Subcommittee on Court Efficiencies

Final Report and Recommendations
August 2006

Planning and Policy Advisory Committee (PPAC)
Of the
Wisconsin Supreme Court

PPAC Subcommittee on Court Efficiencies Membership

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I. History and Background of Subcommittee

The Planning and Policy Advisory Committee's 2004-2006 biennial Report to the Wisconsin Supreme Court titled *Critical Issues: An Operational Plan for the Wisconsin Court System* outlined "Addressing Funding Constraints" as one of the four critical issues to focus on in the upcoming biennium. With this recommendation and its corresponding objectives in mind, the following discussion took place at the May 27, 2004 PPAC Meeting.

Taken from PPAC Minutes:

b. *Plea colloquies and judicial workload*

Judge McMonigal led a discussion of potential changes to the plea colloquy process, explaining that it is a judicial workload issue, especially in smaller counties. He explained that the purpose of a plea colloquy is to assess whether the defendant truly understands the terms of the plea agreement. However, the process can be quite time-consuming, especially when pro se defendants are involved.

Judge McMonigal urged that the plea colloquy process be evaluated to establish and define the minimum standards that should be met. He said such an evaluation has the potential to create more consistency in the process, save time, and reduce errors.

Judge McMonigal also pointed out that there are many other parts of the legal process that can slow down proceedings and may not be necessary. He said the situation is most severe in smaller counties where some judges are handling the workload of two people. The judge argued that the court system should establish an acceptable per-judge-workload standard, then plan accordingly to control workload and meet the standard. He also advocated for greater use of reserve judges for extended periods of time in areas of the state where the workload burden is greatest. At this time, Mr. Wassink distributed the 2003 Wisconsin Circuit Court Judicial Workload statistics.

Attorney Zakowski stated that the length of the plea colloquy is largely determined by the judge and varies widely, often depending on current workload. He wondered why judges couldn't conduct the process more quickly all the time, especially by relying more on the plea form signed by the defendant. Judge Leineweber responded that defendants have certain constitutional rights during the plea colloquy process, and the appellate courts have made it clear that judges must conduct an oral exam and cannot simply rely on the form signed by the defendant. He said the oral exam ensures that the defendant understands what is happening to him/her. Judge Carlson added that it's important to take time to get the process right the first time, or the case could come back on appeal. Judge Bayorgeon agreed and said it is important to standardize the process so all judges know what to do and say to meet constitutional requirements, while also saving the court's time.

Mr. Voelker pointed out that PPAC's planning subcommittee already had a similar discussion, and recommended in its 2004 final report that the plea colloquy process, as well as other procedures, be reviewed to create efficiencies. He suggested PPAC form a new subcommittee to address the issue. Mr. Voelker also said that the judicial weighted caseload study is outdated and unreliable, and a chief judges committee is looking to update it soon.

Mr. Johnson added that the somewhat radical idea of moving judgeships to meet workload needs may be necessary sooner than later.

DECISION: *PPAC decided unanimously to create a new subcommittee to examine court procedures, including plea colloquies, that could be refined or eliminated to streamline the legal process and make it more efficient.*

Following this decision from PPAC, the Subcommittee on Court Efficiencies was established and met for the first time on February 3rd, 2005. At this meeting, background on the impetus for the formation of the group was discussed with newly recruited subcommittee members. The subcommittee also discussed its membership representation, leadership and priorities and agreed on the following **mission statement:**

"Examine the legal process and recommend ways to create a more efficient system by modifying or creating certain court procedures and policies while protecting the rights of litigants."

The subcommittee produced the following list of objectives to consider for further research and/or action:

- Contact/survey judges, court commissioners, clerks of court, attorneys, and others regarding their ideas for improving efficiency
- Look at what other states are doing with this issue
- Examine the possible role of local criminal justice coordinating councils
- Explore the impact of pro se litigants on court procedures
- Solicit feedback from litigants regarding their court experiences and suggestions
- Consider the advantages/disadvantages of a court rotation system in creating efficiencies, as well as the use of judges in intake and probate court
- Look at the role of court commissioners and the duties they are allowed to perform
- Examine judicial practices re: record preservation
- Re-examine civil rules of procedure for new efficiencies and compare to recently modified federal rules (e.g., discovery rules)
- Prepare a list of mandatory vs. optional court proceedings (e.g., hearings on default matters)
- Look at ways to improve communication and coordination outside the courtroom in regards to scheduling matters
- Identify and focus on a few key ideas for possible legislation (e.g., decriminalization of OAR's)
- Examine the reserve judge system for efficiencies in the way assignments are made

Over the next few months, subcommittee members conducted preliminary research on the objectives and reviewed and narrowed its focus after determining that other entities were already focusing their efforts in many of these areas. Specifically:

- Pro se litigants: Forms Committee, Districts 9 and 10, individual county activities
- Role of coordinating councils: PPAC Alternative to Incarceration Subcommittee
- Mandatory vs. Optional Court proceedings: Judicial Council
- Criminal procedures: Judicial Council

- Feedback from litigants regarding court experiences: Study done in the last five years
- Role of Court Commissioners: Weighted Caseload study underway

In an effort to avoid duplication, the subcommittee agreed to focus its research on two main topic areas: the plea colloquy process and examining the potential for creating efficiencies in judicial caseload rotation.

II. Plea Colloquies

a. Background and Research Summary

A plea colloquy is a conversation between a judge and a criminal defendant, which must occur when the defendant enters a guilty plea in court in order for the plea to be valid. The intent of the colloquy is to ensure that a guilty plea is being made intelligently, knowingly, and voluntarily by the defendant. The court must advise the defendant of the following things:

1. The nature of the charge
2. The potential penalties which might result from the plea, including any mandatory minimum sentence.
3. The trial-related rights that are being waived by the guilty plea.

The court must ensure that the defendant understands each of these points. Many courts use a script of questions which a judge will ask while other courts utilize different methods to complete this process.*(Retrieved from http://en.wikipedia.org/wiki/Plea_colloquy)*

As referenced in the *History and Background* section of this report, anecdotal frustration has been voiced by some judges regarding the inconsistent administration of plea colloquies statewide and how varying procedures are impacting the judicial process. The Subcommittee on Court Efficiencies conducted research with the following goal in mind:

Research Goal:
Determine if there is wide spread dissatisfaction in regard to the plea colloquy process among judges and legal professionals, and if so, recommend methods to improve efficiency and consistency of this process in Wisconsin courts.

Research Methods:

- Survey circuit court judges to determine how they administer a plea colloquy to a defendant, if they feel their current process is effective, and solicit procedural recommendations. Research how/why various guilty pleas have been thrown out.

- Survey District Attorneys, defense attorneys, court staff, and any other related legal professionals in an effort to understand how the plea colloquy system affects his/her duties and how it is administered from varying perspectives.

- Research and gain an understanding of the intent, historical significance and parameters Federal Rule 11 and how this shapes plea colloquies. Survey Wisconsin judges to determine if any utilize the Rule 11 approach or would be in favor of adopting this approach.

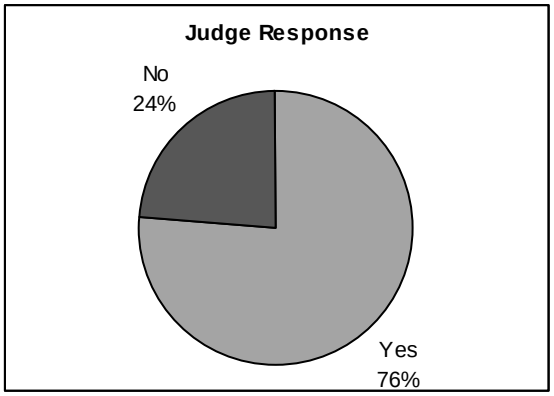
b. Plea Colloquy Procedural Research

Circuit Court Judge Survey Summary:

The subcommittee conducted a survey regarding judge's opinions and concerns with the plea colloquy process. Surveys were distributed to all judicial PPAC members, as well as to judges in counties of court efficiencies subcommittee members. A total of 25 judges responded. The following is a summary of the questions and answers provided by survey respondents.

Are you satisfied with the procedure for taking a criminal plea?

Table #1

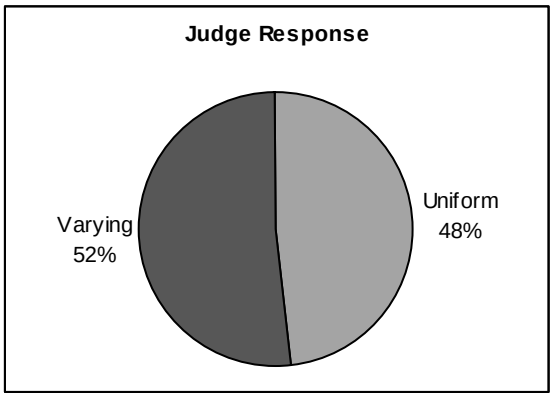


Of the 25 judges who responded to the survey, 19 (76%) reported that they were satisfied with the procedure for taking a criminal plea, six (24%) said they were not satisfied. Comments providing an explanation for answers included:

- Too long, too repetitive, too much uncertainty about the use of forms.
- The procedure would be ok if it didn't take so long, and if there weren't persistent pressures to move the cases along quickly.
- It places the judge in a no-win situation where he or she either slows down and gets backed up, or moves quickly and runs the danger of a legally inadequate colloquy.
- There is no standard procedure. Judges vary widely in how extensive the colloquy is, largely because the law is unclear about the extent to which a plea questionnaire creates a sufficient record of matters in the questionnaire.
- Recommendation of an adequate and minimum colloquy, which could be vaired to address special issues, would be helpful.
- We need a standardized procedure and form that comports with the current law if is not overly time consuming. Few judges seem to agree on what is required.

Is your procedure for administering a plea colloquy basically the same for every case/defendant or does it vary depending on certain circumstances of the case/defendant?

Table #2

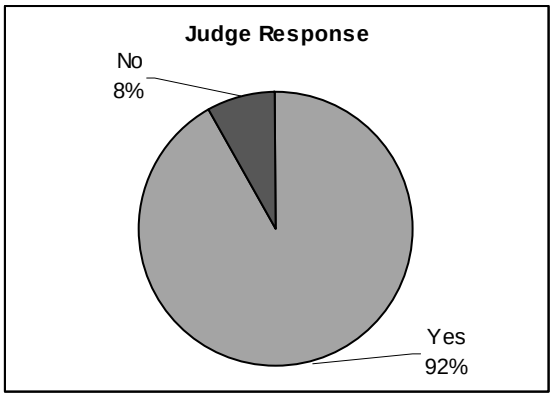


Twelve (48%) judges reported having a uniform process for administering a plea and 13 (52%) reported that their process varied. Comments provided by respondents showed that many of the judges who selected "uniform" also provided narrative when they did things differently. Some explanations for both types of processes provided by respondents to this question included:

- Usually take longer for a felony and OWI, going into more detail re: rights even if they have completed a plea questionnaire.
- Run of the mill cases I rely more on the written form. In a high stakes case with a challenged defendant, I'll spend more time on the verbal.
- If I'm not sure that a defendant understands, I'll ask open-ended questions to gauge their comprehension.
- I triage types of cases and utilize the plea questionnaire to varying degrees depending on the defendant's level of understanding, confidence in the defense counsel, seriousness of charges, proposed sentence and more.

Do you feel that you conduct a meaningful colloquy with each defendant?

Table #3



Twenty-three (92%) of respondents stated that they felt they conducted a meaningful plea colloquy with each defendant and two (8%) felt that they do not.

The following information was written in by respondents to providing further explanation:

- I take too long, it is too repetitious and can't rely on forms.
- In the interested of time, sometimes the procedure is rote and defendant may not indicate that he doesn't understand. A lot depends on how prepared he is and if he has an attorney.
- Some defendants know the drill better than I do, and it's enough to briefly inquire if they went over the plea questionnaire with their attorney and if they have any questions about the rights they are giving up.
- Without question. I do it by the numbers to avoid an inadvertent omission
- I'm not always convinced the defendant truly understands.

