STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP450-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIUS C. BURTON,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE PATRICIA D. MCMAHON AND THE HONORABLE KEVIN E. MARTENS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this court, oral argument and publication are appropriate.

STATUTES INVOLVED

Wisconsin Stat. § 971.06.[1] **Pleas. (1) A defendant charged with a criminal offense may plead as follows:**

(a) Guilty.

(b) Not guilty.

(c) No contest, subject to the approval of the court.

(d) Not guilty by reason of mental disease or defect. This plea may be joined with a plea of not guilty. If it is not so joined, this plea admits that but for lack of mental capacity the defendant committed all of the essential elements of the offense charged in the indictment, information or complaint.

(2) If a defendant stands mute or refuses to plead, the court shall direct the entry of a plea of not guilty on the defendant's behalf.

(3) At the time a defendant enters a plea, the court may not require the defendant to disclose his or her citizenship status.

Wisconsin Stat. § 971.08. Pleas of guilty and no contest; withdrawal thereof.

(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.

(b) Make such inquiry as satisfies it that the defendant in fact committed the crime charged.

(c) Address the defendant personally and advise the defendant as follows: "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 with

[1] All references to the Wisconsin State Statutes are to the *2009-10* edition, unless otherwise indicated.

which you are charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization, under federal law."

(d) Inquire of the district attorney whether he or she has complied with s. 971.095(2).

(2) If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea of guilty or no contest on any other ground.

(3) Any plea of guilty which is not accepted by the court or which is subsequently permitted to be withdrawn shall not be used against the defendant in a subsequent action.

Wisconsin Stat. § 971.15. Mental responsibility of defendant.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

(2) As used in this chapter, the terms, "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

Wisconsin Stat. § 971.165 Trial of actions upon plea of not guilty by reason of mental disease or defect.

(1) If a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect:

(a) There shall be a separation of the issues with a sequential order of proof in a continuous trial. The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second.

(b) If the plea of not guilty is tried to a jury, the jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. No verdict on the first plea may be valid or received unless agreed to by all jurors.

(c) If both pleas are tried to a jury, that jury shall be the same except that:

1. If one or more jurors who participated in determining the first plea become unable to serve, the remaining jurors shall determine the 2nd plea.

2. If the jury is discharged prior to reaching a verdict on the 2nd plea, the defendant shall not solely on that account be entitled to a redetermination of the first plea and a different jury may be selected to determine the 2nd plea only.

3. If an appellate court reverses a judgment as to the 2nd plea but not as to the first plea and remands for further proceedings, or if the trial court vacates the judgment as to the 2nd plea but not as to the first plea, the 2nd plea may be determined by a different jury selected for this purpose.

(d) If the defendant is found not guilty, the court shall enter a judgment of acquittal and discharge the defendant. If the

defendant is found guilty, the court shall withhold entry of judgment pending determination of the 2nd plea.

(2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court. No verdict on the plea of not guilty by reason of mental disease or defect may be valid or received unless agreed to by at least five-sixths of the jurors.

(3) (a) If a defendant is not found not guilty by reason of mental disease or defect, the court shall enter a judgment of conviction and shall either impose or withhold sentence under s. 972.13(2).

(b) If a defendant is found not guilty by reason of mental disease or defect, the court shall enter a judgment of not guilty by reason of mental disease or defect. The court shall thereupon proceed under s. 971.17. A judgment entered under this paragraph is interlocutory to the commitment order entered under s. 971.17 and reviewable upon appeal therefrom.

SUMMARY OF RELEVANT FACTS

By criminal complaint, the State charged Burton with the attempted first-degree intentional homicides of police officers Graham Kunisch and Bryan Norberg by use of a dangerous weapon, which occurred on June 9, 2009, during the performance of the officers' duties (2).

The officers stopped Burton, who was riding a bicycle on the sidewalk. Burton struggled with the officers and shot both of them, while their weapons were still holstered (2). A security videotape revealed that Burton turned and fired directly at the officers. Burton pointed a gun at the head of Officer Kunisch and fired directly at his head, from a distance of about two feet (2). Both officers suffered multiple gunshot wounds. Kunisch suffered a gunshot wound that resulted in severe head trauma and the loss of his left eye (2). After shooting the officers, Burton entered a near-by residence, hid in the basement and secreted the gun there (2). He subsequently exited the basement and surrendered to police. His loaded .40 caliber semi-automatic gun was found in the basement with a bullet in the chamber; a magazine with bullets was found on Burton's person (2). In a subsequent interview, Burton told the police he became scared of the officers and fired at them (2).

