WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 2010AP001414 CR

KENNETH B. BONNER,

Defendant-Appellant.

AN APPEAL FROM AN ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL, CIRCUIT JUDGE, PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Did the Circuit Court err by denying the Defendant-Appellant's Motion to Withdraw Guilty Plea?

The Circuit Court answered this question in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Recognizing the criteria set forth in § 809.22, Rules of Appellate Procedure, the Defendant-Appellant believes that this is a matter where oral argument might well be of assistance to the Court in resolving the matter. While the general principles of law applicable to the issues raised are well established, the application of those principles to the facts of this case would be advanced by the ability of the parties to address the Court.

Recognizing the criteria set forth in § 809.23 Rules of Appellate Procedure this Court's decision may well add to the jurisprudence related to allowing defendants to represent themselves and the acceptance of guilty pleas by the Circuit Courts. The

decision of this Court may well assist parties and courts in fulfilling their obligations during the plea acceptance process. Consequently publication of the opinion is recommended

STATEMENT OF THE CASE

A. Nature of Case

This appeal arises as a consequence of the entry of an Order by the Circuit Court denying the Defendant's Motion to Withdraw Guilty Plea after sentencing and the entry of a Judgment of Conviction.

B. Procedural Status of the Case and Disposition in the Circuit Court

On September 24, 2009 the Milwaukee County District Attorney's Office issued and filed a Criminal Complaint alleging in Count I that the Defendant, on or about January 1, 2009, issued a worthless check in an amount less than $2,500.00 (R. 2). This Count alleged a Class A Misdemeanor. Count II of the Complaint alleged the issuance of a worthless check by the Defendant on January 14, 2009 in an amount in excess of $2,500.00. The Complaint alleged that Count II was a Class I Felony. On this same date the Defendant made his Initial Appearance. A five hundred dollar cash bail was set. A Preliminary Examination was scheduled for October 2, 2009.

On October 2, 2009, the Defendant appeared as required for the Preliminary Examination. He appeared without counsel. A stay of the proceedings was ordered and an Indigency Hearing was scheduled for October 8, 2009.

On October 8, 2009 the Court ordered the appointment of counsel for the Defendant at the expense of the County and ordered that the Defendant make payments to

defray this expense. The Court scheduled the Preliminary Examination for October 26, 2009.

On October 26, the Defendant appeared with appointed counsel, Lori Kuehn, for the Preliminary Examination. After evidence was presented by the State the Defendant was bound over for trial. On October 26, 2009 an Information was filed (R. 5) alleging the same two offenses alleged in the Criminal Complaint.

On January 20, 2010, the matter was scheduled for a Final Pretrial Conference. The Defendant appeared with appointed counsel; the Defendant advised the Court that he had secured retained counsel, Attorney James Toran. The Court allowed Ms. Kuehn to withdraw as counsel; the Court re-scheduled the matter for the following day to allow Mr. Toran to appear.

On January 21, 2010, the Defendant appeared with Mr. Toran. The previously scheduled January 25th trial date was cancelled.

On January 28, 2010, the Defendant appeared for a Status Conference. Mr. Toran did not appear as a consequence of illness. Mr. Toran telephonically contacted the Court and the Court ordered the matter adjourned to February 9, 2010.

On February 9, 2010, the Defendant and Mr. Toran appeared. Mr. Toran moved to withdraw as counsel and the Court granted his motion. The Court then scheduled the matter for Jury Trial on March 1, 2010.

On March 1, 2010 the Defendant appeared before the Circuit Court for Milwaukee County. The matter was scheduled for jury trial on that date. The Defendant appeared without counsel. On that date a representative of Attorney James Toran appeared and

provided to Assistant District Attorney Jon Neuleib the defense copy of discovery materials related to this case. Mr. Neuleib then provided the copy to the Defendant.

Ultimately, an Amended Information was filed alleging a single count, the misdemeanor count originally charged as Count I of the Complaint and Information. The Defendant entered a plea of guilty to the Amended Information; the Court found the Defendant guilty and entered a Judgment of Conviction.

