SM-16 COLLATERAL ATTACK ON PRIOR CONVICTIONS

CONTENTS

Scope

Under the current criminal statutes, many criminal offense definitions, penalty enhancers, and penalty schemes are based on the defendant having prior convictions. As these situations become more common, the propriety of a challenge to the validity of the priors in a prosecution for a new crime is an increasingly important issue. This is commonly referred to as "collateral attack" on the prior convictions. It is deemed "collateral" because the challenge comes not in a direct appeal of the original conviction but in the context of a later prosecution.

There are two issues that arise with respect to collateral attacks on prior convictions:

(1) What uses of prior convictions require allowing collateral attack?

(2) What types of defects in the prior conviction may be raised in a collateral attack?

I. Collateral Attack Must Be Allowed When Prior Convictions Are Used To Support Guilt Or Enhance Punishment

The standard for determining the uses of prior convictions that require allowing collateral attack may be summarized as follows:

- when priors are used to support guilt or enhance punishment, collateral attack must be allowed;

- when priors are used to "identify members of a potentially dangerous class," a defendant may not collaterally attack a prior.

This difficult distinction was articulated by the United States Supreme Court in Lewis v. United States, 445 U.S. 55 (1980). In Lewis, the court held that a federal defendant charged with being a felon in possession of a firearm was not entitled to collaterally attack the prior conviction relied on to establish his felon status. This was based on the distinction that the prior conviction in this situation was used in a way that focused "not on reliability, but on the mere fact of conviction. . . . Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment.'" 445 U.S. 55, 67.

The Wisconsin Court of Appeals commented on the Lewis rule in State v. Foust, 214 Wis.2d 568, 573-4, 570 N.W.2d 905 (Ct. App. 1997), calling it an "elusive" distinction and "a conundrum." However, the court found it settled as a matter of state law that prior criminal convictions for operating under the influence used to establish the defendant's present status as, for example, a third-time offender, are used "primarily to enhance punishment." The court relied on State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), which allowed collateral attack on prior criminal convictions for operating after revocation [OAR]. The Baker decision reviewed Lewis and concluded that "the OAR statute uses prior OAR convictions primarily to enhance punishment, not to identify and classify a defendant or enforce a civil disability with a criminal sanction." 169 Wis.2d 49, 64.[1]

So, Baker and Foust make it clear that the use of prior convictions in the state's graduated penalty schemes for operating after revocation and operating under the influence is "primarily to enhance punishment" and thus appropriate for collateral attack. An example of the other category – use to identify the defendant as a member of a potentially dangerous class – may be offered by the criminal offense of violating a temporary restraining order or injunction in violation of § 813.12. The Wisconsin Court of Appeals held that a "defendant cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." State v. Bouzek, 168 Wis.2d 642, 484 N.W.2d 362 (Ct. App. 1992).

This could be characterized as fitting the Lewis "dangerous class" category, although the Bouzek decision does not make that explicit. The nature of Bouzek's challenge is identified only as the injunction being "overly broad" and "improperly issued." It probably did not involve a constitutionally-based challenge, thus failing to meet what is characterized here as the second part of the standard.

II. Collateral Attack Is Allowed Only For Claims That The Defendant Was Denied The Right To Counsel At The Time Of The Prior Conviction

Collateral attack is allowed only for claims that the defendant was denied the right to counsel at the time of the prior conviction.[2] Custis v. United States, 511 U.S. 485 (1994); State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528. This includes a claim that the defendant did not knowingly, intelligently, and voluntarily waive his or her constitutional right to counsel. State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92.

In Custis v. United States, 511 U.S. 485 (1994), the United States Supreme Court rejected a claim that the United States Constitution requires allowing collateral attack on the grounds of ineffective assistance of counsel and the absence of a knowing and intelligent guilty plea. The court recognized a "sole exception" to the rule prohibiting collateral attacks – convictions obtained in violation of the right to counsel: "failure to appoint counsel for an indigent defendant was a unique constitutional defect." 511 U.S. 485, 496.

