STATE OF WISCONSIN
SUPREME COURT
Appeal No. 03-1728-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

ALAN J. ERNST,

Defendant-Appellant-Appellant.

ON CERTIFICATION FROM THE WISCONSIN COURT OF APPEALS, DISTRICT III

DEFENDANT-APPELLANT-APPELLANT'S SUPPLEMENTARY BRIEF

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STATEMENT ON ORAL ARGUMENT

The appellant believes that additional oral argument is necessary. The questions posed by the court concerning the appropriate procedure to follow on an attack upon a prior conviction in an enhanced sentencing proceeding is an issue of first impression in Wisconsin and, although alluded to in the first oral argument, it was inadequately developed.

ISSUES PRESENTED FOR BRIEFING BY THE SUPEME COURT

I. Given the Supreme Court's statement in ***State v. Klessig***, 211 Wis. 2d 194, 202-03, 564 N.W.2d 716 (1997), that "[t]he scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution[,] do the requirements this court imposed in ***Klessig***, 211 Wis. 2d at 206-07, and ***Pickens v. State***, 96 Wis. 2d 549, 563-64, 292 N.W.2d 601 (1980), regarding waiver of counsel survive the United States Supreme Court's decision in ***Iowa v. Tovar***, 124 S.Ct. 1379 (2004)?

SUMMARY CONCLUSION: The rule of ***Klessig*** easily "survives" the decision of the United States Supreme Court in ***Tovar***. In ***Klessig*** the Wisconsin Supreme Court was not under the misapprehension that the Sixth Amendment *required* that the pitfalls of self-representation be explained to the defendant on the record (as apparently was the Iowa Supreme Court in ***Tovar***). Rather, the ***Klessig*** rule is expressly a "court-made" rule based in part upon judicial economy. The United States Supreme Court expressly recognized the authority of the states to create whatever court made procedural guides they deem to be expedient.

II. Can the Supreme Court impose the requirements of ***Klessig*** and ***Pickens*** as a matter of state constitutional law or state rule in a fashion that complies with ***Tovar*****?**

SUMMARY CONCLUSION: If the ***Klessig*** rule is imposed as a "state rule" to guide the procedure of validly waiving counsel such a rule is unaffected by ***Tovar***. If the ***Klessig*** rule is imposed as a matter of state constitutional law it is, again, unaffected by ***Tovar*** because the rights under the Wisconsin Constitution may be interpreted to provide greater protection than the rights under the Federal Constitution.

III. If the Supreme Court were to impose the requirements of ***Klessig*** and ***Pickens*** as a matter of state constitutional law or state rule, could the violation of the requirements in ***Klessig*** and ***Pickens*** still form the basis of a collateral attack on a conviction in light of this court's decision in ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528?

SUMMARY CONCLUSION: Yes. ***Hahn*** merely stands for the proposition that a "collateral challenge" in an enhanced sentencing proceeding must be based upon the denial of counsel. Any other challenge must be made directly. The rule of ***Klessig*** is a *guide* to determining *whether* the defendant validly waived the right to counsel. If the guide was not followed by the circuit court then the default position is that the defendant did not validly waive his right to counsel. That is, the prior conviction would be declared invalid for sentencing purposes not because the ***Klessig*** procedure was not followed (i.e. a mere procedural violation) but because the failure to follow the procedure compels the legal conclusion that the defendant never validly waived his right to counsel.

IV. If a violation of the requirements in ***Klessig*** and ***Pickens*** can still form the basis of a collateral attack on a conviction, who has the burden of proof in regard to whether the waiver of counsel was knowing, intelligent, and voluntary?

SUMMARY CONCLUSION: This court ought to harmonize the law in Wisconsin by holding that the proper procedure for challenging the validity of a prior conviction in an enhanced sentencing proceeding is as follows: (1) The issue must be raised by the defendant; (2) The court must examine the record of the prior proceeding to determine whether the ***Klessig*** procedure was followed; and, if not, (3) The State then has the burden of proving at an evidentiary hearing that the defendant knowingly and intelligently waived the right to counsel. If the State fails to meet its burden of proof then the prior conviction may not be used to enhance the sentence. At the evidentiary hearing the State may use whatever *non-privileged* evidence it has of the defendant's knowledge (i.e. the defendant should not be compelled to testify). For example, such evidence might include the defendant's occupation, his experience in the legal system, comments the defendant made to persons other than a lawyer, and comments that the defendant made during the course of the proceedings which tend to suggest that he was aware of the hazards of self-representation.