On March 26, 2010 the Defendant appeared for sentencing. Having heard from the parties, the Court ordered the Defendant to serve nine months in the Milwaukee County House of Corrections. The Court stayed that sentence and placed the Defendant on probation for a period of one year. The Court further ordered that the Defendant serve sixty days of conditional time at the Milwaukee County House of Correction and make restitution in the amount of $8,879.94.

On May 6, 2010 a Motion to Withdraw Guilty Plea supported by an Affidavit and a Memorandum of Law was filed with the Court (R. 21, 23, 22). The Court scheduled the motion for a hearing on May 11, 2010.

On May 11, 2010 the Court heard argument from the parties and rendered an oral decision denying the Defendant's Motion.

On May 24, 2010 the Court executed a written Order denying the Defendant's Motion to Withdraw his Guilty Plea for the reasons stated in the Court's May 11 oral decision.

On June 4, 2010 a Notice of Intent to Pursue Post-Conviction Relief and a Notice of Appeal from the Court's Order denying the Defendant's request to withdraw his guilty plea were filed with the Clerk of Circuit Court for Milwaukee County.

C. Statement of Facts

On March 1, 2010 the Defendant appeared before the Circuit Court as a consequence of a jury trial having earlier been scheduled. At the time the Defendant appeared, he appeared without counsel. On the morning of March 1 someone associated with Attorney James Toran left a packet of discovery relating to the Defendant's case with Assistant District Attorney Jon Neuleib. Mr. Neuleib provided the discovery to Mr. Bonner. Mr. Neuleib, in describing this situation to the Court, advised that the Defendant was not ready. (R.37:2)

In light of this report, the Court inquired as to whether the Defendant had hired a lawyer. The Defendant responded in the negative and indicated that he intended to represent himself. (R.37:3)

The Court asked a series of questions relating to the Defendant's financial situation. The Court also indicated that the Defendant had a lawyer appointed at County expense and had retained Mr. Toran. The Court opined "Based upon your income and your expenses, I feel that you can afford a lawyer." (R.37:5) The Court also indicated that if the Defendant wanted to represent himself the Court understood. The Court did inquire regarding the tardy delivery of discovery to the Defendant. The Defendant responded that he had attempted on several occasions to contact Attorney Toran by telephone and by sending text messages. (R.37:5)

A long colloquy occurred between the Court and the Defendant regarding the "deadline" with respect to negotiated resolutions of the case. (R.37:5-7) The Defendant on multiple occasions indicated in response to remarks of the Court that he would go to trial. (R.37:6, 10, 12, 13)

After a potential new date for trial was selected the Defendant asked for an opportunity to further discuss resolution of the case with the Assistant District Attorney (R.37:15) The Court granted the request and passed the case. (R.37:15)

When the case was recalled the Court was advised that an Amended Information had been filed and a plea agreement reached. (R.37:15-26)

The agreement provided that the District Attorney would move to dismiss Count 1, a misdemeanor, of the original Information outright. The State would move to amend Count 2 of the original Information, and the only count in the amended information to a misdemeanor, despite the amount of the check being in excess of $2500.00. (R.37:16, 17)

During the discussion between the Court and the District Attorney regarding the amended charge the Defendant indicated he had a question regarding the wording of the Amended Information. He stated that it was incorrect that he intended the check not be paid. (R.37:16) The Court's response was that he couldn't plead because that intent was one of the elements the State had to prove. (R.37:16-17)

During the Court's explanation of the "elements" of the amended offense the Defendant asked if he could share things with the Court regarding the offense. (R.37:21) Without inquiring as to the nature of the things the defendant wished to share the Court

said: "Certainly those are mitigating circumstances, but they are not a defense, sir." (R.37:21)

Shortly after this exchange the Defendant, acknowledging that there were insufficient funds in the checking account when the check was written, said:

> "I was told by an attorney - - I gave him my routing number and my checking account number, and he guaranteed me he was going to wire that money in there on behalf of his client.
> I took him at his word, and that's how I deposited those checks. When he didn't come through, I was left holding the bag."
> (R.37:22)