The Wisconsin Supreme Court adopted the Custis rule in State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528. Noting that Custis interpreted the federal constitution, the court adopted the same conclusion as a matter of state law:[3]

> Although these administrative considerations may weigh differently in different cases, we conclude that considerations of judicial administration favor a bright-line

> rule that applies to all cases. We, therefore, hold that a circuit court may not determine the validity of a prior conviction during an enhanced sentence proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction. Instead, the offender may use whatever means available under state law to challenge the validity of a prior conviction on other grounds in a forum other than the enhanced sentence proceeding. If successful, the offender may seek to reopen the enhanced sentence. If the offender has no means available under state law to challenge the prior conviction on the merits because, for example, the courts never reached the merits of this challenge under State v. Escalona-Naranjo, 185 Wis.2d 168, 517 N.W.2d 157 (1994), or the offender is no longer in custody on the prior conviction, the offender may nevertheless seek to reopen the enhanced sentence. We do not address the appropriate disposition of any such application.[4]

State v. Hahn, 2000 WI 118, ¶28, as modified on reconsideration by 2001 WI 6, ¶2.

In State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92, the court confirmed that the right to collateral attack extends to claims of invalid waiver of counsel. The standards for a valid counsel waiver are set forth in State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1977). The Klessig standards, though not mandated by the United States Constitution, are required by the Wisconsin Supreme Court as an exercise of its superintending power.[5]

Klessig identified four requirements for a valid waiver of counsel to be covered in a colloquy conducted by the court. The colloquy must ensure that the defendant:

1) made a deliberate choice to proceed without counsel;
2) was made aware of the difficulties and disadvantages of self-representation;
3) was aware of the seriousness of the charge of 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, 206. [Cited in Ernst, 2005 WI 107, ¶14.]

For a description of the Klessig requirements and discussion of related issues, see SM-30 Waiver and Forfeiture of Counsel; Self-Representation; Standby Counsel; "Hybrid Representation"; Court Appointment of Counsel.

III. Procedure

In State v. Ernst, 2005 WI 107, 283 Wis.2d 300, 699 N.W.2d 92, the court set forth the procedures to be used when a defendant challenges a prior conviction on a collateral attack. In State v. Clark, 2022 WI 21, 401 Wis. 2d 344, 972 N.W.2d 533, the court clarified that the procedure set forth in Ernst applies only in cases in which there is a transcript of the relevant proceedings from the prior case and the transcript shows a defect in the defendant's waiver of the right to counsel in the prior case. If a transcript is unavailable or does not show a defect in the waiver of the right to counsel, Clark mandates a different procedure. The two procedures are described below.

While Ernst and Clark were specifically concerned with an alleged deficiency in obtaining a waiver of counsel, the same general procedure would be suitable for a claim that counsel was denied.

A. When a transcript is available, and the transcript shows a defect in the waiver of counsel

If a transcript of the relevant proceedings from the prior case is available, the procedure set forth in Ernst applies. The procedure is modeled after that used for withdrawal of a plea of guilty. See State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

1. The burden is on the defendant to make a prima facie showing of a constitutional violation

The defendant must allege that the constitutional right to counsel was violated, either by denial of counsel or by failure to obtain a knowing, intelligent, and voluntary waiver of counsel. The allegation must point to specific facts that support the allegation:

> For there to be a valid collateral attack, we require the defendant to point to facts that demonstrate that he or she did not know or understand the information which should have been provided in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel. Any claim of a violation on a collateral attack that does not detail such facts will fail.

Ernst, 2005 WI 107, ¶25 (internal citations omitted). Clark clarified that, in pointing to facts to support the collateral attack, the defendant must identify in the transcript a defect in or failure to conduct the colloquy required by State v. Klessig, 211 Wis.2d 194, 564 N.W.2d 716 (1997), when accepting a defendant's waiver of the right to counsel. The defendant cannot make a prima facie showing absent a defect in the colloquy, as evidenced

by the transcript. Clark, 401 Wis.2d 344, ¶¶18, 20.

The Ernst decision also stated that "[a]n affidavit from the defendant setting forth such facts [facts that demonstrated that he or she did not knowingly, intelligently, and voluntarily waive counsel] would be necessary, in order to establish a prima facie case." Ernst, 2005 WI 107, ¶33. In other words, not only must the defendant identify a defect in or failure to conduct the Klessig colloquy, the defendant must also allege that he or she did not understand the information that should have been covered in the colloquy. Ernst, 2005 WI 107, ¶26.