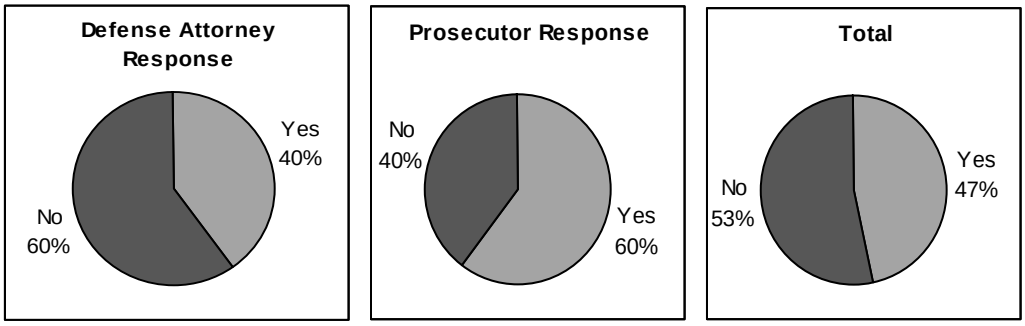
Average times reported for conducting a colloquy in misdemeanor, felony and OWI cases varied from 3 minutes to 30 minutes.

Lastly, respondents were asked what changes they would suggest, if any, to improve the plea colloquy process. Most of the comments centered on determining a minimum of what is needed and many promoted the use of forms. Some respondents also strongly asked not to change or tamper with the current process.

Attorney Survey Summary:

Representatives of the subcommittee agreed to send a survey to defense attorneys and prosecutors via various e-mail listervs including "DefenderNet Digest", "SPD Attorneys", and "DANet". A total of 30 attorneys responded to the survey, 20 of which were defense attorneys and 10 of which were prosecutors. The following is a summary of their responses.

Are you satisfied with the procedure for taking a criminal plea?
Tables #4,5,6



When asked if they were satisfied with the procedure for taking a criminal plea, eight defense attorney's and six prosecutors reported "Yes" and 12 defense attorney's and four prosecutors answered "No." A total of 14 (47%) attorney's surveyed answered "Yes" and 16 (53%) answered "No".

Some explanations provided by survey respondents included:

Defense Attorneys:

- Judges in our county do a good job taking pleas.

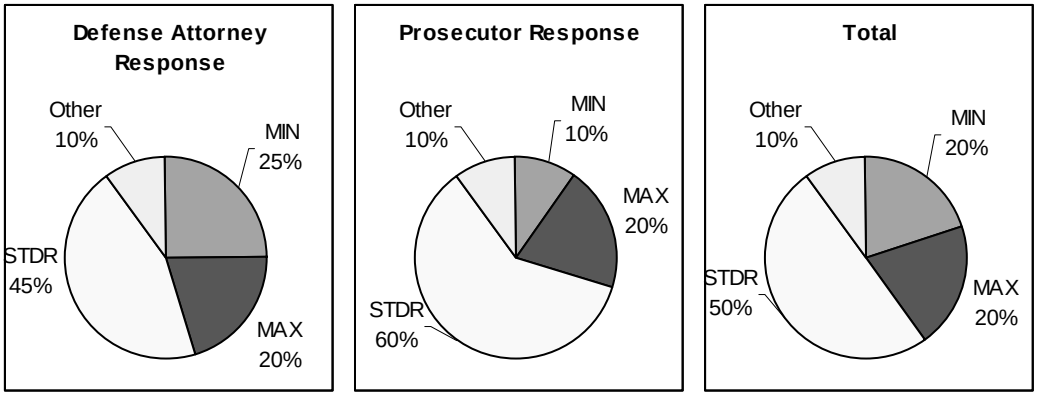
- It works well 99% of the time.
- It seems that some judges want to see how fast they can get through the colloquy. The client is so intimidated, he responds with what the judge wants. I get questions and doubts after the hearing is adjourned despite my prior discussions and explanations. Some of the language used in the canned questions is incomprehensible to my clients.
- Some judges take much too long to take pleas, especially in misdemeanor cases where an attorney is representing.
- In general, courts should do a better job of directly asking defendants if they understand that the whole purpose of all the other questions is to make it very difficult for the defendant to take the plea back later. The present colloquy skirts around this.
- Too often, the court asks only questions that the defendant can answer yes or no and this does not ensure the defendant understands.
- SM-32 provides a sufficient overall structure.
- Overall, a reliable and well known process that keeps all parties and onlookers informed of what is happening and why.
- More emphasis should be placed on the more important thing—the elements. When properly discussed, I have seen many defendants, saddled with stupid and ineffective lawyers, properly balk at pleading guilty when they understand (for the first time) what it is they are pleading guilty to. Good example—worthless checks, "intended at the time they were written to bounce."

Prosecutors:

- Could be shorter but the plea questionnaire is helpful.
- I have never had a successful challenge to a plea when judges follow SM-32.
- I believe our appellate courts have taken the position that form/rhetoric/ritual is more important than substance.
- It takes longer than it ought to.
- It depends on the judge. The problems arise not from the procedure, but from judges who rush through, or rail to question defendants about inconsistencies between their answers and what is written on the form.

Do you consider SM-32 to be the Minimum colloquy, Maximum Colloquy, Standard Colloquy or Other?

Tables #7,8.9



When asked if they considered SM-32 to be the minimum, maximum or standard colloquy, five defense attorneys and two prosecutors responded "minimum", four defense attorney's and two prosecutors responded "maximum", nine defense attorneys and six prosecutors responded "standard", and two defense attorneys and one prosecutor wrote-in another answer or selected more than one answer. In total, six attorneys (20%) selected "minimum", six (20%) attorney's selected "maximum", 15 (50%) selected "standard" and three (10%) were categorized as "other."

Attorneys were asked the open ended question of **What questions must a judge always ask at a plea hearing, regardless of the charge?** Responses given included:

Defense Attorneys:

- Have there been any threats or promises?
- Do you admit a factual basis for the plea?
- Are you on any medications or under the influence of anything that may impair your ability to understand the plea?
- What are the elements of the charge that you are admitting?
- Are you satisfied with the representation of your attorney?
- What is the maximum charge and/or penalty you face?
- Do you have any questions about your plea?
- Do you understand the charge?
- Do you understand the rights you are giving up?
- Do you understand the plea agreement?
- Did you read the form or go over it with your attorney?
- Restate the plea agreement in your own words.
- Is this your signature on the form?
- Do you understand that the court is not bound by the agreement and that the court could sentence you to the maximum penalties under the law?
- Are you pleading guilty because you are guilty?
- Have you had enough time to consult with your lawyer?

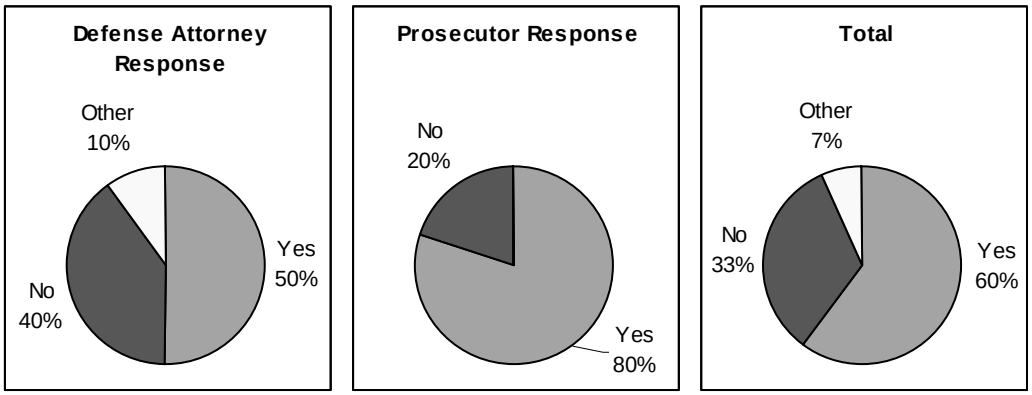
Prosecutors:

- Is the plea voluntary or done in response to a promise or threat?

- Ask all questions in SM-32.
- Do you understand constitutional rights being given up?
- Do you understand the elements of the crime?
- Have you been satisfied with the representation of your counsel?
- Do you want more time with your attorney?
- Do you understand INS consequences?
- Go through questionnaire thoroughly.

Do you believe that attorney's have any responsibility to ensure that the court satisfies the requirements for accepting a plea?

Tables #10, 11, 12



When asked if attorney's have any responsibility to ensure that the court satisfies the requirements for accepting a plea, 10 defense attorney's and eight prosecutors reported "Yes" and eight defense attorney's and two prosecutors answered "No." Two defense attorneys selected something other than yes or no. A total of 18 (60%) attorney's surveyed answered "Yes" and 10 (33%) answered "No". Explanations provided by respondents included:

Defense Attorneys:

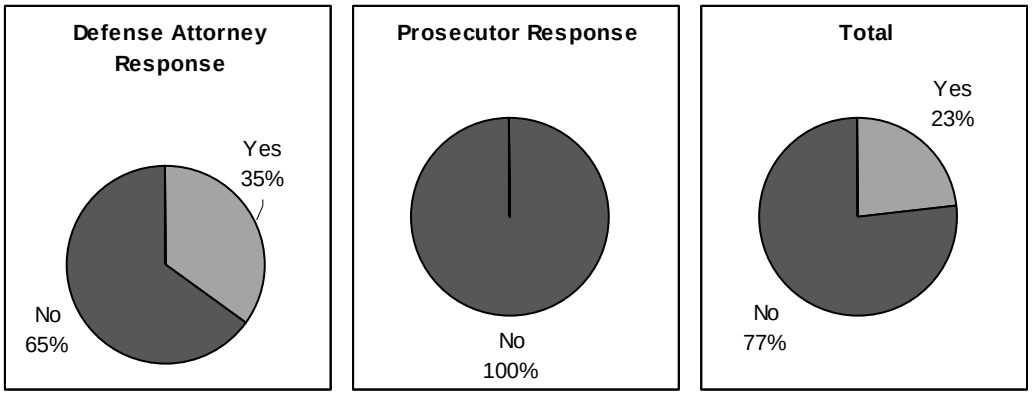
- It is a waste of time and money if a plea is not adequate, and attorneys should be authorized to speak up if they believe the colloquy is not adequate.
- Prosecutors yes, defense lawyers no. Good prosecutors will remind judges to tighten the record.
- Judges in my county seem to have forgotten what their role is. They have ceded much of their responsibilities to attorneys and judicial staff already. Their goal, these days, is to close cases…
- Defense attorneys should have discussed and explained all the defendants' rights and the effects of the plea before they get into court. They don't have any obligations to ensure the court satisfies the requirements for accepting the plea; however, the district attorney does.
- Since the state filed the charge and has the burden on proving the charge, the prosecutor should ensure there is a proper basis for the entry of judge of conviction.
- The responsibility is shared by the court and criminal defense counsel.
- If my client wants to plead, his/her right to effective counsel means I have a duty to handle the proceedings correctly.
- We have a duty to educate the client about the system they are being processed through.

Prosecutors:

- Yes, of course. All attorneys have the ethical obligation to make sure the plea was taken in full compliance with the law. If not, they must do what they can to remedy the problem.
- Defense attorneys have a special obligation to go through the elements of the offense. Unfortunately not all attorneys diligently go through jury instructions prior to the hearing. Both prosecutor and defense have an obligation to speak up if the judge misses something during a plea.
- Otherwise you will have to spend time in a future plea withdrawal situation that may not come out in your favor.
- It's the defense attorney's job to make sure the defendant understands the plea. It's the prosecutors job to make sure the plea is valid so there are not appeals and so justice is served.
- No responsibility, but as a practical matter, a vested interest because counsel will have to live with the fallout from a later successful attack on the guilty plea.

Do you receive or file a lot of plea withdrawal motions after sentencing?