The Court responded that the facts described were a mitigating circumstance - not a defense. (R.37:22)

Continuing its guilty plea colloquy, the Court advised the Defendant that he had to admit that he issued the check. The Defendant acknowledged this fact. (R.37:22-23) The colloquy continued:

> "The Court: And that you intended it not be paid because there wasn't enough money in your checking account to pay it.
>
> Mr. Bonner: I can't agree with that, but it happened.
>
> The Court: You have to agree that you intended that it not be paid because at the time you wrote the check there wasn't $10,000.00 in the account.
> You may have had a promise that $10,000.00 was going to be put in there, but that ain't good enough. Do you understand, sir?

Mr. Bonner: I understand that.

The Court: And you admit to those facts?

Mr. Bonner: Yes sir.

(R.37:23)

In response to the Court's question whether the defendant was pleading guilty to the amended charge Mr. Bonner said:

> "I am guilty for writing the check. I am guilty for writing it. I should have never trusted him. So I am guilty. I wrote the check. I was innocent in what I did, but I am guilty for doing it."
>
> (R.37:23)

The Court then proceeded to ask the Defendant questions consistent with the content of the Plea Questionnaire / Waiver of Rights and Addendum to plea questionnaire form utilized in the Milwaukee County Circuit Court. (R.37:24-31, App. 7-9)

In its colloquy with the Defendant, the Court at one point said:

> "Do you understand if it was in front of a jury, all twelve members of the jury would have to find you guilty of what I just read to you on the jury instructions? Do you understand that?
>
> (R.37:25)

The Defendant said he did understand.

The Court then said:

> "You are also giving up your right to remain silent. And you understand that your silence could be used against you. Do you understand that, sir?
>
> (R37:25)

The Defendant responded that he did understand.

At a later point in the colloquy the Court corrected its first question regarding unanimity of a jury. The Court asked:

> "You are also giving up your right to a jury trial where all twelve jurors would have to agree that you are guilty or not guilty?"
>
> (R.37:26)

The Defendant indicated that he understood this as well.

The Court also advised the Defendant that, accepting the Defendant's plea of guilty, the Court would use the allegations in the Criminal Complaint against him. The Defendant responded he understood. (R.37:28)

The Court and the Defendant also engaged in the following questions and answers:

> "The Court: And also you are giving up your right to challenge the sufficiency of the Complaint; that is, whether or not the Complaint had enough to charge you with this crime in the first place. You understand that?
>
> Mr. Bonner: Yes.
>
> The Court: And you are also giving up your right to raise any defenses. Do you understand that, sir?
>
> Mr. Bonner: Yes, Sir."
>
> (R.37:30)

Late in the colloquy the Court asked "Do you want to hire a lawyer to help you with this, sir?" The Defendant responded no. (R.37:31)

Near the conclusion of the Court's plea colloquy it inquired "are there any questions about what you are doing here that you have for me?" (R.37:32) The Defendant responded:

> "No. Not based on what you said as it relates to the law. If I wrote it, whatever - - regardless of my intentions if I wrote based on the law - -"
>
> (R.37:32)

The Court interrupted the Defendant's remark by saying: "I'll give you a copy of the law if you want it, sir. I prepared it for the trial. If you want a copy of it, I'll give it to you. (R.37:32)

The Court having failed to place the Defendant under oath prior to the plea colloquy swore the Defendant. (R.37:32) The Court then had the Defendant review and execute the documents the Court prepared - the Plea Questionnaire / Waiver of Rights form and the Addendum to that form. (R.37:33)

The Court, with the consent of the State, relied upon the Criminal Complaint as the factual basis for the acceptance of the Defendant's plea. (R.37:35-36)

Such further facts are necessary for a resolution of the issue raised in this case will be found in appropriate portions of the Argument.