Applying this standard in the Ernst case, the court found that the defendant failed to meet it:

> Ernst made no mention of specific facts that show that his waiver was not a knowing, intelligent, and voluntary one. Instead, Ernst simply relied on the transcript and asserted that the court's colloquy was not sufficient to satisfy Klessig. . . . Since this was a collateral attack, the lack of specific facts resulted in a failure to establish a prima facie case that Ernst did not knowingly, intelligently, and voluntarily waive his right to counsel.

Ernst, 2005 WI 107, ¶26.

In State v. Bohlinger, 2013 WI App 39, 346 Wis.2d 549, 828 N.W.2d 900, decided before Clark, a conviction for 4th offense operating under the influence was reversed, and the case remanded for an evidentiary hearing on whether the defendant validly waived counsel during his prosecutions for the 2nd and 3rd offenses. The court held the defendant made a sufficient prima facie showing that because of cognitive disability, he did not have the mental capacity to understand the rights he was waiving. Note, however, that while transcripts from the prior cases were available in Bohlinger, the defendant did not allege the waiver colloquies were defective, and the court held he was not required to show a defect in the colloquy to make a prima facie showing. 345 Wis.2d 549, ¶¶17-20. That part of Bohlinger's holding is no longer valid in light of Clark.

Also see State v. Hammill, 2006 WI App 128, 293 Wis.2d 654, 718 N.W.2d 747, and State v. Verhagen, 2013 WI App 16, 346 Wis.2d 196, 827 N.W.2d 891, where the court of appeals concluded that the defendant failed to make a prima facie showing. Note that transcripts were not available in either of these cases; thus, after the decision in Clark, the defendants would not be entitled to the burden-shifting procedure set forth in Ernst but would bear the burden of showing a constitutional violation.

2. If a prima facie showing is made, an evidentiary hearing should be held, at which the burden shifts to the state

The burden is on the state to prove by clear and convincing evidence that the defendant was not denied the right to counsel or that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered.[6] The "court should hold an evidentiary hearing to allow the State an opportunity to meet its burden." Ernst, 2005 WI 107, ¶27.

3. At the hearing, the state may call the defendant as a witness

Ernst concluded that the collateral attack situation was the same as that where withdrawal of a plea of guilty is sought. The defendant may be called as a witness to shed light on his or her understanding of matters relevant to entering a voluntary and intelligent plea or a voluntary waiver of counsel. Ernst, 2005 WI 107, ¶31.

4. The defendant may not claim the privilege against self-incrimination

If called as a witness, the defendant may not validly claim the 5th Amendment privilege against self-incrimination. Making a prima facie case will require an affidavit from the defendant alleging facts in support of the constitutional violation. Once a defendant successfully makes a prima facie showing, the defendant cannot avoid testifying about circumstances concerning that claim. By raising the issue, the defendant has waived the privilege. Ernst, 2005 WI 107, ¶33. "Finally, if the defendant refuses to testify under these circumstances, a circuit court is free to draw the reasonable inference that the State has satisfied its burden, and that the waiver of counsel was a knowing, intelligent, and voluntary one." Ernst, 2005 WI 107, ¶35.

B. When a transcript is not available or does not show a defect in the waiver of counsel

If a defendant collaterally attacking a prior conviction cannot point to a defect in the relevant transcript, either because a transcript of the relevant proceeding is not available or because the colloquy in the transcript is facially valid, the burden-shifting procedure established in Ernst does not apply. Instead, the defendant carries the burden to demonstrate that his or her waiver of counsel in the prior proceeding was not knowing, intelligent, and voluntary. Clark, 401 Wis.2d 344, ¶20.

IV. Common Situations Where the Collateral Attack Issue May Arise

This section lists the situations where the collateral attack issue is addressed by case law or in the published jury instructions. The situations are divided into two categories: those where priors are used to support guilt or enhance punishment and where collateral attack must be allowed; those where priors are used to "identify members of a potentially dangerous class" and where a defendant may **not** collaterally attack the prior. Within the categories, the offenses are listed in the order in which they appear in the statutes. [Some of the examples do not involve prior convictions but rather are based on a prior court order or injunction. The Committee believes the same analysis would apply to the court order/injunction cases.]