Tables #13,14,15



When asked if they receive or file a lot of plea withdrawal motions after sentencing, seven defense attorney's and zero prosecutors reported "Yes" and 13 defense attorney's and 10 prosecutors answered "No." A total of seven (23%) attorney's surveyed answered "Yes" and 23 (77%) answered "No".

Why do you think some defendants file plea withdrawal motions after sentencing?

Defense Attorneys:

- Defendants are unhappy that the judge did not follow the plea bargain and the judge did not do an adequate job explaining the elements and/or maximum charge.
- Unsatisfied with sentence (note: several respondents wrote this as the answer).
- They have second thoughts. They were talked into pleading by attorney, friends or family. Friends convince them they got ripped off.
- 2 main reasons: The common reason is the defendant is upset because the judge gave him a longer sentence than he expected because the plea agreement contained a sentencing recommendation. The other reason is people who felt rushed and regretted the decision because of doubts the state could prove its case or a desire to tell his/her side of the story.
- The judge "jumped" the plea agreement to the surprise of the defendant.
- They (defendants) figure out they have a loser lawyer.

Prosecutors:

- Talk to inmates in jail or friends.
- In a small number of cases, a few defense attorneys do not realistically explain potential outcomes to clients. This raises expectation for clients and results in complaints when outcome differs from expectations.
- Defendants do what suits them at the moment. They want the best offer they can get so they plea then they really do not want to face the consequences of their action so they move to withdraw.
- They didn't like their sentence.
- They are bored in prison.
- Unhappy with quality of representation by their lawyers.
- What difference does it make, the plea colloquy should be designed to satisfy the law, not to try and anticipate the complaints of defendants. As a class, criminal defendants suffer the effects of criminal thinking patterns which lead to a whole host of decisions that are usually irrational. They listen to advice from other jail or prison inmates or the person on the barstool next to them or "enabler" family members as to what is legal or not. They don't like the consequences is the predominant reason…
- When the presentence interview goes badly, and they realize there is going to be a recommendation at or higher than the negotiations, they get scared and start denying things again.

What changes would you suggest, if any, to change the plea colloquy?

Defense Attorneys:

- Adopt Federal Rule 11. If the court will not follow the plea, the defendant should be allowed to withdraw his or her plea….Our current system is fundamentally unfair and inefficient…Rule 11 hasn't destroyed the federal system and it will not glut our system with unwanted trials either.
- None, except the "understandings" section is frequently not applicable. Maybe a different form for misdemeanors.
- Instead of asking a series of yes/no questions, the judges should ask questions which would force the client to explain back his/her perception of what accepting a plea means.
- None (note: several responded this way).
- Not as long for misdemeanors. Attorneys job to make sure the defendant understands what rights are being given up.
- The effect of Truth in Sentencing should be explained.
- Judges should pin the defense lawyer down on what they have actually done to prepare and whether client is truly giving informed consent.
- Require open ended questions.
- Adoption of a rule similar to Rule 11.
- Written form should be more extensive.
- Standard set for taking a plea and courts should not be allowed to vary from this.
- Shorten it up for heaven's sake!

Prosecutors:

- Shorter
- None, it is sufficient as is.
- Change the law to make it as hard to withdraw a plea before sentencing as it is after sentencing.
- Keep training judges and bring their attention to the problem(s) of pleas.
- It should be required for a factual basis to be placed on the record by the State and agreed to by the defendant. Even if a defendant disagrees about certain facts and this is placed on the record, this will insure that he is agreeing to enough facts to support the plea after hearing them out loud.

c. Federal Rule 11 Procedural Research

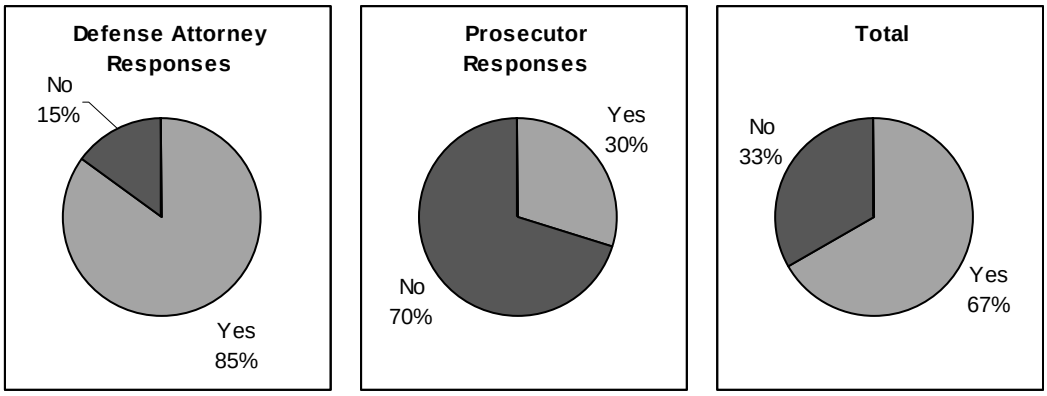
Rule 11 of the Federal Rules Of Criminal Procedure specifically addresses three types of plea agreements. One of these allows the parties to agree that "a specific sentence . . . is the appropriate disposition of the case." Rule 11(c)(1)(C). Trial courts are either to accept or reject the "C" agreement. If the court accepts the agreement, the court must impose the disposition provided for in the agreement. Rule 11(c)(3). If the court rejects the agreement, the court must inform the defendant that the court is not bound and afford the defendant the opportunity to withdraw the plea. Rule 11(c)(4).

Supporters of the rule argue that most post-conviction motions seeking withdrawal of a plea and most appeals concerning the topic come from defendants who received a greater sentence than expected. Supporters argue that "up front" involvement by the trial court would increase certainty, reduce post-conviction motions and appeals and make the plea process more efficient. Opponents argue that judges should not take part in the bargaining process at all and that judges might feel pressured to adopt the plea agreement for the wrong reasons (i.e. to get the case off the calendar).

<u>Attorney Response Summary</u>

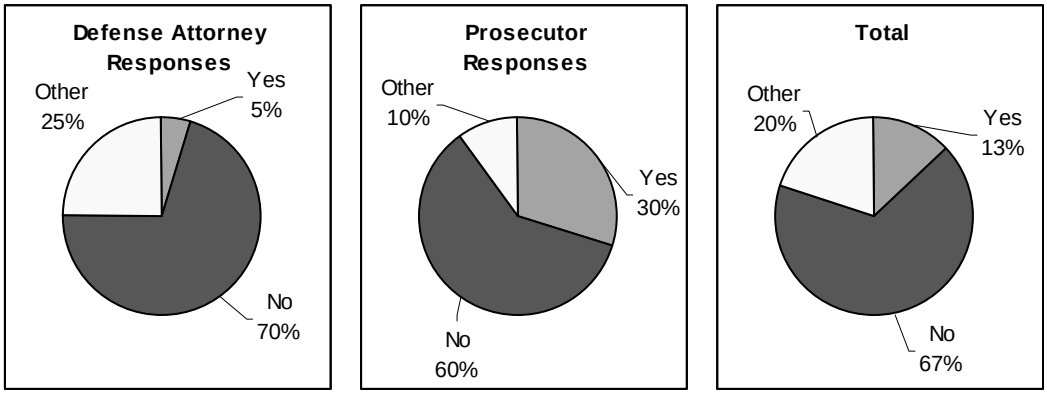
The following is a summary of two questions asked to attorney's who were surveyed regarding plea colloquy process. These questions were included in the same survey referenced in the previous section. To reiterate, a total of 30 attorneys responded to the survey, 20 of which were defense attorneys and 10 of which were prosecutors. Respondents were provided the above summary/explanation of Federal Rule 11.

Would you favor adoption in Wisconsin of a rule like Federal Rule 11?
Tables #16,17,18



When asked if they would favor adoption in Wisconsin of a rule like Federal Rule 11, 17 defense attorney's and three prosecutors reported "Yes" and three defense attorney's and seven prosecutors answered "No." A total of 20 (67%) attorney's surveyed answered "Yes" and 10 (33%) answered "No".

Do you, or do courts before which you practice, allow a defendant to withdraw a plea if a specific, joint, sentence recommendation will not be followed?
Tables #19,20,21



When asked if they or the courts before which they practice, allow a defendant to withdraw a plea if a specific, joint, sentence recommendation will not be followed, one defense attorney and three prosecutors reported "Yes" and 14 defense attorney's and six prosecutors answered "No." Five defense attorneys and one prosecutor wrote in an "other" answer. A total of four (13%) attorney's surveyed answered "Yes" and 20 (67%) answered "No". Six (20%) reported an answer other than yes or no.

Judge Plea Agreement Response Summary

A separate survey was given to judges by subcommittee member Professor David Schultz at the end of a session during the Criminal Law and Sentencing Institute. Judges were provided the following narrative description on the history of the Rule 11 approach in Wisconsin.

The Longstanding rule in Wisconsin is that the trial court may not participate in plea bargaining. This rule has been extended to disfavoring all attempts to require the judge to indicate when he or she will not go along with the sentence recommended in an agreement.

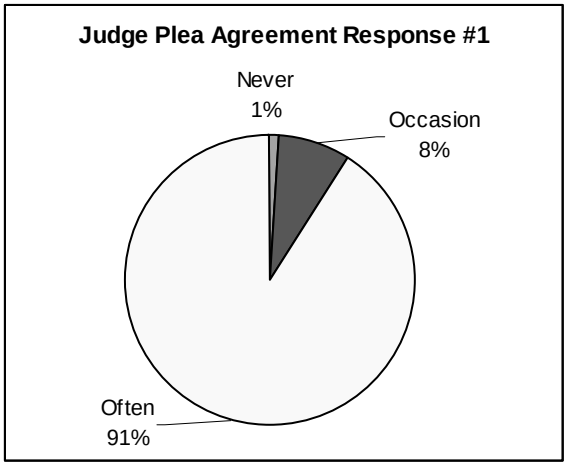
The Wisconsin Supreme Court most recently reviewed this issue in State v. Williams, 2000 WI 78, 236, Wis.2d 293, 613 N.W.2d. 132. The defendant in this appeal asked the court "to adopt a new rule of procedure, which would require that if a trial judge anticipates exceeding the state's sentence recommendation under a plea agreement, the trial judge must inform the defendant of that fact and allow the defendant to withdraw his or her plea." 1. The court denied the request, reaffirming the traditional rule against judge participation in the plea agreement process. SM-32, Accepting A Plea of Guilty, includes questions that reflect the traditional rule. However, in footnote 11, the following stated:

Some Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant the opportunity to withdraw the guilty plea at that point…This is similar to the practice recognized by the ABA Standards For Criminal Justice, which allows the parties to give advance notice of the pleas agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement if such concurrence is consistent with the material disclosed in the presentence report. Section 3.3, ABA Standards Relating To The Plea Of Guilty. Also see Rule 11(c) of the Fedral Rules of Criminal Procedure. The Wisconsin Supreme Court has declined to adopt this practice as a statewide requirement…

At the time this was written, it appeared to the subcommittee that the trend among state judges was toward following the ABA Standards/Federal Rule 11 procedure. The Court Efficiencies Subcommittee was interested in knowing whether this perception is accurate today. Additionally, the subcommittee considered whether any changes might improve the efficiency of the plea acceptance procedures. The following is a summary of the questions and answers received from judges regarding this procedure. A total of 86 judges responded to the survey.

As to typical plea agreements in your court, how often do they include a specific sentence recommendation?