V. If a violation of the requirements in ***Klessig*** and ***Pickens*** can still form the basis of a collateral attack on a conviction, must the defendant

allege that he did not know how he would be affected by the right to counsel?

SUMMARY CONCLUSION: No. Requiring the defendant to allege personally that he did not know how he would be affected by the right to counsel in the prior case impinges upon the defendant's Fifth Amendment protection against compulsory self-incrimination.

ARGUMENT

I. THE RULE OF ***KLESSIG*** EASILY "SURVIVES" THE DECISION OF THE UNITED STATES SUPREME COURT IN ***TOVAR***.

In ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716, 721 (1997) the Wisconsin Supreme Court set forth the following procedural mandate concerning the waiver of counsel in criminal matters. The court wrote:

> We now overrule ***Pickens*** to the extent that we mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel. Conducting such an examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions. Thus, a properly conducted colloquy serves the dual purposes of ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding our scarce judicial resources. We hope that our reaffirmation of the importance of such a colloquy will encourage the circuit courts to continue their vigilance in employing such examinations.
>
> To prove such a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that 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. See Pickens, 96 Wis.2d at 563-64, 292 N.W.2d 601. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel.

Plainly, this is a procedural mandate by the Wisconsin Supreme Court. The court specifically wrote that "we mandate" the rule- that is, there was an awareness that the rule was being created *by the court* (as opposed to being required by the constitution). Additionally, the court

explained the *reasons* for the rule and nowhere does the court suggest that the rule is *required* by the Sixth Amendment. Rather, the court reasoned that the rule was the "clearest and most effective" means of assuring that the waiver of counsel was valid. This, in turn, makes sure that the defendant is not denied a constitutional right and preserves precious appellate judicial resources by making the standard clear.

In ***Iowa v. Tovar,*** 124 S.Ct. 1379, 1389 (2004), by contrast, the United States Supreme Court framed the issue as follows, "[W]e turn to, and reiterate, the particular language the Iowa Supreme Court employed in announcing the warnings *it thought the Sixth Amendment required . . .*" (emphasis provided)

In reversing the Iowa Supreme Court the United States Supreme Court carefully framed its holding. The court wrote, "We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution." *Id.* p.. 1390. The Supreme Court specifically noted that the states are free to adopt procedural rules by court decision to "guide" the waiver of counsel procedure. *Ibid.*

Therefore, since the mandate of ***Klessig*** was knowingly created by the Wisconsin Supreme Court as a court-made "guide" to waiver of counsel proceedings (and the court was not under the misapprehension that the warnings were required by the Sixth Amendment) the rule is unaffected by the holding of the United States Supreme Court in ***Tovar.***

II. THE WISCONSIN SUPREME COURT MAY IMPOSE THE RULE OF ***KLESSIG*** AS EITHER A STATE RULE OR AS A MATTER OF STATE CONSTITUTIONAL LAW.

The "***Klessig*** rule" appears to in fact be a court-made state rule concerning the procedure for accomplishing the waiver of the right to counsel in criminal cases. Therefore, the rule is unaffected by the holding of the United States Supreme Court in ***Tovar.*** The Wisconsin Supreme Court would certainly have the authority, though, to hold that such a colloquy is a matter of state constitutional law.

A. The Klessig *rule appears to be a "court made" state rule and, therefore, it is unaffected by* Tovar.

As mentioned above, the United States Supreme Court in ***Tovar*** specifically reserved unto the states the ability to impose whatever waiver

of counsel colloquy that each state deems to be expedient. The Supreme Court recognized that such a rule may be either a "state rule" (court decision) or based upon state constitutional law.

It seems apparent from the language used by the Wisconsin Supreme Court in ***Klessig*** that the colloquy required by court is a matter of state rule; that is, the court wrote that "we" mandate the use of the colloquy (as opposed to holding that the colloquy is mandated by the Sixth Amendment). If, as seems to be the case, the ***Klessig*** rule is a state rule then it is entirely unaffected by the United States Supreme Court's holding in ***Tovar***.