ARGUMENT

I. SUMMARY OF ARGUMENT

The Court, on March 1, a the date scheduled for a jury trial, was confronted by the appearance of an unrepresented Defendant. The Court made inquiry regarding the Defendant's financial status or ability to retain counsel. The Court explained at length the

Defendant had a deadline to accept a plea offer made by the State. The deadline was March 1.

The Court gave the parties time to talk about a negotiated settlement.

Ultimately, the Court accepted the Defendant's plea of guilty to a misdemeanor Issue of Worthless Check charge.

During the Court's colloquies with the Defendant regarding the entry of a guilty plea, the Court never asked a question or solicited information about the Defendant's asserted desire to represent himself or his ability to effectively act *pro se.*

The Court engaged in a colloquy regarding the entry of the Defendant's plea that misstated or wholly neglected to address certain of the Constitutional rights the Defendant was waiving.

The Court also discounted the Defendant's assertion that he did not intend at the time of the check's writing that the check would not be paid.

The Court found there was a sufficient factual basis to accept the Defendant's guilty plea despite the fact that the person to whom the "check" in question was written was paid, the Defendant's protestations that he never intended the check to not be paid and the absence of any statement in the Criminal Complaint that the Defendant received "notice" the check was not paid.

II. STANDARD OF REVIEW

A Defendant seeking to withdraw a guilty plea after sentencing bears the initial burden of establishing a *prima facie* case that the Circuit Court failed to conduct the plea hearing in conformity with the dictates of §971.08 Stats. or failed to fulfill other

mandated procedures. If the Defendant makes such a showing, the burden then shifts to the State to prove by clear and convincing evidence that the Defendant's plea was entered knowingly, voluntarily and intelligently despite the inadequacy of the record at the time of the plea's acceptance. *State v. Bangert,* 131 Wis. 2d 246,274, 389 N.W. 2d 12 (1986).

In order for a Defendant to prevail he must ordinarily show a manifest injustice. *State v. Rock*, 92 Wis. 2d 554,558, 285 N.W. 2d 739 (1979)

On appellate review, the issue of whether a plea was voluntarily and intelligently entered is a question of constitutional fact and is reviewed by this Court independently of the lower court's conclusion. The trial court's findings of evidentiary or historical facts will be sustained unless contrary to the great weight and clear preponderance of the evidence. *State v. Bangert, supra,* 131 Wis.2d at 283, 389 N.W.2d 12.

III. ARGUMENT

A. The Court Failed To Conduct An Inquiry Regarding The Defendant's Ability To Effectively Represent Himself

On March 1, 2010 the Defendant appeared before the Circuit Court for Milwaukee County, the Honorable Dennis R. Cimpl, Circuit Judge, presiding. The Defendant's case was scheduled for a Jury Trial. The proceedings began with Assistant District Attorney John Neuleid, appearing on behalf of the State, advising the Court that

> "Mr. Toran - - I don't know about his associate, his fellow counsel, provided a packet which is essentially the entire discovery packet was dropped off to me even after your deputy told him that Mr. Bonner was sitting in the front row at approximately sometime during the 9:00

> hour. I provided that to Mr. Bonner. He is not ready."
>
> (R.37:2)

The Court obtained from Mr. Neuleib an affirmation that the State was prepared to proceed. (R.37:2-3)

The Defendant advised the Court that he had just received the discovery and had not had an opportunity to look at it. The Court inquired whether Mr. Bonner had retained a lawyer. Mr. Bonner advised the Court had not retained a lawyer and intended to represent himself. (R.37:3)

The Court proceeded to ask Mr. Bonner a series of questions regarding his employment, his income, his wife's employment, her income and expenses on behalf of the Defendant and his wife on a monthly basis. (R.37:3-5) Having made these inquiries the Court said:

> "Well, I have given you one lawyer at county expense. I am not giving you another. Based upon your income and your expenses, I feel that you can afford a lawyer.
>
> If you want to represent yourself, that's certainly it. I can understand that. Why didn't you call Mr. Toran and get this discovery ahead of time?"
>
> (R.37:5)

In response the Defendant indicated that he had attempted on several occasions to obtain the discovery from Mr. Toran. He advised that Mr. Toran's voice mail was full and could not receive messages. He has also indicated that he had sent text messages. (R.37:5)

The Court then advised the Defendant that "...any offers at this point are off the table?" (R.37:38) The Court proceeded to advise the Defendant that the Court would not

accept "anything" other than a plea to the two charges, the felony and the misdemeanor. (R.37:5-6) The Defendant acknowledged he understood the Judge's position.