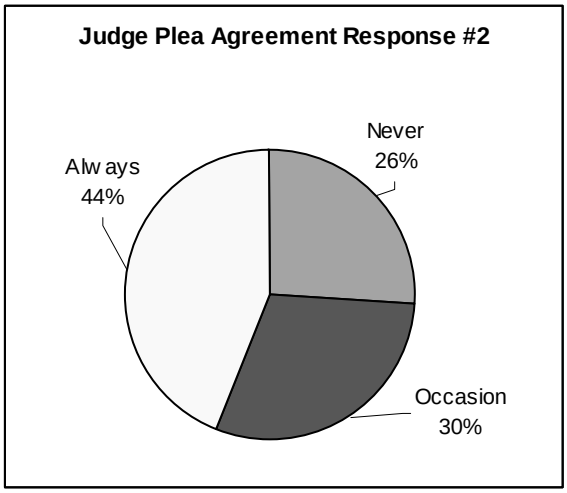
Table #22



Seventy-eight (91% of respondents) reported that typical plea agreements in their court, "often" include a specific sentence recommendation while seven judges (8%) reported that they "occasionally" include a specific recommendation, and one judge reported that a specific recommendation is "never" included.

In cases where you believe you are likely to impose a more severe disposition than called for, or apparently anticipated by, the plea agreement, do you advise the defendant of that fact?

Table # 23

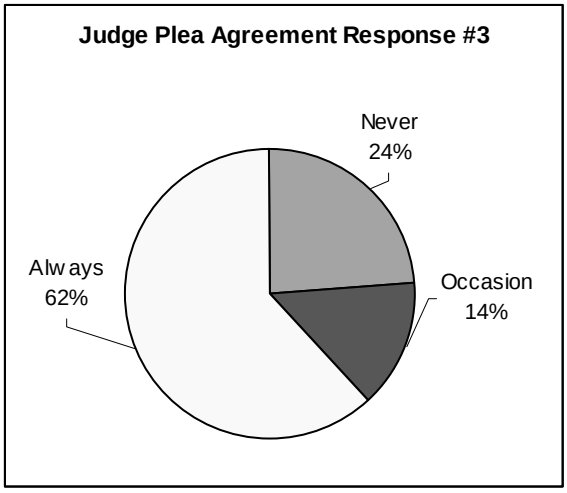


Judges were asked "in cases where you believe you are likely to impose a more severe disposition than called for, or apparently anticipated by, the plea agreement, do you advise the defendant of that fact?" Twenty-two judges (26%) reported "never", twenty-five (29%) reported "occasionally" and thirty-seven (43%) reported "always." Two judges wrote in the word "rarely" for his/her answer.

For those that answered "occasionally" or "always" to the previous question, two follow-up questions were asked.

Do you advise the defendant that he or she may withdraw his/her plea of guilty at this time?

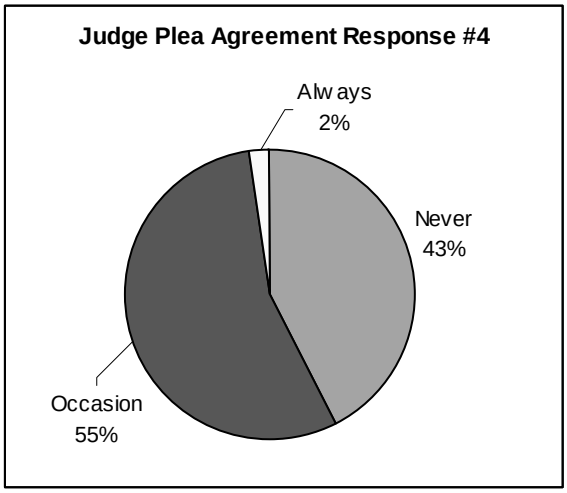
Table #24



A total of 63 respondents answered this question. Fifteen (24%) responded "never", nine (14%) responded "occasionally", and 39 (62%) answered "always."

If you have advised defendants that they may withdraw their plea under these circumstances, how often do they withdraw?

Table #25



A total of forty-seven respondents answered this question. Twenty (43%) responded "never", 26 (55%) responded "occasionally" and one judge responded "always."

At the end of the Judge and Plea Agreements Survey, there was a section for open-ended comments. The following is a summary of comments provided:

- I do not have all of the sentencing information at the time the recommendation is made. I also tell the defendant as part of the plea colloquy that I am not bound by recommendations.

- If a judge follows State vs. Klessig, etc. in taking a plea, you don't have to warn that you might not accept "the deal" because you've already told them that in the plea colloquy.

- I rarely know the terms of a plea bargain until I'm in court. Quite often the cases are resolved on a pretrial day and so I don't know in advance that a plea will be taken. In the majority of cases, we proceed to plea and sentencing on the spot. I ask in the colloquy that the defendant understands that the state's recommendation is not binding on the court and discuss the range of penalties. Then we go forward. In a significant felony cases I would be more careful to follow a Rule 11 approach.

- I believe that fundamental fairness requires advance notice.

- I have very few cases where I am likely to exceed a sentencing recommendation. I am going to adopt this procedure in the future.

- Frankly I think it is fair to give both sides and the defendant a heads-up that the recommendation does not make sense and that they will really need to persuade the court in order for the court to feel that it is the right decision.

- If I think I may deviate significantly from the recommendation, I have said "I won't go along with that." Defendant can then decide whether to continue with plea. I've only done that a couple of times. Otherwise, I just stress that I don't have to go along.

- I advise prior to taking plea so it would be the choice to not go forward with the plea.

- I have always believed that this procedure is required by "fundamental fairness." Some prosecutors I have seen agree to a deal which they know will not be followed by the judge. This is done just to get a plea. If the judge did not "warn" or allow withdrawal, the defendant would effectively have been tricked into entry of the plea based on an implicit misrepresentative of what the judge was most likely to do. I feel very strongly about this issue.

- Aren't we obligated to wait until sentencing before making this decision?

- I tell them it is likely for an upward deviation from the agreement prior to taking the plea and let the defendant decide to either plea or not or go back to discussion.

- I declined to do so in a multiple homicide case. The defendant plead guilty anyway.

- No matter what the judge says, the defendant believes he will receive the sentence recommended by the DA in the bargain. That is the fact in the great majority of the plea bargain cases. Sentencing is in the judge's province.

Although optional, many of the judges who completed this survey provided their name. If further research is necessary, many of these judges could be contacted for further information on their procedures.

d. Recommendations

Through its research and discussions, the Court Efficiencies Subcommittee concluded that there are inconsistencies and differences of opinion regarding the plea colloquy. Additionally there are varying methods of administering the plea colloquy, differences of opinion on who holds the responsibility of certain aspects of the process, and questions about the effects of these varying approaches on the appellate system. There is also little consensus on how to change or create efficiencies in regard to the colloquy. As an additional reference point, on July 12, 2006, the Wisconsin Supreme Court underscored the importance of administering a complete colloquy in State vs. Brown, 2006 WI 100, especially when characteristics of the defendant show a need for more care and attention to detail (See *State vs. Brown* in Appendix).

As a result of the research conducted and the feedback received, the Court Efficiencies Subcommittee recommends to PPAC that these inconsistencies brought to the attention of judges and the topic of plea colloquies be addressed through Judicial Education. Specifically, the development of a judicial education course or seminar that addresses the minimums and necessities of completing a colloquy that would include a panel of judges discussing their respective methods. Since there seem to be many approaches, the subcommittee felt a panel would be able to best address the spectrum of techniques in administering a colloquy and an open dialogue could communicate several perspectives on the topic. The subcommittee also recommends that the seminar materials include a copy of SM-32 and, in an effort to engender open dialogue, the faculty utilize an electronic surveying system in which questions and answers can be viewed by participants during the seminar. Information gathered in this report should be utilized to assist in the development of the judicial education course.

In regard to Federal Rule 11, the subcommittee believes that its preliminary research showed that the potential for this to become a Wisconsin Rule is something that should be further explored. The data collected showed that many judges are already practicing the Rule 11 approach and many attorneys would be in favor of this approach so in a sense a test population already exists. The subcommittee recommends that this approach and the potential for a Rule be further examined by the Judicial Council.

The Subcommittee understands that a significant portion of the Court of Appeals criminal caseload concerns issues arising out of plea withdrawal motions. It is unknown whether a large percentage of these cases come from disgruntled defendants who receive a greater sentence of incarceration than the sentencing recommendation. The thought is that if it can be proven that a large percentage of plea withdrawal cases involve defendants who were sentenced to terms greater than the sentence recommendation, then serious consideration might be given to adopting a rule similar to Federal Rule 11 (letting defendants know ahead of time whether the court is likely to disregard the sentencing recommendation in favor of a greater sentence and giving the defendant the opportunity to withdraw from the plea bargain.)

With this idea in mind, it is the recommendation of the Subcommittee to PPAC that the Court of Appeals keep the following statistics for a two year period:

1. The number of appeals each month in each district that are criminal cases.

2. Of that number, the number that involves plea withdrawals.
3. Of that number, the number of appeals where the facts are (as opposed to the issue or issues on appeal) that the judge sentenced the defendant to a term greater than the specific sentencing recommendation (plea bargains where no sentencing recommendation has been made do not count).

At the conclusion of the two year period, the court of appeals will send the results to PPAC and/or the Judicial Council if they are exploring the topic, for further consideration.

III. Judicial Caseload Rotation

e. Background and Research Summary

Judicial Rotation was included as an issue by the PPAC Subcommittee on Court Efficiencies. The subcommittee was made aware of problems with cases in which there was a change of judge between entry of judgment and post judgment activity. The subcommittee discussed the history, purposes and evolution of rotation procedures and rules.

Preliminary background research showed that the Committee on Judicial Organization laid the foundation for the court reorganization in 1978 and included the following recommendations and comments:

a. All courts in the single level trial court system should be courts of general jurisdiction, and the judges thereof should periodically rotate among various types of cases.

b. Specialized courts are an impediment to flexibility and create artificial barriers to the flow of judicial workload.

c. Periodic rotation of judges among various types of cases, with certain possible exceptions, will improve the quality of judicial performance and will make more judicial manpower available for any given case.

Additionally, Supreme Court Rule (SCR) Ch 70, Rules of Judicial Administration, includes provision for the assignment of circuit judges [SCR 70.23]

a. The original rule 70.23, created as part of court reorganization, required each chief judge to: " . . . design a plan for the rotation of judicial assignments in multi-judge circuits within the district." The rule did not define "rotation", provide a time line or articulate a purpose.

b. Supreme Court Order 94-10, adopted pursuant to a petition by the Chief Judges and the Director of State Courts amended the rule to add: "In designing a rotation plan the chief judge shall do all of the following: (a) Equalize the workload in an equitable manner considering any special circumstances in each circuit. (b) Assure general jurisdiction availability and competence of all judges in the circuit."

Current Status of caseload rotation in Wisconsin

1. Of the 72 Wisconsin counties, 4 appear to have "clean break" rotation/assignment systems (Kenosha, Milwaukee, Walworth and Waukesha). In these counties, all cases are left behind when a judge is assigned to a new case type court division.
2. These 4 counties include 70 circuit judges, 29% of Wisconsin's 241 circuit court judges.
3. All other counties and judges, as a general rule, maintain control over post judgment matters in cases they have decided.
4. The Uniform Rules for Trial Court Administration provide in TCA 2 (a) "Where practical, post-judgment matters shall be assigned to the judge who entered judgment."

The efficiency issue was determined to have two aspects. Continuous assignment to one judge provides efficiency in some individual cases. Rotation in large jurisdictions may not allow for this. However, organization of the large courts by case-type divisions provides efficiencies for management of caseloads, staff and facilities. The subcommittee determined that rotation would result in inefficiency on in a small subset of cases in "clean break" counties.

- **Counties which have a "clean-break" rotation system.**

- **Cases which have taken a substantial amount of judicial time and judicial discretion.** These are most often felony or family cases with judgment entered in the last 3 years. The most obvious problems arise when a successor judge has to try to "read the mind" of a previous judge in felony sentencing revocations and interpretations of a judgment from a contested divorce. In these cases, reassignment of a case not only creates judicial inefficiencies but, arguably, the finality and quality of justice. However, the courts must and do deal with the same problems when a substitution is filed after appeal and when a circuit judge retires or dies.