A. Priors used to support guilt or enhance punishment – collateral attack must be allowed

1. Prior convictions for operating after revocation – § 343.44

State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), allowed collateral attack on prior criminal convictions for operating after revocation [OAR]. The Baker decision concluded that "the OAR statute uses prior OAR convictions primarily to enhance punishment, not to identify and classify a defendant or enforce a civil disability with a criminal sanction." 169 Wis.2d 49, 64.[7]

2. Prior convictions for operating under the influence – § 346.63

In State v. Foust, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997), the court found it settled as a matter of state law that prior criminal convictions for operating under the influence used to establish the defendant's present status as, for example, a third-time offender, are used "primarily to enhance punishment." The court relied on State v. Baker, supra. The same should be true for convictions used to support the application of the 0.02 level of alcohol concentration.

3. Prior convictions used under the "habitual criminality" statute ("repeater") – § 939.62

Although there is not a published decision directly on point in Wisconsin, the logic of the cases discussed above is that collateral attack would be allowed with respect to prior convictions used to support a repeater allegation under § 939.62. The United States Supreme Court recognized the propriety of collateral attack in that situation in Burgett v. Texas, 389 U.S. 109 (1967).

4. Prior convictions used under the "persistent repeater" statute ("three strikes") – § 939.62(2m)(b)1.

In State v. Hahn, 2000 WI 118, 238 Wis.2d 889, 618 N.W.2d 528, the court allowed collateral attack on a prior conviction used as the basis for a "persistent repeater" or "three strikes" determination under § 939.62(2m)(b)1.

5. Prior convictions used at sentencing

In United States v. Tucker, 404 U.S. 443 (1972), the United States Supreme Court held that convictions obtained in violation of the right to counsel could not be relied on as prior convictions at sentencing in a later prosecution.[8] That the priors were obtained in violation of the right to counsel had been established in a collateral attack in the state courts.

To be distinguished is State v. Orethun, 84 Wis.2d 487, 267 N.W.2d 318 (1978), a decision upholding an OAR conviction despite the fact that a speeding conviction upon which the revocation was based had been reversed. In terms of the categories outlined here, the prior conviction only identified the defendant as a member of a class – those whose privileges could be revoked – and did not support guilt or enhance punishment.

B. Priors used to identify members of a potentially dangerous class – collateral attack is not allowed

1. Contempt of court: punitive sanction – § 785.01

The Committee's conclusion is stated as follows in the Comment to Wis JI-Criminal 2031, Contempt of Court: Punitive Sanction: "It apparently is not appropriate to challenge the validity of the order in the context of the criminal prosecution based on failure to obey that order." The basis for this conclusion was a civil case holding that regardless of the legality of an order, a party is bound to comply with it until it is set aside through regular appeal channels. Getka v. Lader, 71 Wis.2d 237, 238 N.W.2d 87 (1976). Of course, the fact that there was a court order and that the defendant violated a provision of that order are elements of the crime.

2. Violation of injunction or restraining order – §§ 813.12, 813.122, 813.123, 813.125

"A defendant cannot collaterally attack the validity of a harassment injunction in a criminal prosecution for the violation of that injunction." State v. Bouzek, 168 Wis.2d 642,

484 N.W.2d 362 (Ct. App. 1992). See the discussion in the Comment to Wis JI-Criminal 2040, Violating a Temporary Restraining Order or an Injunction.

3. Felon in possession of a firearm – § 941.29

In Lewis v. United States, 445 U.S. 55 (1980), the United States Supreme Court held that a defendant charged under the federal counterpart to § 941.29 was not allowed to collaterally attack the prior conviction relied on to establish his felony status. The conclusion in Lewis was based on the distinction that the prior conviction in this situation was used in a way that focused "not on reliability, but on the mere fact of conviction. . . Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment.'" 445 U.S. 55, 57.

4. Escape – § 946.42

The Committee's conclusion is stated as follows in footnote 4, Wis JI-Criminal 1774, Jail or Prison Escape: "Although there apparently is no Wisconsin law on the subject, the Committee is of the opinion that the legality of the underlying conviction and sentence is not an issue where the charge is escape after conviction or sentence. Thus, it should be no defense that the defendant's underlying conviction is subject to challenge."

V. Effect of a Successful Collateral Attack on the Original Conviction

One of the Committee's assumptions when SM-16 was originally drafted was that a successful collateral attack affects only the use of the attacked prior conviction in the current proceeding. That is, the court in the current case has no authority to take any other action with respect to the prior; it remains a valid conviction for all other purposes unless additional action is taken in the court that entered the conviction.