While the Court was discussing potential trial dates with the State, the Defendant interjected that he had questions about the offer made by the State. (R.37:8)

The Court explained the maximum penalties the Defendant faced with respect to each of the two counts of the Information. The Court advised that it was not a part of any negotiations and that sentencing was entirely at his discretion. (R.37:8-10)

The Defendant indicated that he would go to trial. The Defendant said "I think good common sense says that if I ran that possibility its best for me to prove my innocence. I'll go to trial. (R.37:10) The Court indicated to the Defendant that the State had to prove him guilty; the Defendant did not have to prove his innocence. (R.37:10) The Defendant again indicated that he would go to trial. (R.37:10)

The Court indicated to the Defendant the process of sentencing and discussed the four goals of sentencing. (R.37:11-12) The Defendant again said that he would go to trial. (R.37:12, 13)

Other than advising the Defendant that he believed it could afford to retain a lawyer and that another lawyer would not be appointed, the Court made no inquiries regarding the Defendant's ability to represent himself. The Court did not engage in a colloquy with the Defendant focusing on the Defendant's "knowing or voluntary waiver of his right to counsel."

In *State v. Klessig,* 211 Wis. 2d 194, 564 N.W. 2d 716 (1997) the Supreme Court, recognizing that a defendant in the State of Wisconsin is guaranteed, both by the federal

and state constitutions, the fundamental right to the assistance of counsel for his defense also acknowledged that the federal and state constitutions guarantee a defendant the right to conduct his own defense. The Court in discussing the potential conflict between these rights said:

> "When a defendant seeks to proceed pro se, the circuit court must ensure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel and (2) is competent to proceed pro se. [citations omitted] If these conditions are not satisfied, the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel."
>
> *State v. Klessig, supra,* 211 Wis. 2d at 203-204, 564 N.W. 2d at 720.

Having earlier, in *Pickens v. State,* 96 Wis. 2d 549, 292 N.W. 2d 601 (1980), indicated the need for careful consideration when a defendant expressed the desire to represent himself, the Court in *Klessig* said:

> "...we mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel. Conducting such an examination of the defendant is the clearest and most efficient means of ensuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and post conviction appeals."
>
> *State v. Klessig, supra,* 211 Wis. 2d at 206, 564 N.W. 2d at 721.

The Court then went on to say:

> "To prove [such] a valid waiver of counsel, the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him. *See:* 96 Wis. 2d at 563-64, 292 N.W. 2d 601. If the Court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel."
>
> *State v. Klessig, supra,* 211 Wis. 2d at 206, 564 N.W. 2d 721-22. (emphasis supplied)

Once the Defendant indicated he would represent himself, the Court conducted no inquiry regarding the Defendant's choice to proceed without counsel. The Court asked no questions and presented no information outlining the difficulties and disadvantages of self-representation. Admittedly, the Court did advise the Defendant of the maximum penalties he faced and the Defendant acknowledged he understood the Court's advisal regarding those penalties.

Moreover, the Court conducted no inquiry that would provide a basis for finding that the Defendant was "competent" to proceed pro se.

A suggested format to establish the competence of an individual to represent himself is set forth in SM-30 Wis. JI - Criminal. The Special Material outlines with specificity the inquiries required by *Klessig*. As the Court began dealing with the

Defendant as a *pro se* defendant, the record is void of any inquiries or findings required by the Supreme Court's holding in *Klessig*.

The Court failed utterly to fulfill the mandate.