It appears that most of these counties allow for either the successor judge or a party to ask for the matter to be handled by the predecessor judge. This seems to achieve a reasonable compromise between judicial consistency and rotation of assignments. However, serious questions have been raised as to whether this approach can work in Milwaukee County Circuit Courts given the separate locations and different layouts of its court facilities.

f. Recommendation

The Judicial Caseload Rotation Work Group which included Judge Brown, Kassie Murphy and Robin Dorman met with the Chief Judges in the "clean break" counties to discuss a possible recommendation. With their input, the subcommittee recommends to PPAC that Chief Judges in these counties take this issue into consideration in designing rotation plans and, if possible, develop a procedure that is most appropriate locally to provide for the return of a case to a predecessor judge under certain circumstances.

IV. Conclusion

Summary of Recommendations to PPAC:

1. Development of a judicial education course/seminar on procedures surrounding the plea colloquy featuring a panel of judges who have differing approaches or opinions on this topic. Information from this report can and should be utilized to develop curriculum.
2. Referral to the Judicial Council, exploration of the Federal Rule 11 approach and its effects on the system and the potential development of a similar Wisconsin Rule.
3. Request that the Court of Appeals keep statistics on cases related to Federal Rule 11 topic (see report narrative).
4. Chief Judges in "clean break" rotation counties develop local procedures for return of case to predecessor judge when possible and appropriate.

V. Appendix

Please circle your answer.

1. **Are you satisfied with the procedure for taking a criminal plea?**

Yes No

If you circled "No", please explain.

2. **Is your procedure for administering a plea colloquy basically the same for every case/defendant or does it vary depending on certain circumstances of the case/defendant?**

Uniform process Varying process

If you circled "Varying Process", please explain.

3. **Do you feel that you conduct a meaningful colloquy with each defendant?**

Yes No

If you circled "No", please explain.

4. **Please estimate the average time it takes you to take a plea in each of the following case types:**

Misdemeanor:
Felony:
OWI:

5. **What changes would you suggest, if any, to improve the plea colloquy?**

Please return survey to Erin Slattengren, Office of Court Operations
fax: 608-267-0911 ■ **email:** erin.slattengren@wicourts.gov ■ **mail:** 110 E. Main St.,Suite 410, Madison, WI 53703

Please circle your answer and provide further explanation when requested.

1. Are you satisfied with the procedure for taking a criminal plea?

Yes No

Please explain your answer.

2. Do you consider SM-32 to be:

the minimum colloquy the maximum colloquy the standard colloquy

Please explain your answer.

3. What questions must a judge always ask at a plea hearing, regardless of the charge?

4. Do you believe that attorneys have any responsibility to ensure that the court satisfies the requirements for accepting a plea?

Yes No

Please explain your answer.

5. Do you receive or file a lot of plea withdrawal motions after sentencing?

Yes No

Please explain your answer.

6. Why do you think some defendants file plea withdrawal motions after sentencing?

7. Rule 11 of the Federal Rules Of Criminal Procedure specifically addresses three types of plea agreements. One of these allows the parties to agree that "a specific sentence . . . is the appropriate disposition of the case." Rule 11(c)(1)(C). Trial courts are either to accept or reject the "C" agreement. If the court accepts the agreement, the court must impose the disposition provided for in the agreement. Rule 11(c)(3). If the court rejects the agreement, the court must inform the defendant that the court is not bound and afford the defendant the opportunity to withdraw the plea. Rule 11(c)(4).

   Supporters of the rule argue that most post-conviction motions seeking withdrawal of a plea and most appeals concerning the topic come from defendants who received a greater sentence than expected. Supporters argue that "up front" involvement by the trial court would increase certainty, reduce post-conviction motions and appeals and make the plea process more efficient. Opponents argue that judges should not take part in the bargaining process at all and that judges might feel pressured to adopt the plea agreement for the wrong reasons (i.e. to get the case off the calendar).

   a) Would you favor adoption in Wisconsin of a rule like Federal Rule 11?

   Yes No

   b) Do you, or do courts before which you practice, allow a defendant to withdraw a plea if a specific, joint, sentence recommendation will not be followed?

   Yes No

8. What changes would you suggest, if any, to change the plea colloquy?

SUPREME COURT OF WISCONSIN

CASE NO.:	2003AP2662-CR

COMPLETE TITLE:

State of Wisconsin,
Plaintiff-Respondent,
v.
James E. Brown,
Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS
(no cite)

OPINION FILED:	July 12, 2006
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	December 6, 2005

SOURCE OF APPEAL:

COURT:	Circuit
COUNTY:	Milwaukee
JUDGE:	Martin J. Donald

JUSTICES:

CONCURRED:	
DISSENTED:	
NOT PARTICIPATING:	

ATTORNEYS:

For the defendant-appellant-petitioner there were briefs and oral argument by *Richard D. Martin*, assistant state public defender.

For the plaintiff-respondent the cause was argued by *William C. Wolford*, assistant attorney general, with whom on the brief was *Peggy A. Lautenschlager*, attorney general.

2006 WI 100

No. 2003AP2662-CR
(L.C. No. 2001CF4764)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

James E. Brown,

Defendant-Appellant-Petitioner.

FILED

JUL 12, 2006

Cornelia G. Clark
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Reversed and cause remanded.*

¶1 DAVID T. PROSSER, J. This is a review of an unpublished court of appeals decision[1] affirming the circuit court's denial of James Brown's (Brown) postconviction motion to withdraw his guilty pleas to three felony charges. Brown contends that he did not enter his guilty pleas knowingly, intelligently, and voluntarily. To support this claim, he points to the transcript of the plea hearing and alleges that

[1] State v. Brown, No. 2003AP2662-CR, unpublished order (Wis. Ct. App. Feb. 21, 2005).

the circuit court judge failed to follow some of the duties imposed by Wis. Stat. § 971.08 (2001-02)[2] and State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

¶2 This review presents the question whether the circuit court erred by denying Brown's postconviction motion without an evidentiary hearing. A defendant is entitled to an evidentiary hearing on a motion to withdraw a guilty plea when (1) the defendant makes a prima facie showing that the circuit court's plea colloquy did not conform with § 971.08 or other procedures mandated at a plea hearing; and (2) the defendant alleges he did not know or understand the information that should have been provided at the plea hearing. State v. Hampton, 2004 WI 107, ¶46, 274 Wis. 2d 379, 683 N.W.2d 14; Bangert, 131 Wis. 2d at 274. In this case, the parties dispute whether Brown has met these two requirements.

¶3 First, Brown contends his guilty plea was not knowing, intelligent, and voluntary because the circuit court (1) failed to enumerate the elements of the charges to which he pleaded guilty; (2) failed to inform him of the constitutional rights he waived by pleading guilty; and (3) failed to adequately explain the potential punishment he faced.

¶4 Second, Brown alleges, somewhat indirectly, that he did not understand information that should have been presented at the plea hearing.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise indicated.

¶5 Based on the transcript of the plea hearing, we conclude Brown has made a prima facie showing that the circuit court did not fully comply with Wis. Stat. § 971.08 and Bangert. The circuit court did not satisfactorily enumerate, explain, or discuss the facts or elements of the three felonies in a manner that would establish for a reviewing court that Brown understood the nature of the charges to which he pleaded guilty. We further conclude that Brown adequately alleged that he did not understand the nature of the charges to which he pleaded guilty. Finally, we conclude that there were shortcomings with respect to Brown's apparent waiver of constitutional rights.

¶6 Accordingly, we reverse the court of appeals and remand to the circuit court for an evidentiary hearing at which the State will have an opportunity to present evidence that Brown understood the nature of the charges to which he pleaded guilty and understood the rights he gave up. See Hampton, 274 Wis. 2d 379, ¶46. If the State cannot prove by clear and convincing evidence that Brown understood the nature of the charges and the constitutional rights he gave up, the circuit court shall grant Brown's motion to withdraw his guilty pleas.

I. FACTS AND PROCEDURAL HISTORY

¶7 The criminal complaint alleges that on July 19, 2001, Brown and two other males approached Steven Booth at a Milwaukee hotel where Booth worked. Brown and the other men robbed Booth at gunpoint and forced him into the hotel room where Booth lived with his girlfriend. Booth's girlfriend was sleeping in the room when the men entered. Once in the room, Brown and his

friends rummaged through the victims' belongings, forced Booth into the bathroom, and each sexually assaulted Booth's girlfriend. Some of these allegations are in dispute.

¶8 The criminal complaint charged Brown with first-degree sexual assault by use or threat of use of a dangerous weapon,[3] armed burglary,[4] and armed robbery.[5] Subsequently, the State filed an information that added a charge of kidnapping.[6] On all four counts, Brown was named as party to the crime pursuant to Wis. Stat. § 939.05. All four counts were Class B felonies that carried maximum penalties of 60 years. Wis. Stat. § 939.50(3)(b).

¶9 At the time of these crimes, Brown was a 17-year-old high-school dropout. He had completed ninth grade but was illiterate and had been diagnosed with reading and mathematics disorders. At the sentencing hearing, Brown's attorney told the court: "Mr. Brown is not a slow reader. He's not a poor reader. He is a nonreader. He's as deficient in this regard as anybody I've ever represented in 20-some years."

¶10 At Brown's initial appearance, the court stated the three offenses with which Brown was originally charged and told Brown that each charge carried a maximum penalty of 60 years. In his next court appearance, Brown waived his right to a

[3] Wis. Stat. § 940.225(1)(b).

[4] Wis. Stat. § 943.10(2)(a).

[5] Wis. Stat. § 943.32(1)(a) and (2).

[6] Wis. Stat. § 940.31(1)(b).

preliminary hearing. Neither the criminal complaint nor the information was ever read to Brown in court before the plea hearing.

¶11 After plea negotiations, Brown pleaded guilty, as a party to the crime, to first-degree sexual assault with a weapon, armed robbery with use of force, and kidnapping, at a hearing before Milwaukee County Circuit Judge Jeffrey Wagner.[7] Because of Brown's illiteracy, no plea questionnaire and waiver of rights form was completed. Instead, Brown's attorney, Patrick Earle, advised the circuit court that the requirements for a valid guilty plea, including "the factual basis," would have to be done orally.

¶12 Despite this notice, the circuit court never addressed any of the elements of the crimes to which Brown pleaded guilty. The entire exchange between the circuit court and Brown concerning the nature of the charges was as follows:

> THE COURT: But we need a signed Guilty Plea Questionnaire and Waiver of Rights form.
>
> MR. EARLE: Okay.[8]
>
> THE COURT: If I have one, then you can——I mean do you feel comfortable with what you've said to him and gone over the provisions that are contained in that form, right?

[7] In exchange for his guilty pleas, the State agreed to dismiss the charge of armed burglary and have it read in at sentencing.

[8] Completed documents were never supplied for the record.

MR. EARLE: I've gone over every word.

THE COURT: All right. Then he can sign the one that he's got.

MR. EARLE: I wasn't able to put all the elements of all three offenses on each one. I started to fill out one and decided I could do it orally with him. So I don't have three for him to sign, just this one. I would have to do three more.

THE COURT: But he understands those elements of the offenses?

MR. EARLE: Yes.

THE COURT: You've gone over those elements with him?

MR. EARLE: Yes.

THE COURT: Okay. Sir, do you understand what you're charged with, the charges against you? The first degree sexual assault while armed; is that correct?

THE DEFENDANT: Yeah.

THE COURT: And the armed robbery, party to a crime?

THE DEFENDANT: Yeah.

THE COURT: And the kidnapping, party to a crime?

THE DEFENDANT: Yeah.

THE COURT: You have read the Complaint or had it read to you?

THE DEFENDANT: Yeah.

THE COURT: So you understand it?

THE DEFENDANT: Yes.

. . . .

THE COURT: You understand the charges to which you're pleading to?

THE DEFENDANT: Yeah.

. . . .

THE COURT: And you've gone over the elements with your lawyer, right?

THE DEFENDANT: Yeah.

THE COURT: And, Counsel, you've gone over those elements specific with him as to each one of those counts?

MR. EARLE: Yes.