In State v. Deilke, 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945, a defendant in a 2001 prosecution for 5th offense operating under the influence moved to collaterally attack prior convictions from 1993, 1994, and 2000 on the ground that they were obtained in violation of his right to counsel. The state conceded that the record did not show a valid waiver of counsel, and the trial court granted Deilke's motion. The State then moved to reopen those priors, and the motion was granted in two of the three cases.[9] The Wisconsin Supreme Court held that Deilke's successful collateral attack violated a term of the plea agreements on which those convictions were based. This was a breach of the plea agreement, and the breach was material because it deprived the state of a benefit for which it had bargained – using those convictions as predicates for higher penalties for future violations. So, the state could seek to reopen the convictions and, when successful, could

reissue those original charges and try, or negotiate with, Deilke again. The court's decision did not address the basis for the court's authority to reopen those final judgments.[10]

Deilke involved unique facts in that all the prior convictions and the current prosecution were in the same county. The decision allows options for the prosecution that are beyond the scope of this Special Material. It does not affect the substance of the analysis provided here, which focuses on the validity of the prior convictions in a new prosecution.

COMMENT

SM-16 was originally published in 2000 and revised in 2001, 2003, 2005, 2009, and 2019. This revision was approved by the Committee in April 2023; it updated the text and the comment.

1. When this SM was originally drafted, State v. Baker was one of the leading decisions relating to collateral attack. It was decided when OAR criminal penalties were determined by the number of prior OAR convictions. OAR penalties have changed several times since Baker was decided. Under the 2017-2018 Wisconsin Statutes, OAR is criminal only if the revocation is based on an OWI-related offense as set forth in § 343.307(2) or if death or great bodily harm is caused. The references to Baker in this SM were retained because the general rules it announced regarding collateral attack continue to apply.

2. For the right to counsel to apply, the prior offense must be a crime. For example, a refusal proceeding is a civil matter to which the right to counsel does not apply. State v. Krause, 2006 WI App 43, 289 Wis.2d 573, 712 N.W.2d 67.

3. Before Hahn, appellate decisions in Wisconsin allowed collateral attack based on at least two different defects in the prior prosecution:

(a) denial of the right to counsel; and,
(b) acceptance of a guilty plea that was not voluntarily and understandingly made.

In State v. Baker, 169 Wis.2d 49, 485 N.W.2d 237 (1992), the Wisconsin Supreme Court allowed collateral attack based on an allegation that the guilty plea in the prior case was not understandingly and voluntarily made. The court stated that collateral attack must be allowed whenever the alleged defect "undermines the reliability of the conviction." Baker relied on its interpretation of the decisions of the United States Supreme Court that had dealt with this issue – the primary one being Burgett v. Texas, 389 U.S. 109 (1967), which dealt with a challenge based on denial of counsel. Hahn limited Baker to the rule stated in Custis. 238 Wis 2d. 889, ¶17.

In State v. Foust, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997), the defendant was charged with operating under the influence as a third offense. The court of appeals held that the defendant could challenge the validity of one of the prior offenses in the new prosecution because he alleged that the earlier conviction was obtained as a result of a constitutionally defective plea colloquy. Though not referred to in Hahn, Foust is inconsistent with the Hahn decision and is implicitly overruled. [Also see State v. Dye, 215

Wis.2d 281, 572 N.W.2d 524 (Ct. App. 1997), suggesting that a collateral attack could be based on a contention that the earlier conviction was "constitutionally invalid because of an alleged Fourth Amendment violation: that it was the result of an illegal stop." 215 Wis.2d 281, 291. This possibility is clearly inconsistent with Hahn.].

4. In Hahn, the court stated that it was providing a bright line rule and repeated its holding three times – compare paragraphs 4, 28, and 29 – in essentially the same words. The second-to-last sentence of paragraph 28 did not appear in the other two statements of the new rule. This sentence was revised in response to the state's motion for reconsideration in the decision reported at 2001 WI 6.

The Wisconsin Supreme Court applied Hahn in State v. Peters, 2001 WI 74, 244 Wis.2d 470, 628 N.W.2d 797. The court held that the defendant could collaterally attack his second conviction for operating after revocation [OAR] in a prosecution for a fifth offense OAR because the challenge was based on the denial of the right to counsel.