It is important to emphasize here, though, that although the rule is a court-made procedural rule, the violation of the rule has constitutional implications. In other words, the Wisconsin Supreme Court has created a mandatory procedure by which the waiver of the Sixth Amendment right to counsel must be accomplished. If the procedure is not followed the default adjudication is that the waiver of counsel was not freely and voluntarily made (i.e. the defendant was denied his constitutional right to counsel). The default position ought not to be conclusive- in fact, a rule is suggested in a following section of this brief under which the State could overcome a defective record of the waiver of counsel colloquy. This is because the ultimate question is whether the defendant was *actually* denied a constitutional right. The ***Klessig*** rule is the court-mandated means of accomplishing the waiver of this right and where the record reflects that the procedure was not followed a presumption arises that the waiver was invalid.

B. This court could certainly mandate the waiver of counsel colloquy as a matter of state constitutional law.

In, ***State v. Doe***, 78 Wis.2d 161, 172, 254 N.W.2d 210 (1977) the Wisconsin Supreme Court proudly recognized that:

> Certainly, it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment. See **216 William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv.L.Rev. 489 (January 1977). This court has never hesitated to do so. Two significant examples come to mind.

> This court in ***Carpenter v. Dane County***, 9 Wis. 249 (*274) (1859), one hundred two years before the United *172 States Supreme Court's pronouncement in ***Gideon v. Wainwright***, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), announced as a principle of constitutional law that a defendant in a felony case is entitled to have counsel furnished at the state's expense. In ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923), this court adopted, as a protection to persons within its boundaries, the rule that excludes evidence secured by unlawful searches and seizures. That decision antedated by almost forty years the United States Supreme Court's mandate in ***Mapp v. Ohio***, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which applied the Fourth Amendment exclusionary rule to the states. This court has demonstrated that it will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded.

Therefore, despite this court's observation in ***Klessig*** that, generally speaking, "the scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution" there is historical precedent for the idea that the "right to counsel" provision of the Wisconsin Constitution provides greater protection than does the Sixth Amendment to the United States Constitution. As this court observed in ***Doe***, the right to appointed counsel was found to exist under the Wisconsin Constitution over a century before it was found to exist under the Sixth Amendment.

III. ***KLESSIG*** MERELY ESTABLISHES THE MEANS BY WHICH THE COURT MUST DETERMINE WHETHER THE DEFENDANT VALIDLY WAIVES HIS SIXTH AMENDMENT RIGHT TO COUNSEL; AND, THEREFORE, ***HAHN*** DOES NOT PROHIBIT A CHALLENGE BASED UPON THE FAILURE TO FOLLOW THE ***KLESSIG*** PROCEDURE.

In, ***State v. Hahn,*** 238 Wis. 2d 889, 618 N.W.2d 528 (2000) the Wisconsin Supreme Court limited its previous holding in ***State v. Baker***, 169 Wis.2d 49, 485 N.W.2d 237 (1992) so that Wisconsin law would be in accord with the holdings of the United States Supreme Court. ***Hahn*** stands for the proposition that a challenge to a prior conviction in an enhanced sentencing (for the sake of consistence a "collateral attack") must be based upon the Sixth Amendment denial of the right to counsel. Any other challenge to the validity of a prior conviction must be made directly.

The question here is: What is the true nature of a challenge where it is alleged that the procedural mandate of ***Klessig*** was not followed in the prior conviction? Is this a mere procedural violation or is it a constitutional challenged based upon the Sixth Amendment?

The Sixth Amendment requires that in a criminal proceeding the defendant be afforded the right to legal counsel. This right might be waived by the defendant but, if the record does not demonstrate that the defendant validly waived the right to counsel, then the conviction itself is invalid.

As was explained above, the mandate of ***Klessig*** is court-made and procedural in nature. However, a challenge based upon the failure to follow the ***Klessig*** procedure is not a mere procedural technicality which ought not to serve as the basis for a collateral challenge to a prior conviction.

Rather, the ***Klessig*** procedure is the means by which the courts adjudicate whether the defendant validly waived his Sixth Amendment right to counsel. That is, if the procedure was not followed then the default conclusion is that the defendant was denied his right to counsel.

Therefore, ***Hahn*** does not prohibit a "collateral attack" based upon a claim that the ***Klessig*** procedure was not followed.

IV. THE SUPREME COURT OUGHT TO HARMONIZE THE LAW CONCERNING COLLATERAL ATTACKS BASED UPON A DENIAL OF THE SIXTH AMENDMENT RIGHT TO COUNSEL.