THE COURT: And he appeared to understand those elements the State would have to prove?

MR. EARLE: Yes.

¶13 After accepting Brown's guilty pleas, the circuit court added:

THE COURT: Now, you've gone over the concept of party to a crime with your lawyer, also, right?

THE DEFENDANT: Yeah.

THE COURT: You understand that also?

THE DEFENDANT: Yeah.

¶14 Next, the circuit court reviewed the constitutional rights Brown waived by pleading guilty, including the right to a trial; the right to a jury and a unanimous verdict; the right not to incriminate himself; the right to testify and present evidence; the right to subpoena witnesses; the right to confront witnesses; and the right to make the State prove the elements of each count beyond a reasonable doubt. Additionally, the circuit

court explained that each charge carried a maximum sentence of 60 years.

¶15 Based on the colloquy, the circuit court accepted Brown's guilty pleas. At the subsequent sentencing hearing, Brown was sentenced to 25 years initial confinement and 25 years extended supervision by Circuit Judge M. Joseph Donald.[9]

¶16 After sentencing, Brown timely filed a postconviction motion under Wis. Stat. § 809.30, seeking to withdraw his guilty pleas on the basis that the pleas were not knowing, intelligent, and voluntary. The motion alleged that the elements of the offenses were not recited or discussed, that the record failed to demonstrate Brown understood the elements of the charges or the constitutional rights he was waiving, and that the record lacked an accurate and complete recitation of the potential penalties or the possibility of consecutive sentences. The motion also alleged indirectly that Brown did not understand the information that should have been presented at the plea hearing.

¶17 Judge Wagner denied Brown's motion without an evidentiary hearing, finding that the plea colloquy met the requirements of both Wis. Stat. § 971.08 and Bangert. The court

[9] The circuit court sentenced Brown to 10 years for the sexual assault, and 40 years each for the armed robbery and kidnapping. The 40-year sentences are concurrent to each other, and consecutive to the 10-year sentence. The sentences are bifurcated as follows: for the sexual assault, 5 years initial confinement and 5 years extended supervision; for the armed robbery, 20 years initial confinement and 20 years extended supervision; for the kidnapping, 20 years initial confinement and 20 years extended supervision.

of appeals summarily affirmed, and we granted Brown's petition for review.

II. STANDARD OF REVIEW

¶18 When a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in "manifest injustice." State v. Thomas, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. One way for a defendant to meet this burden is to show that he did not knowingly, intelligently, and voluntarily enter the plea. State v. Trochinski, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891; State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998); State v. Krawczyk, 2003 WI App 6, ¶9, 259 Wis. 2d 843, 657 N.W.2d 77.

¶19 When a guilty plea is not knowing, intelligent, and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea "violates fundamental due process." State v. Van Camp, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. Trochinski, 253 Wis. 2d 38, ¶16. We accept the circuit court's findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant's plea was knowing, intelligent, and voluntary. Id.

¶20 The issue presented in this case does not require us to determine whether Brown's guilty pleas were knowing, intelligent, and voluntary. Our task is to determine whether

Brown has raised sufficient concerns about whether his pleas were knowing, intelligent, and voluntary to entitle him to an evidentiary hearing on his motion to withdraw the pleas.

¶21 Brown's postconviction motion concerns alleged deficiencies in the plea colloquy. Whether Brown has pointed to deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing is a question of law we review de novo. See State v. Brandt, 226 Wis. 2d 610, 618, 594 N.W.2d 759 (1999). Likewise, whether Brown has sufficiently alleged that he did not know or understand information that should have been provided at the plea hearing is a question of law. See State v. Bentley, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

III. THE BANGERT REQUIREMENTS FOR A PLEA COLLOQUY

¶22 Given the frequency with which violations of Wis. Stat. § 971.08[10] and Bangert are alleged, and in light of the inadequate plea colloquy in this case, we take this opportunity to reexamine the legal tenets fundamental to guilty pleas.

[10] Wisconsin Stat. § 971.08(1) provides in part:

> (1) Before the court accepts a plea of guilty or no contest, it shall do all of the following:
>
> (a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

¶23 The duties established in Wis. Stat. § 971.08,[11] in Bangert, and in subsequent cases are designed to ensure that a defendant's plea is knowing, intelligent, and voluntary. The faithful discharge of these duties is the best way we know for courts to demonstrate the critical importance of pleas in our system of justice and to avoid constitutional problems.[12]

¶24 The Bangert opinion is a timeless primer on the foundation principles of the plea colloquy. It answers the oft-expressed concern that pleas consume too much valuable court time.

¶25 The United States Constitution sets forth the standard that a guilty or no contest plea must be affirmatively shown to be knowing, intelligent, and voluntary. Bangert, 131 Wis. 2d at 260. If this showing does not appear in the transcript of the plea hearing, there is a high probability that it will have to be shown in a postconviction hearing.

¶26 Historical perspective on the required procedure is valuable. In Bangert this court confronted the implications of a decision it had made a year earlier. In State v. Cecchini, 124 Wis. 2d 200, 368 N.W.2d 830 (1985), the court held

[11] Wis——JI Criminal SM-32 (1995) summarizes the duties a circuit court should complete in accepting a guilty, no contest, or Alford plea and prescribes a recommended procedure to ensure no step is omitted. See North Carolina v. Alford, 400 U.S. 25 (1970). We strongly encourage courts to follow these plea-acceptance procedures.

[12] "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction." Boykin v. Alabama, 395 U.S. 238, 242 (1969).

unanimously that prior to accepting a plea, a trial court "must ascertain that the defendant understands the nature of the charge, and that this must be done on the record at the plea hearing." Id. at 201 (emphasis added). The court added: "Because the trial court failed to do so . . . the plea was involuntary and unknowing and in violation of the defendant's right to due process." Id. In short, under Cecchini, a deficient plea colloquy was per se a violation of due process and required withdrawal of the defendant's plea.

¶27 Then Bangert came along. It involved a defendant who had murdered an Eau Claire police officer. Although the defendant had been involved in extensive proceedings and discussions before his plea, his plea colloquy was plainly insufficient to show that he understood the nature of the charge. If Cecchini were applied, Bangert could withdraw his plea as a matter of right.

¶28 The Bangert court reconsidered the Cecchini rule and withdrew language from that opinion, but it did not compromise or "discard the mandatory requirement that trial judges undertake a personal colloquy with the defendant to ascertain his understanding of the nature of the charge[.]" Bangert, 131 Wis. 2d at 260 (emphasis added).

¶29 The court held that a plea will not be voluntary unless the defendant has a full understanding of the charges against him. Id. at 257 (citing Brady v. United States, 397 U.S. 742, 748 n.6 (1970)). In addition, for a plea to function as a valid waiver of constitutional rights, the plea must be an

intentional relinquishment of known rights. Id. at 265 (citing McCarthy v. United States, 394 U.S. 459, 466 (1969); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Thus, a plea will not be voluntary unless the defendant understands the nature of the constitutional rights he is waiving. Bangert, 131 Wis. 2d at 265.

¶30 To ensure a knowing, intelligent, and voluntary plea, Bangert also required that a trial judge explore the defendant's capacity to make informed decisions.

¶31 In his concurring opinion, Chief Justice Nathan Heffernan stated: "Cecchini established that a complete record of a defendant's understanding of a plea be made at the plea hearing. This procedure discourages postconviction attacks." Id. at 298 (Heffernan, C.J., concurring). "[A] postconviction cure procedure simply means there will be one or more evidentiary hearings on the plea withdrawal issue." Id. at 299.

¶32 Smarting from this criticism, the majority condemned perfunctory colloquies, facially superficial colloquies, and ritualistic colloquies. "This court cannot overemphasize the importance of the trial court's taking great care in ascertaining the defendant's understanding" of the nature of the charges and the constitutional rights being waived. Id. at 266, 270.

¶33 To head off postconviction hearings on plea withdrawals, the court said:

> We reiterate that the duty to comply with the plea hearing procedures falls squarely on the trial

> judge. We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude."

Id. at 278-79 (quoting Boykin v. Alabama, 395 U.S. 238, 243-44 (1969)) (emphasis added). "Such solicitude will serve to forestall postconviction motions, which have an even more detrimental effect on a trial court's time limitations than do properly conducted plea hearings." Id. at 279.

¶34 To assist circuit courts, the Bangert decision outlined a judge's duties at a plea hearing, drawing on Wis. Stat. § 971.08, familiar case law, and Wis JI——Criminal SM-32 (1985), Part V, Waiver of Constitutional Rights. Bangert, 131 Wis. 2d at 261-62, 270-71. We take this opportunity to restate and supplement the Bangert outline.

¶35 During the course of a plea hearing, the court must address the defendant personally and:

> (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;[13]
>
> (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;[14]

[13] State v. Bangert, 131 Wis. 2d 246, 261-62 389 N.W.2d 12 (1986).

[14] Id. at 262.

(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;[15]

(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;[16]

(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;[17]

(6) Ascertain personally whether a factual basis exists to support the plea;[18]

(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;[19]

(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;[20]

(9) Notify the defendant of the direct consequences of his plea;[21] and

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[15] Id.

[16] Id.

[17] Id.; Wis. Stat. § 971.08(1)(a).

[18] Id.; Wis. Stat. § 971.08(1)(b).

[19] State v. Hampton, 2004 WI 107, ¶24, 274 Wis. 2d 379, 683 N.W.2d 14; Bangert, 131 Wis. 2d at 270-72.

[20] Hampton, 274 Wis. 2d 379, ¶¶20, 69; State ex rel. White v. Gray, 57 Wis. 2d 17, 24, 203 N.W.2d 638 (1973).

[21] State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998). The most contemporary interpretation of this requirement is catalogued in Wis JI——Criminal SM-32.

> (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). [22]

¶36 A circuit court's failure to fulfill a duty at the plea hearing will necessitate an evidentiary hearing if a defendant's postconviction motion alleges he did not understand an aspect of the plea because of the omission. As Bangert put it: "Whenever the sec. 971.08 procedure is not undertaken or whenever the court-mandated duties are not fulfilled at the plea hearing, the defendant may move to withdraw his plea." Bangert, 131 Wis. 2d at 274. Assuming the defendant's postconviction motion is adequate to require a hearing, he may withdraw his plea after sentencing as a matter of right unless the state can show the plea was entered knowingly, intelligently, and voluntarily, despite the deficiencies in the plea hearing. Trochinski, 253 Wis. 2d 38, ¶17; Van Camp, 213 Wis. 2d at 139.

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[22] See State v. Douangmala, 2002 WI 62, ¶19, 253 Wis. 2d 173, 646 N.W.2d 1.

The court is also required by Wis. Stat. § 971.08(1)(d) to inquire of the district attorney whether he or she has complied with Wis. Stat. § 971.095(2) concerning consultation with victims.

Wisconsin Stat. § 971.08 is modeled on the 1970 version of Federal Rule of Criminal Procedure 11. Bangert, 131 Wis. 2d at 260-61. Since that time, Rule 11 has been significantly amended to impose a greater number of duties upon federal district court judges before accepting a guilty or no contest plea. Many of the accretions to Rule 11 are tracked in Wisconsin case law and amendments to Wis JI——Criminal SM-32.

¶37 If a defendant does not understand the nature of the charge and the implications of the plea, he should not be entering the plea, and the court should not be accepting the plea. On the other hand, if a defendant does understand the charge and the effects of his plea, he should not be permitted to game the system by taking advantage of judicial mistakes.

¶38 Under our rules, a defendant can wait until he knows his sentence before he moves to withdraw his plea, and he may not be disadvantaged by this delay as long as he is able to point to a deficiency in the plea colloquy. Thus, only the court, with the assistance of the district attorney, can prevent potential sandbagging by a defendant by engaging the defendant at the plea colloquy and making a complete record. See Bangert, 131 Wis. 2d at 275.