The defendant in Peters had focused his argument "on the Sixth Amendment and due process implications of conducting a plea and sentencing hearing by closed-circuit television from jail." 2001 WI 74, ¶18. Because the court found that the challenge was actually based on denial of the right to counsel, it could resolve the case by a straightforward application of Hahn:

> Whether the defendant is entitled to mount this sort of constitutional challenge to a prior conviction collaterally rather than directly (or at all) depends upon an interpretation of the above-quoted language in Hahn [referring to the decision on rehearing, 2001 WI 6, ¶2], and the influence, if any, of the Supreme Court's recent opinions in Daniels and Lackawanna County. We do not address this issue, however, because the record reflects an arguable right-to-counsel violation, which is clearly established as an exception to the rule against collateral attacks on prior convictions. 2001 WI 74, ¶18.

[The United States Supreme Court cases referred to are Daniels v. United States, 532 U.S. 374, (2001) and Lackawanna County District Attorney's Office v. Coss, 532 U.S. 394, (2001). Their relevance to Wisconsin practice is unclear because they discuss the collateral attack in the context of the procedural limits on a federal motion to vacate a sentence under 28 USC § 2255 (Daniels) and federal habeas corpus review of a state conviction under 28 USC § 2254.].

5. "We conclude that the Klessig colloquy requirement was and is a valid use of the court's superintending and administrative authority, . . . and that such a rule does not conflict in any way with the United States Supreme Court's decision in Tovar . . ." State v. Ernst, 2005 WI 107, ¶21, 283 Wis.2d 300, 699 N.W.2d 92. The reference is to Iowa v. Tovar, 541 U.S. 77 (2004), where the court held that a valid waiver of the Sixth Amendment right to counsel did not require specific advice from the court that waiver of counsel might result in a viable defense being overlooked and losing the opportunity for an independent opinion on whether pleading guilty is a wise choice.

In State v. Gracia, 2013 WI 15, 345 Wis.2d 488, 826 N.W.2d 87, the court rejected a collateral attack on a prior operating under the influence conviction: "despite a technically deficient plea colloquy, Gracia knowingly, intelligently, and voluntarily waived his right to counsel before he pleaded no contest to his second OWI in 1998 . . . He understood the difficulties and disadvantages of self-representation." ¶4.

6. To the extent that reconstructing the record relating to waiver of counsel appears to be necessary,

see State v. DeFelippo, 2005 WI App 213, 287 Wis.2d 193, 704 N.W.2d 410. The decision outlines the standards for reconstructing the record where, on direct appeal, the defendant claimed absence of a voluntary waiver of counsel.

7. When this SM was originally drafted, State v. Baker was one of the leading decisions relating to collateral attack. It was decided when OAR criminal penalties were determined by the number of prior OAR convictions. OAR penalties have changed several times since Baker was decided. Under the 2017-2018 Wisconsin Statutes OAR is criminal only if the revocation is based on an OWI-related offense as set forth in § 343.307(2) or if death or great bodily harm is caused. The references to Baker in this SM were retained because the general rules it announced regarding collateral attack continue to apply.

8. The Committee believes that Tucker does not affect the general rule that allows considering other bad acts at sentencing even if they did not result in a criminal conviction. Tucker recognized that greater weight might be given to convictions believed to be valid and suggested the sentence might have been different if the trial judge had known that Tucker served 10 years on a conviction obtained in violation of the right to counsel.

9. State v. Deilke, 2004 WI 104, 274 Wis.2d 595, 682 N.W.2d 945, at footnote 4: "The State's motion regarding Deilke's 1993 and 2000 cases was granted by the circuit court for Eau Claire County, Judge Eric J. Wahl, presiding. The State's motion regarding Deilke's 1994 conviction was denied by a different judge in a different circuit court branch . . ." [Judge Wahl was the presiding judge in Deilke's new prosecution, in which he collaterally attacked the 1993, 1994, and 2000 convictions.].

10. The convictions affected were from 1993 and 2000. As to those convictions, Deilke had "served all of his time, paid all his fines, attended all required classes, endured his license revocations, and even forfeited his vehicle." 2004 WI 104, ¶51 [dissenting opinion of Justice Bradley].