B. Insufficiency of the Plea Acceptance Colloquy.

In *State v. Jenkins*, 2007 WI 96, 303 Wis. 2d 157, 736 N.W. 2d 24 (2007) the Court provided a historical summary of the increasing obligations placed upon courts in the State of Wisconsin to ensure the entry of knowing intelligent and voluntary pleas. The Court noted that it had proceeded from no standard requirement through a series of additions to the plea colloquy requirement. The Court said in discussing this progression:

> "The effect of more elaborate and comprehensive plea colloquies is to ensure that pleas are knowing, intelligent, and voluntary. *Id,* ¶ 23. The corresponding impact, however, is to make it more difficult for defendants to withdraw their pleas. Unlike circuit courts at the time of *Strickland*, circuit courts today are expected to develop an extensive record relating to the defendant's personal understanding of the plea. The undertaking has changed the notion that guilty pleas are merely tentative until after sentence. As long as circuit courts follow the court mandated and statutory plea colloquies, defendants will ordinarily have difficulty showing a fair and just reason for plea withdrawal if the reason is based on grounds that were adequately addressed in the plea colloquy.
>
> *State v. Jenkins, supra*, 2007 WI 96 ¶ 60 (fn omitted).

In the instant case, a pro se defendant was on multiple occasions advised by the Court that a potential defense was not a defense but rather a mitigating fact.

After the Defendant's sentencing on March 26, 2010 the Defendant filed a Motion and Affidavit seeking to withdraw his guilty plea. The Defendant's Motion asserted that the Court failed to conduct the inquiry required by law as to the Defendant's competency to represent himself in proceedings before the Circuit Court and the Court during the guilty plea colloquy did not fulfill the requirements set forth in § 971.08(1) Wis. Stat. The Defendant also asserted that there was a failure to comply with the process described in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W. 2d 12 (1986). The Affidavit annexed to the Motion set forth specific failures on the part of the Court to comply with the statute and holdings in *State v. Klessig, supra*, 211 Wis. 2d 194, 564 N.W. 2d 716 (1997) and *Bangert, supra* (R.21-23; App. pp.10-13).

The Court, having reviewed the Motion set the matter for a hearing on May 11, 2010. At the hearing, appearances having been made by the parties' counsel, the Court inquired whether or not the State had an opportunity to review the transcript of the plea hearing. The State responded it had. (R.39:3) The Court also inquired whether the State conceded that a "*prima facia* case" had been made resulting in a shift of the burden of proof to the State. The State so conceded. (R.39:3)

The State then called the Defendant as a witness.

The Defendant testified that he felt "forced" to enter a guilty plea to the Amended Information alleging a single misdemeanor count of Issue of a Worthless Check as a consequence of the deadline set by the Court. (R.39:6) The Defendant further indicated that he believed he was misinformed by the Court during the plea colloquy. The State inquired what the Defendant meant by "misinformed." The Defendant responded "I was

told that I didn't have the defense." (R.39:7) The Defendant further indicated this "misinformation" regarding the defense was provided by the Judge. (R.39:7) The Defendant further testified that although funds were not in his account at the time the check was written he did intend that the check be paid. (R.39:8)

The Defendant testified that with respect to the required unanimity of twelve jurors he did not understand that right on the day he entered his plea. His lack of understanding was based upon his having been told he didn't have a defense. (R.39:12-13)

The Defendant did testify that the check described in the Amended Information was paid by the bank. The funds were disbursed to the person to whom the check was written. (R.39:16)

The Court, at the conclusion of the May 11 Evidentiary Hearing, stated, with respect to the issue of compliance with *Klessig* and Wisconsin JI - Criminal, SM-30:

> "As a part of the guilty plea colloquy with him, I asked the questions that are mandated by *Pickens* and *Klessig*; and if I hadn't gotten the right answers to those questions, I would have stopped the guilty plea and I would have said, no, you got to have a lawyer to help you with the guilty plea. But I was satisfied that Mr. Bonner made a deliberate choice to proceed without counsel, was aware of the difficulties and disadvantages of self-representation."
> (R.39:25)

The Court further said:

> "These are all of the things that I should have gone in with him before the guilty plea colloquy, but I didn't know at the time that I wasn't going to give him a lawyer at county expense, and that's my call.
>
> * * *
>
> So I am satisfied that belatedly I complied with the requirements of SM-30, *Pickens* and *Klessig*."
>
> (R.39:25-26)

The Court's questions it is respectfully submitted that a belated inquiry does not fulfill the Circuit Court's duty. It is further submitted that the Court's "questions" during the plea colloquy were not adequate to address the Defendant's ability to represent himself.