¶39 After sentencing, in cases that involve an alleged deficiency in the plea colloquy, an attempt to withdraw a guilty plea proceeds as follows. The defendant must file a postconviction motion under Wis. Stat. § 809.30 or other appropriate statute. The motion must (1) make a prima facie showing of a violation of Wis. Stat. § 971.08(1) or other court-mandated duties by pointing to passages or gaps in the plea hearing transcript; and (2) allege that the defendant did not know or understand the information that should have been provided at the plea hearing. Bangert, 131 Wis. 2d at 274.

¶40 When a Bangert motion is filed, it is reviewed by the court. If the motion establishes a prima facie violation of Wis. Stat. § 971.08 or other court-mandated duties and makes the

requisite allegations, the court must hold a postconviction evidentiary hearing at which the state is given an opportunity to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy.[23] Bangert, 131 Wis. 2d at 274. When the defendant has met his two burdens, the burden of producing persuasive evidence at the evidentiary hearing shifts to the state.[24] Id. at 275. In meeting its burden, the state may rely "on the totality of the evidence, much of which will be found outside the plea hearing record." Hampton, 274 Wis. 2d 379, ¶47. For example, the state may present the testimony of the defendant and defense counsel to establish the defendant's understanding. Bangert, 131 Wis. 2d at 275. The state may also utilize the plea questionnaire and waiver of rights form, documentary evidence, recorded statements, and transcripts of prior hearings to satisfy its burden.

¶41 If the state is able to meet its burden, the hearing should be over. In a theoretical sense, the burden will have

[23] There will be no need for an evidentiary hearing if the court grants the defendant's motion to withdraw his plea. Of course, the objective of a complete plea colloquy, beyond assuring that a defendant's plea is knowing, intelligent, and voluntary, is to minimize the necessity of a postconviction evidentiary hearing on the plea.

[24] As we explained in Bangert, 131 Wis. 2d at 275, part of the reason the burden shifts from the defendant to the state is that this burden-shifting "will encourage the prosecution to assist the trial court in meeting its sec. 971.08 and other expressed obligations."

shifted back to the defendant, but there is nothing for the defendant to prove because the defendant is not entitled to turn a Bangert hearing into a fishing expedition on other issues that were not pleaded in the defendant's original motion.

¶42 When the defendant files a dual purpose motion——that is, a Bangert motion combined with a motion that alleges ineffective assistance of counsel or some other problem affecting the plea that is extrinsic to the plea hearing record——the court should make an initial ruling on whether an evidentiary hearing is required and, if it is, what the hearing will address. It must be remembered that when the defendant makes the type of motion discussed in Bentley, which requires testimony or the examination of evidence outside the existing record, the defendant is entitled to an evidentiary hearing only if his postconviction motion alleges facts that, if true, would entitle him to relief. Id. at 310. "To ask the court to examine facts outside the record in an evidentiary hearing requires a particularized motion with sufficient supporting facts to warrant the undertaking." Hampton, 274 Wis. 2d 379, ¶61. In addition, the defendant maintains the burden of proof in a Bentley-type hearing and the facts adduced must show manifest injustice by clear and convincing evidence before the defendant may withdraw his plea. Bentley, 201 Wis. 2d at 311.

IV. BROWN'S MOTION

¶43 This case concerns whether Brown's postconviction motion was sufficient to require an evidentiary hearing because of alleged deficiencies in the plea colloquy. Accordingly, we

must determine (1) whether Brown has made a prima facie showing that Wis. Stat. § 971.08(1) or other court-mandated duties were not followed, and (2) whether he adequately alleged that he did not understand information that should have been provided at the plea hearing.

¶44 Brown contends the circuit court failed to conform to its plea-taking duties in three respects. First, the circuit court did not establish that Brown understood the nature of the charges to which he pleaded guilty. Second, the circuit court did not adequately inform Brown of the constitutional rights he waived by pleading guilty. Third, the circuit court did not adequately explain the range of punishments associated with each charge. We will address each of Brown's challenges to the plea colloquy.

A. The Nature of the Charges

¶45 Brown argues he made a prima facie showing that he did not understand the nature of the charges based on the fact that the plea hearing lacked any discussion of the elements of the offenses to which he pleaded guilty. The State responds that the circuit court established Brown's understanding of the charges at the plea hearing in other ways. Both parties rely upon Bangert.

¶46 In Bangert we said a circuit court may establish the defendant's understanding of the charges to which he is pleading by any one of, or combination of, the following non-exhaustive methods. "First, the trial court may summarize the elements of the crime charged by reading from the appropriate jury

instructions, see Wis. JI——Criminal SM-32, Part IV [1995], or from the applicable statute." Bangert, 131 Wis. 2d at 268.

¶47 "Second, the trial judge may ask defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing." Id. (emphasis added).

¶48 "Third, the trial judge may expressly refer to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing." Id. "For example, when a criminal complaint has been read to the defendant at a preliminary hearing, the trial judge may inquire whether the defendant understands the nature of the charge based on that reading." Id. "A trial judge may also specifically refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge." Id.

¶49 The State emphasizes that the Bangert list is non-exhaustive, and we agree. There may be other ways to show a defendant's understanding of the charges.

¶50 In this case, the State notes: (1) Brown's defense attorney stated he had reviewed the elements with Brown; (2) Brown confirmed that his attorney reviewed with him the elements of the charges; and (3) Brown said he understood the charges.

¶51 These representations are not sufficient to establish that Brown's plea was knowing, intelligent, and voluntary. The State concedes that where an illiterate defendant is involved,

the better practice is to use one of the three methods expressly stated in Bangert to establish that the defendant understood the nature of the charges.

¶52 Complying with the requisite standards is not optional. Bangert requires that the plea colloquy establish the defendant's understanding of the nature of the charges, the range of penalties, the constitutional rights being waived, and other essential information on the record. We observed in Bangert that the method a circuit court employs to ascertain a defendant's understanding should depend upon "the circumstances of the particular case, including the level of education of the defendant and the complexity of the charge[s]." Bangert, 131 Wis. 2d at 267-68. The less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges.

¶53 In the present case, the circuit court did not follow any of the methods established in Bangert. The circuit court never enumerated, explained, or discussed the elements of first-degree sexual assault, armed robbery, or kidnapping, or the facts making up the elements. Although Brown's attorney stated that he had explained the nature of the charges to Brown, the circuit court never asked either Brown or his attorney to summarize the extent of the explanation or the elements of the crimes on the record. The circuit court never referred to the record from prior court proceedings to establish that Brown

understood the nature of the charges.[25] The circuit court never referred to or summarized the charges as found in a plea questionnaire or other writing signed by Brown, because there were no such documents.

¶54 The fact that there was no plea questionnaire at hand should have warned the court that special steps were imperative to ensure, on the record, that the defendant was fully apprised and understood the charges, the potential penalties, and the panoply of valuable rights he was surrendering by entering his plea. The absence of the plea questionnaire and waiver of rights form prevented the court from using these documents to instruct the defendant, to assess the defendant's understanding, or to construct an invulnerable record. The absence of these documents will now hamper the State at the evidentiary hearing.

¶55 An examination of the record illustrates why the court's failure to enumerate or discuss elements of the crimes may have shortchanged the defendant. Brown pleaded guilty to all charges as a party to the crime without the circuit court ever explaining or ensuring that the defendant understood the concept of party to a crime. This could be significant for four reasons. First, at the plea hearing Brown's attorney said that Brown denied that he personally held or pointed a gun in Booth's hotel room. Second, at the sentencing hearing, Brown's attorney repeated Brown's denial that he had intercourse with Booth's

[25] Indeed, the circuit court could not have done so because the record is silent in that respect.

girlfriend. Third, the court never referenced "party to a crime" when it mentioned the sexual assault charge. Fourth, Attorney Earle acknowledged, "perhaps I didn't prepare him as well for his plea as I should have . . . perhaps we should have tendered a no contest plea with regard to the sexual assault." These statements and omissions raise questions of whether Brown understood the concept of party to a crime, an essential element of the charges to which he pleaded guilty.

¶56 The admission by Brown's original attorney that he may not have fully prepared Brown to plead guilty to the sexual assault charge also helps to explain why a court cannot rely very heavily upon mere statements from defense counsel that he or she has reviewed the nature of the charges with a defendant. Bangert requires verification, independent of defense counsel's assertion, that a defendant understands the nature of the charges. See Bangert, 131 Wis. 2d at 267 (requiring the circuit court to "ascertain that the defendant possesses accurate information about the nature of the charge"). Hence, Bangert requires a circuit court to summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document

signed by the defendant that includes the elements.[26] Id. at 268. Each method enables a court to ascertain the accuracy of the defendant's knowledge; each method gives substantive content to a defendant's understanding. Cf. id. at 269 ("Understanding must have knowledge as its antecedent; knowledge, like understanding, cannot be inferred or assumed on a silent record."). Moreover, we encourage circuit court judges to translate legal generalities into factual specifics when necessary to ensure the defendant's understanding of the charges.

¶57 Unfortunately, the record in this case is bereft of what Brown knew and understood about the charges to which he pleaded guilty. Although Brown's attorney stated he reviewed the charges with Brown, we do not know whether he accurately described and discussed all the elements because that is not on the record. In view of Brown's illiteracy, his one-word responses, the complexity of the charges, and the absence of a plea questionnaire, Brown's one-word acknowledgment that he reviewed the elements with his attorney and understood them is conclusory, not persuasive.

[26] We recognize that the United States Constitution is satisfied by defense counsel's representation that he or she has reviewed the elements of each charge with the defendant, and the defendant's acknowledgement that the elements were indeed reviewed by counsel. Bradshaw v. Stumpf, 545 U.S. 175, 192 (2005). Since Bangert, however, we have interpreted Wis. Stat. § 971.08 to require a court to obtain more direct confirmation of a defendant's understanding before accepting a plea.

¶58 We conclude Brown's postconviction motion alleges a prima facie violation of Wis. Stat. § 971.08. Although a circuit court must establish that a defendant understands every element of the charges to which he pleads, the circuit court is not expected to explain every element of every charge in every case. This opinion is intended to revitalize Bangert, which allows a court to tailor a plea colloquy to the individual defendant.[27] In customizing a plea colloquy, however, a circuit court must "do more than merely record the defendant's affirmation of understanding." Bangert, 131 Wis. 2d at 267. As we stated in Bangert:

> [I]t is no longer sufficient for a trial judge merely to perfunctorily question the defendant about his understanding of the charge. Likewise, a perfunctory affirmative response by the defendant that he understands the nature of the offense, without an affirmative showing that the nature of the crime has been communicated to him or that the defendant has at some point expressed his knowledge of the nature of the charge, will not satisfy the requirement of sec. 971.08, Stats.

[27] The need to expand the colloquy in certain cases is echoed by the American Bar Association, which states, "where a court is uncertain about the defendant's understanding, perhaps because of the defendant's lack of education or low intelligence, it may be advisable to ask the defendant to explain in his or her own words what several of the rights mean." III American Bar Association, Standards for Criminal Justice, § 14-1.4 at 14.28 (2d ed. 1980). Although this section pertains to establishing a defendant's understanding of what constitutional rights are waived by a guilty plea, the footnote to this sentence demonstrates it applies with equal force to establishing a defendant's understanding of the nature of the charges.

Bangert, 131 Wis. 2d at 268-69 (emphasis added). A statement from defense counsel that he has reviewed the elements of the charge, without some summary of the elements or detailed description of the conversation, cannot constitute an "affirmative showing that the nature of the crime has been communicated." Id. at 268.

¶59 To earn a Bangert evidentiary hearing, a defendant must satisfy a second obligation. In addition to making a prima facie case that the circuit court erred in the plea colloquy, a defendant must allege he did not enter a knowing, intelligent, and voluntary plea because he did not know or understand information that should have been provided at the plea hearing. Bangert, 131 Wis. 2d at 274. Accordingly, we turn to the question whether Brown's postconviction motion sufficiently alleged that he did not understand the nature of the charges to which he pleaded guilty.