As is amply demonstrated by the briefs of the parties and by the oral argument to date the state of the law concerning the procedure for "collateral attacks" on prior convictions in enhanced sentencing procedures is a patch-work quilt. In its original brief the State attempted to cobble the procedure together by drawing from, ***State v. Bangert***, 131 Wis. 2d 246, 275 389 N.W.2d 12 (1986) [direct attack- guilty plea not knowingly and voluntarily made], ***Klessig*** [direct attack on invalid waiver of counsel grounds]**,** and, ***State v. Grant***, 230 Wis. 2d 90, 100, 601 N.W.2d 8 (Ct. App. 1999) where the Court of Appeals noted that the *evidentiary hearing* contemplated by ***Klessig*** is a "Bangert-style" hearing. Also drawn into the mix is, ***State v. Trochinski***, 253 Wis.2d 38, 644 N.W.2d 891 (2002) in which the Supreme Court held that on a direct attempt to withdraw a guilty plea on the grounds that it was not knowingly and voluntarily made the

defendant must affirmatively allege that the ***Bangert*** procedure was not followed *and* that he did not understand the nature of the charges.[1]

Therefore, this is an issue of first impression and the state of the law cries out for clarification. Counsel can only suggest to the court what the procedure *ought to be* because there does not seem to be compelling precedent for what the procedure is.

When a defendant in an enhanced sentencing proceeding seeks to challenge the validity of a prior conviction on Sixth Amendment right to counsel grounds the following procedure ought to be followed.

The defendant must raise the issue by motion. In the motion the defendant must allege that the record of his waiver of counsel in the prior case violated the ***Klessig*** procedure and he must attach relevant portions of the transcript of the prior case to substantiate this claim. It is the defendant's burden to properly raise the issue before the court.

The court must review the defendant's motion and determine as a matter of law whether the record of the waiver of counsel was valid under ***Klessig.*** If the record of the colloquy with the defendant in the prior case was sufficient the motion should be denied.

If the colloquy is defective then the court should order an evidentiary hearing at which the State is permitted to present evidence concerning the defendant's knowledge of the pitfalls of self-representation. It should be the State's burden to prove that despite the defective record the defendant knew the pitfalls of self-representation.

It is contemplated that at the evidentiary hearing the State would not be permitted to call the defendant as a witness. The reasons for this requirement are set forth at length in Ernst's first brief and need not be restated here. Rather, the State could present evidence concering the defendant's experience in life (e.g. is the defendant a criminal defense lawyer or a business professional used to working with lawyers?); his experience in the legal system (e.g. has the defendant been through several criminal jury trials with counsel?); comments the defendant made to other people concerning his self-representation; and, most importantly, the defendant's performance in the case (e.g. did the defendant file motions or other pleadings demonstrating an adequate knowledge of the law and legal

[1] ***Trochinski*** is directly implicated by Question No. 5 posed by the Supreme Court in its recent order and, therefore, this case will be discussed in greater detail below.

proceedings, did the defendant's arguments on his own behalf demonstrate an understanding of the pitfalls of self-representation and the existence of legal defenses?)

The procedure outlined above draws from the established procedures in the similar cases cited above while, at the same time, it protects the defendant's Fifth Amendment protection against self-incrimination.

V. REQUIRING THE DEFENDANT TO ALLEGE THAT HE PERSONALLY DID NOT KNOW THE RISKS OF SELF-REPRESENTATION IMPINGES ON THE DEFENDANT'S FIFTH AMENDMENT PROTECTION AGAINST COMPULSORY SELF-INCRIMINATION.

When a defendant in an enhanced sentencing procedure challenges the validity of his waiver of counsel in a prior conviction he should not be required to affirmatively allege that he did not know the pitfalls of self-representation. Because his testimony on this point may give rise to new criminal liability the defendant has Fifth Amendment protection against self-incrimination[2]. There is no point in requiring the defendant to affirmatively allege the lack of certain personal knowledge where the defendant may not be called to testify at a hearing on the subject.

Thus, the answer to this issue lies squarely in the Supreme Court's determination of the original issue in this case- whether the defendant has a Fifth Amendment right to be protected against compulsory self-incrimination.

[2] The reasons for this are the subject of Ernst's original brief and it is not necessary to restate them here. If the court determines that Ernst may not be called as a witness in the enhanced sentencing proceeding this settles the issue.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2004.

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