Without the assistance of counsel, the Defendant accepted a plea offer from the State. The offer itself was complex. The State agreed to dismiss Count 1 of the original Information, a misdemeanor, and to amend Count 2, a felony, to a misdemeanor despite the "amount" of the check ($10,000.00) being consistent with a felony violation. (R.37:17-18)

The Court engaged in a colloquy with the Defendant to make a record for acceptance of his plea to the Amended Information. The Court pressed on with that colloquy despite the Defendant questioning the wording of the Information. (R.37:16)

> "Mr. Bonner: I do have a question about the wording.
>
> The Court: Ok.

> Mr. Bonner: When it says the Defendant intended not to be - - intended not to be paid.
>
> The Court: I understand, sir.
>
> Mr. Bonner: That's not correct.
>
> The Court: Well, then you can't issue - - you can't plea because that's one of the things the State has to prove. Ok? What Mr. Neuleib has presented is an Amended Information. In effect, is Count 1 going to be dismissed outright?"
>
> (R.37:16-17)

When "reading the elements of the offense to which the Defendant was pleading, the Court included a rebuttable "presumption" found in the jury instruction without identifying the "presumption" as one." (R.37:21)

The Court said in response to an interjection by the Defendant "if you wrote a check for $10,000.00 on December 16, 2008 and you don't have the money into it, the law presumes that you didn't intend it to be paid. Ok?" (R.37:22)

The Defendant proceeded to describe his "defense," but the Court labeled it a "mitigating circumstance." (R.37:22) The Defendant stated he couldn't agree that he didn't intend the check to be paid. (R.37:23)

During the Court's questions regarding rights the Defendant was waiving, the following occurred:

> "The Court: Do you understand that if it was in front of a jury, all twelve members of the jury would have to find you guilty of what I just read to you on the jury instructions. Do you understand that?

> Mr. Bonner: Yes, sir.
>
> The Court: You are also giving up your right to remain silent. And you understand that your silence could be used against you. Do you understand that, sir?
>
> Mr. Bonner: Yes, sir."
>
> (R.37:25)

At a later point the Court did "correct" its statement regarding jury unanimity. (R.37:26)

Late in the plea hearing the Court asked if the Defendant had any questions. (R.37:32) The Defendant responded:

> "Mr. Bonner: No. Not based on what you said as it relates to the law. If I wrote it, whatever my - - regardless of my intentions if I wrote it based on the law - -"
>
> (R.37:32)

The Court interrupted and indicated that it would provide a copy of the law to Mr. Bonner.

In making its findings that the plea was knowing, voluntary and intelligent and that a factual basis existed for acceptance of the plea the Court relied upon the Criminal Complaint. (R.37:36)

In *State v. Bangert*, 131 Wis. 2d 246, 389 N.W. 2d 12 (1986) the Court enumerated the obligations placed upon a circuit court in accepting a plea of guilty. They are:

> (1) To determine the extent of the defendant's education and general comprehension.

> (2) To establish the accused's understanding of the nature of the crime with which he is charged and the rage of punishments which it carries;
>
> (3) To ascertain whether any promises or threats have been made to him in connection with his appearance, his refusal of counsel, and his proposed plea of guilty;
>
> (4) To alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused;
>
> (5) To make sure that the defendant understands that if a pauper, counsel will be provided at no expense to him, *Ernst*, 43 Wis.2d at 674, 170 N.W.2d 713 (citing *State ex rel. Burnett v. Burke*, 22 Wis.2d 486, 494, 126 N.W.2d 91(1964)); and
>
> (6) To personally ascertain whether a factual basis exists to support the plea. *Id.*
>
> *State v. Bangert, supra,* 131 Wis. 2d at 262, 389 N.W. 2d at 21.

