the legal elements of the crime, as "the functional equivalent of a guilty plea," citing a lack of waiver of trial rights. ***Id.***, ¶24.

Invoking the guilty-plea-waiver rule only for formal guilty, no contest, or *Alford* pleas is clear and straightforward. Generally, trials and pleas are "'areas with a clear division between them. They are either black or white.'" *See* ***Adams v. Peterson***, 968 F.2d 835, 840 (9th Cir. 1992) (quoting ***United States v. Terrack***, 515 F.2d 558, 561 n.3 (9th Cir. 1975)). When trials and pleas are distinct, circuit courts always know when they must ensure that defendants understand their statutory and constitutional trial rights. When trials and pleas are distinct, defendants always know when the issues they will be able to raise on appeal will be severely circumscribed. Clear rules, especially with regard to waiver and forfeiture, benefit the judiciary and litigants by providing predictability and preventing inequality in the application of the law. *See* ***State v. Counihan***, 2020 WI 12, ¶¶64-65, 390 Wis.2d 172, 938 N.W.2d 530 (R. Bradley, J., concurring).

By contrast, treating some stipulations essentially as guilty pleas requires making fine distinctions. Courts would have to distinguish between stipulations that merely are "a confession which admits that the accused did various acts," ***Boykin***, 395 U.S. at 242, and those that add "a conviction" for which "nothing remains but to give judgment," ***id***. Does

someone who stipulates that "'the evidence of the State would establish the following facts beyond a reasonable doubt'" and then tracks the language of an indictment or information sufficiently concede guilt for the stipulated trial to be treated as a guilty plea? *See* ***Adams v. Peterson***, 968 F.2d 835, 837-39 (9th Cir. 1992) (answering no). Does it matter that the parties agreed that "'it is the expectation of the parties that the defendant will be found guilty?" *See* ***id.*** (answering no because "[a] stipulation to facts from which a judge or jury may *infer* guilt is simply not the same as a stipulation to guilt, or a guilty plea." (Emphasis in original))

Some courts have tried and found it unworkable to distinguish stipulations that are the equivalent of guilty pleas from those that are not. Arizona, for example, once required following guilty plea procedures when a stipulation "gave up so much that it was the practical equivalent of a guilty plea," but abandoned the idea partially because of difficulties in determining when it became a guilty plea. *See* ***State v. Allen***, 220 P.3d 245, 247-48 (Ariz. 2009) (en banc). This Court too has recognized that deciding whether to treat a stipulation to the underlying facts on one minor count and a concession that the defendant should be adjudged guilty of that count as a guilty plea would pull courts into defense trial strategy. *See* ***Gordon***, 2003 WI 69, ¶¶20-30.

No statute requires applying the guilty-plea-waiver rule to trials by stipulation. Wisconsin Statutes §971.31(10) by its terms applies to "a plea of guilty or no contest to the

information or complaint." This statute first appears in the 1969 Wisconsin Statutes. No Wisconsin case before 1969 (or even after) has held or suggested that the phrase means anything other than a formal guilty or no contest plea taken at a traditional plea proceedings.

Nor would making the waiver rule less clear solve any pressing problem. No statistics show the portion of the 5% of criminal trial cases that involve stipulations as to the facts. But in the 37 years since this Court decided ***Riekkoff***, counsel has found only two published appellate cases, *see* ***Village of Little Chute v. Walito***, 2002 WI App 211, 256 Wis.2d 1032, 650 N.W.2d 981; ***State v. Miles***, 221 Wis.2d 56, 584 N.W.2d 703 (Ct. App. 1998), and approximately 30 unpublished cases resulted from trials on stipulated facts, which presumably were done to preserve issues for appeal.

Substituting interlocutory appeals for trials on stipulated facts still requires appellate involvement and solves nothing. Successful petitions for leave to appeal are rare. Between 2015 and 2019, the Wisconsin Court of Appeals received 665 petitions for leave to appeal and granted only 122 (or 18%) of them. *See* Court of Appeals Annual Report 2015-2019.

This Court therefore should hold that the guilty-plea-waiver use applies only when defendants explicitly and personally waive their trial rights in a formal plea proceeding while admitting all factual and legal elements and consenting to entry of judgment. If the Court holds otherwise, this Court

should maintain the link between the voluntary, knowing, and intelligent waiver of rights and the rule and allow a new trial to defendants who did not understand that they could not appeal trial issues after a trial on stipulated facts.

Creating rules that require the courts of this state to determine how much stipulating is "equivalent to" a guilty plea complicates the system. It requires courts "to make the difficult determination of where to draw the line between not guilty pleas that should be treated as guilty pleas and those not guilty pleas that have no special significance." ***Robertson***, 698 F.2d at 707. It also ignores the long-standing concern that plea situations require special scrutiny because of the seriousness of the waiver involved and because they create an opportunity for coercing defendants into relinquishing their constitutional rights. *See* ***id.*** at 707-08. This coercion can occur because "the significant advantages to be gained from having a defendant plead guilty exert pressure on an over-zealous prosecutor to wring involuntary guilty pleas from uninformed defendants." ***Id***. at 708.

The criminal justice system is complex. It was designed for trials and yet relies on guilty pleas. Expanding the idea of guilty pleas solves nothing and reduces constitutional guardrails for those accused of crimes. This Court should not extend the guilty-plea-waiver rule.

## CONCLUSION

This Court should hold that the guilty-plea-waiver rule applies only when defendants have admitted all elements for

all of the counts against them and consented to entry of judgment on all counts in a formal plea hearing in which they personally and explicitly waived their trial rights. If this Court determines otherwise, this Court should remand the matter to the circuit court to grant a new trial when the defendant believed he could appeal because then the plea was unknowing, unintelligent.

Dated at Milwaukee, Wisconsin, February 15, 2021.

Respectfully submitted,

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## 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 2,930 words.

_____
Ellen 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.

_____
Ellen Henak

## CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 15th day of February, 2021, 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.

_____
Ellen Henak

Beyer amicus brief marked RRH.wpd