¶60 The State contends Brown failed to adequately allege that he did not understand the nature of the charges. The State argues Brown's motion to withdraw his guilty pleas was insufficient because it failed to specifically state what Brown did not understand.

¶61 Brown's motion reads in part as follows:

> The guilty plea record fails to demonstrate that Mr. Brown actually understood the elements of any of the crimes to which he pled guilty. The guilty plea record also fails to demonstrate that Mr. Brown actually understood the valuable constitutional rights he was waiving.
>
> . . . .

> Illustration of the second part of defendant's burden, that Mr. Brown "did not know or understand the information which should have been provided at the plea hearing" is (only a bit) more problematic. Undersigned counsel considered, but rejected, having Mr. Brown execute an affidavit to this effect. An affidavit would suffer from the same flaw as the (never executed) Plea Questionnaire——to wit, what use is an affidavit executed by an illiterate defendant?
>
> Counsel also considered submitting his own affidavit. This suffers from a different flaw, placing counsel in the untenable dual role of advocate and witness. Suffice it to say that counsel has discussed the issues raised herein and represents that Mr. Brown appears to understand very little of what transpired in connection with the entry of his guilty pleas. His testimony will make this clear beyond dispute. (Emphasis added.)

¶62 We share the State's concern that this motion does not allege directly that the defendant did not know or understand certain information that should have been provided or addressed at the plea hearing. A defendant is not required to submit a sworn affidavit to the court, but he is required to plead in his motion that he did not know or understand some aspect of his plea that is related to a deficiency in the plea colloquy.

¶63 This requirement is necessary for at least three reasons. First, if the defendant is unwilling or unable to assert a lack of understanding about some aspect of the plea process, there is no point in holding a hearing. The ultimate issue to be decided at the hearing is whether the defendant's plea was knowing, intelligent, and voluntary, not whether the circuit court erred. The court's error has already been exposed. In the absence of a claim by the defendant that he

lacked understanding with regard to the plea, any shortcoming in the plea colloquy is harmless.

¶64 Second, if the defendant alleges that he did not understand some aspect of the plea colloquy (such as the nature of the charges) but the transcript shows that the court's treatment of the subject was unassailable, the defendant's motion for a hearing cannot be granted on the basis of a deficiency in the transcript. On that score, the defendant's motion will have failed to make a prima facie showing that the plea colloquy was deficient. Strictly speaking, a Bangert motion relies on information in the record. When a defendant moves to withdraw a plea based on information outside the record, the defendant has a higher burden and must meet the standards set out in Bentley, 201 Wis. 2d at 318.

¶65 Third, when a Bangert-type motion is granted, the state should know from the pleading what it is required to prove at the evidentiary hearing. A Bangert evidentiary hearing is not a search for error; it is designed to evaluate the effect of known error on the defendant's plea so that the court can determine whether it must accept the withdrawal of the defendant's plea. The state must be given fair notice of what it must prove.

¶66 In this case, defense counsel persuasively documented deficiencies in the plea hearing transcript, but the motion did not allege directly that the defendant did not understand the nature of the charges against him. Counsel explained his decision not to submit an affidavit from the defendant or

himself, but he did not explain why the defendant could not plead that he did not understand the nature of the charges. We are required to infer such an allegation from the totality of the motion. In this case, we accept counsel's representations that the defendant lacked understanding about the charges and that the defendant's "testimony will make this clear beyond dispute."

¶67 In the ordinary case, defense counsel should plead with greater particularity a defendant's lack of understanding. A defendant must identify deficiencies in the plea colloquy, state what he did not understand, and connect his lack of understanding to the deficiencies. See Hampton, 274 Wis. 2d 379, ¶57; State v. Giebel, 198 Wis. 2d 207, 217, 541 N.W.2d 815 (Ct. App. 1995). This procedure should prove fair to both parties.

¶68 Because this case is being remanded to the circuit court for a hearing, we will respond to the defendant's two other attacks on the plea colloquy.

B. Waiver of Constitutional Rights

¶69 Brown alleges that the colloquy was insufficient with respect to the waiver of constitutional rights.

¶70 The Plea Questionnaire/Waiver of Rights form lists seven statements of constitutional rights that a defendant agrees to give up by entering a plea. The form reads as follows:

1. I give up my right to a trial.

2. I give up my right to remain silent and I understand that my silence could not be used against me at trial.

3. I give up my right to testify and present evidence at trial.

4. I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.

5. I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.[28]

6. I give up my right to confront in court the people who testify against me and cross-examine them.

7. I give up my right to make the State prove me guilty beyond a reasonable doubt.

¶71 The circuit court paraphrased these statements, asking the defendant if he was giving up each right. Six times the defendant answered "yeah;" one time the defendant answered "yes."

¶72 The circuit court was told earlier in the hearing that defense counsel had gone over the content of the plea questionnaire on two occasions. "I've gone over every word," counsel declared.

¶73 Brown contends the court "never engaged Brown in any discussion concerning the several constitutional rights waived by the plea." On these facts, he has a point. The transcript reveals no representation by Brown's attorney that he ever had a

[28] This statement does not take into account the possibility of a hung jury. We respectfully suggest that the Judicial Conference Forms Committee review the wording of this point.

quality discussion with Brown about the meaning or value of the defendant's constitutional rights. The court itself never probed the subject or elicited more than perfunctory one-word answers to its questions.

¶74 This aspect of the colloquy contrasts dramatically with a court commissioner's colloquy with Brown when he waived a preliminary examination:

> The Court: You're waiving your right to a preliminary hearing. Do you know what that is?
>
> The Defendant: Yeah.
>
> The Court: Tell me what it is, please.
>
> The Defendant: To get my next court date.
>
> The Court: Wrong. Try again. What is a preliminary hearing? What are you waiving? I've got to know that you know what you're waiving.
>
> The Defendant: Oh, well, what we discussed?
>
> Mr. Earle: Yes.
>
> The Court: What is a preliminary hearing?
>
> The Defendant: What we discussed, about what happened.
>
> The Court: Well, that doesn't help. I know that you understand. Let me define what I think a preliminary hearing is, and you tell me if you agree with it. Okay?
>
> The Defendant: Yes.
>
> The Court: All right. At a preliminary hearing the State must establish by evidence two things: Number 1, that a felony occurred in Milwaukee County, a serious crime. Number 2, that you were

> probably responsible for it. It's a preview of the State's case. Is this what you want to waive? Hello?
>
> The Defendant: Yes?
>
> The Court: Is that what you want to waive?
>
> The Defendant: Yes.

¶75 The commissioner's colloquy is more in keeping with our expectation of what a court should do when it is dealing with a poorly educated defendant than the circuit court's colloquy. The commissioner was not satisfied with one-word answers.

¶76 On the facts of this case, where the defendant was illiterate, where there was no waiver of rights form, and where there was no rendition by Brown's attorney of a meaningful discussion of the defendant's rights, the court should have done more to show that the defendant understood the rights he was giving up by entering a plea.

¶77 Probing questions may not always be necessary, but they help to ensure a defendant's understanding and they help to complete the hearing record. Upon remand, the State, which remained silent in the face of an inadequate colloquy, will be required to show that the defendant made a knowing, intelligent, and voluntary waiver of his constitutional rights.

C. Maximum Potential Sentence

¶78 Brown also claims that the circuit court violated Wis. Stat. § 971.08(1) by failing to state that the punishment for each charge could run consecutively. The circuit court stated that each charge was a Class B felony and that it could

impose a 60-year sentence for each charge. We find it difficult to accept Brown's suggestion that failure to inform a defendant who is facing multiple charges that the sentence imposed on each charge could be consecutive (that is, the total sentence could add up to more than 60 years), would render a defendant's plea not knowing, intelligent, and voluntary. The reasonable conclusion when a defendant is confronted with multiple charges is that the defendant could face multiple punishments. That realization is a major explanation for plea bargains that reduce the number of charges. Although the better practice is to advise a defendant of the cumulative maximum sentence he could receive from consecutive sentences, we do not believe the omission of such information should allow a defendant to withdraw a guilty plea in the absence of any allegation that the defendant did not understand the effect of multiple charges on his sentence. Failure to understand this simple concept would signal more serious problems with the plea. Even if we found error in the omission, it would be harmless on these facts because Brown's total sentence did not reach the maximum on even one of the Class B felonies.

V. CONCLUSION

¶79 Brown's postconviction motion makes a prima facie showing that the circuit court did not comply with Wis. Stat. § 971.08 and Bangert in conducting the plea colloquy. The circuit court did not satisfactorily enumerate, explain, or discuss the facts or elements of the three felonies in a manner that would establish for a reviewing court that Brown understood

the nature of the charges to which he pleaded guilty. We further conclude Brown adequately alleged that he did not understand the nature of the charges to which he pleaded guilty. Finally, we conclude that there were shortcomings with respect to Brown's waiver of constitutional rights. Accordingly, the court of appeals decision is reversed and the case is remanded for an evidentiary hearing at which the State will have an opportunity to present evidence that Brown understood the nature of the charges to which he pleaded guilty and the constitutional rights he gave up, despite the deficiencies in the plea hearing.

By the Court.—The decision of the court of appeals is reversed and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

May 17, 2006

The Judge and Plea Agreements

The longstanding rule in Wisconsin is that the trial court may not participate in plea bargaining. This rule has been extended to disfavoring all attempts to require the judge to indicate when he or she will not go along with the sentence recommended in an agreement.

The Wisconsin Supreme Court most recently reviewed this issue in State v. Williams, 2000 WI 78, 236 Wis.2d 293, 613 N.W.2d 132. The defendant in this appeal asked the court "to adopt a new rule of procedure, which would require that if a trial judge anticipates exceeding the state's sentence recommendation under a plea agreement, the trial judge must inform the defendant of that fact and allow the defendant to withdraw his or her plea." ¶1. The court denied the request, reaffirming the traditional rule against judge participation in the plea agreement process.

SM-32, Accepting A Plea Of Guilty, includes questions that reflect the traditional rule. However, in footnote 11, the following is stated:

> Some Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant the opportunity to withdraw the guilty plea at that point. . . . This is similar to the practice recognized by the ABA Standards For Criminal Justice, which allows the parties to give advance notice of the plea agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement if such concurrence is consistent with the material disclosed in the presentence report. Section 3.3, ABA Standards Relating To The Plea Of Guilty. Also see Rule 11(c) of the Federal Rules Of Criminal Procedure. The Wisconsin Supreme Court has declined to adopt this practice as a statewide requirement. . . .

At the time this was written, it appeared to the committee that the trend among state judges was toward following the ABA Standards/Federal Rule 11 procedure. The committee will be revising the comments to SM-32 and is interested in knowing whether that perception is accurate today.

Further, the PPAC Court Efficiencies Sub-Committee is considering whether any changes might improve the efficiency of plea acceptance procedures.

Therefore, both groups are interested in receiving your comments and suggestions on this topic. On the back of this page are four questions. Please share any feedback you would like these committes to have by responding to the questions and returning this page, attaching more comprehensive remarks if you wish, to the address indicated. Or, leave your completed form with Judicial Education staff for forwarding.

The Judge and Plea Agreements
[Summary – 86 Responses]

1. As to typical plea agreements in your court, how often do they include a specific sentence recommendation?

__1__ Never __7__ Occasionally __78__ Often

2. In cases where you believe you are likely to impose a more severe disposition than called for, or apparently anticipated by, the plea agreement, do you advise the defendant of that fact?

__22__ Never __25__ Occasionally __37__ Always [2 – "Rarely"]

3. If you answered "Yes" to question 2., do you advise the defendant that he or she may withdraw his plea of guilty at that time?

__15__ Never __9__ Occasionally __39__ Always

4. If you have advised defendants that they may withdraw their plea under these circumstances, how often do they withdraw?

__20__ Never __26__ Occasionally __1__ Always

Comments/Suggestions:

Name: _____ [optional]
County:

Years on the bench:	0+	5+	10+	15+	20+	25+
	7	17	20	11	13	10

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