See also: § 971.08(1)(a) and (b) Wis. Stat.

The Court must make a record establishing that the Defendant understood the constitutional rights the Defendant was waiving by entry of a plea. See: *State v. Brown*, 2006 Wis. 100, 293 Wis. 2d 594, 716 N.W. 2d 906; *Edwards v. State*, 51 Wis. 2d 231, 186 N.W. 2d 193 (1971); Wis JI Criminal SM-32.

In this case, the Court misinformed the Defendant regarding the "meaning" of two fundamental constitutional rights - the right to a jury trial and his right against self-

incrimination. (R.37:25) The Court failed in its obligation to determine the appropriateness of the Defendant acting *pro se*.

The Court disregarded the Defendant's protestations of innocence - the existence of a potential defense. See: *Dudrey v. State*, 74 Wis. 2d 480, 247 N.W. 2d 105 (1976)

The Court's reliance upon the Criminal Complaint to establish a factual basis for the plea is also problematic. The second element of a violation of § 943.21(1) Stat. is:

> "2 At the time the check was issued, the Defendant intended that it not be paid.
>
> This requires that the defendant issued the check knowing or believing that it would not be paid."
>
> Wis JI - Criminal 1468

The jury instruction provides that a rebuttable presumption may arise if insufficient funds were in the account when the check was written and the check was not paid within five days of receiving notice it was not paid. The Complaint contains no information regarding notice of non-payment being given the Defendant. See: *State v. Lackershire*, 2007 WI 74, 301 Wis. 2d 418, 734 N.W. 2d 23.

The Court, in denying the Defendant's Motion to Withdraw his plea, at the May 11 hearing said:

> "Again, I am limited to what the transcript says, but I will go to my grave saying that the court reporter missed the word "not" in that sentence. I'm positive I said the word "not." However, there is no question a fair reading of the entire transcript is that Mr. Bonner understood that the word "not" was

> there, and he answered that he understood his right to remain silent and he understood that his silence could not be used against him because he answered that affirmatively."
>
> (R.39:27-28)

The transcript is the record. There is no clear and convincing evidence that Mr. Bonner understood his silence could not be used against him.

The Court also, with respect to the elements of the offense, said that it had advised Mr. Bonner that the presumption based upon failure to pay after receiving notice was rebuttable. (R.39:28) The record simply does not sustain this finding.

The Court's plea acceptance colloquy failed to comply with the requirements of law.

III. Conclusion

As a consequence of the foregoing, the Defendant would respectfully request that the Court enter an Order directing that the Defendant be allowed to withdraw the guilty plea previously entered.

Dated at Milwaukee, Wisconsin this 7th day of September, 2010.

Respectfully submitted,

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By:

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WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.: 2010AP001414 CR

KENNETH B. BONNER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S APPENDIX

CERTIFICATION OF COMPLIANCE WITH REGARD TO THE APPENDIX

Dennis P. Coffey, Counsel for the Defendant-Appellant, certifies to the Court as follows:

1. I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that it contains: (1) a table of contents; (2) the findings or opinions of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning with regard to the issue raised.

2. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

3. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin this 7th day of September, 2010.

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FORM AND LENGTH CERTIFICATION

Dennis P. Coffey, Counsel for Defendant-Appellant, certifies to the Court as follows:

1. I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) Stats. for a brief produced with a proportional Serif font. The length of this brief is 5,985 words.

Dated at Milwaukee, Wisconsin this 7th day of September, 2010.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

Dennis P. Coffey, Counsel for Defendant-Appellant, certifies to the Court as follows:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I hereby certify that:

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

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated at Milwaukee, Wisconsin this 7th day of September, 2010.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

Dennis P. Coffey, Counsel for Defendant-Appellant, certifies to the Court as follows:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated at Milwaukee, Wisconsin this 7th day of September, 2010.

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