A competency evaluation was ordered and a competency report finding Burton competent was filed (33:39-50).[2] The State agreed with the competency report, trial counsel stated that neither he nor Burton objected to the evaluator's opinion that Burton was competent and Burton confirmed that on the record (41:2-3). The trial court reviewed the report and found Burton competent (41:3).

[2] None of the expert reports are in the record, except as exhibits to Burton's postconviction motion which is in the record and in Burton's appendix. The reports provided by Burton appear to be accurate copies of the reports filed by the experts. The State does not object to this court considering them.

At the preliminary hearing, police officer Norberg testified that he and Kunisch were in their marked squad car dressed in full, visible police uniform on routine patrol between three and four in the afternoon (42:9-12). Norberg observed Burton riding a full-sized bicycle on the sidewalk, which is a violation of a city ordinance (42:12-13). From the squad car, Norberg made a verbal command to Burton to stop. Burton glanced over and made eye contact with the officers. Norberg continued to make verbal commands to Burton to stop, but instead of stopping, Burton continued to ride the bicycle away from the officers (42:13-14). Norberg got out of the squad car and ran toward Burton on foot, while Kunisch followed Burton in the car (42:14-15).

Norberg approached Burton, grabbed him from the back to get him off the bicycle and tried to gain control of him. Burton said something like "don't put your hands on me. Why are you touching me?" (42:15). Burton resisted Norberg, moving his arms and legs in an apparent attempt to flee (42:15). Kunisch exited the squad and came to the left side of Burton; Norberg was behind Burton, and had gained control of Burton's left arm (42:15). As Norberg was holding Burton's left arm, he felt a muzzle blast from a pistol in his face from a distance of about six inches, and then heard multiple gun shots (42:16-17). As soon as Norberg felt the muzzle blast to his face, he felt burning and immense pain and saw Burton's face showing anger (42:16). Norberg fell to the ground, he felt immense pain in his shoulder and leg, and he could not see or move (42:16-17). Neither officer had withdrawn his firearm, used OC spray, a baton or handcuffs before Burton fired his weapon (42:17). The first bullet went through Norberg's lip, a bullet went into his shoulder and remained there, and he suffered a graze wound to his knee (42:18).

Officer Kunisch testified that when he gave Burton a verbal command to stop riding his bicycle, Burton refused to comply, looked at Kunish and appeared to say something that Kunisch could not hear (42:30). Kunisch

saw Burton flailing his arms, struggling with Norberg. Kunisch attempted to gain control of Burton, then felt extreme pain. He heard two gunshots, fell to the ground and heard two more gunshots (42:31). Kunisch received a severe gunshot wound to his face which destroyed his left eye and did significant damage to his skull, requiring rebuilding of the skull; as a result, his jaw does not operate, he was undergoing therapy for his jaw and suffered persistent pain (42:32). A gunshot wound to his left hand tore out the bone that connects the finger to the hand. The bone was replaced with artificial material, leaving damage and pain (42:31-32). Another gunshot to the shoulder, lodged in the joint, resulting in two surgeries, pain and loss of mobility (42:32). He also sustained a gunshot wound to the back of the neck (42:32).

Detective Christopher Blaszak investigated the scene of the shooting and found several shell casings and fired cartridges (42:42). He obtained a videotape from an outside surveillance camera from a tavern at the location of the shooting and observed the videotape (42:43). The content of the tape showed the officers attempting to gain control of Burton and Burton struggling with them. It showed Burton shooting both officers with a gun. It showed that as both officers were falling to the ground, Burton continued to shoot them. Neither officer had pulled a weapon or done anything to defend themselves (42:44-45).

Probable cause was found and Burton was bound over for trial (42:46). The prosecutor filed the information charging two counts of attempted first-degree intentional homicide by use of a dangerous weapon (42:47; 3). Defense counsel entered a plea of not guilty to both charges on behalf of Burton (42:47).

Trial counsel later added a plea of not guilty by reason of mental disease or defect[3] to the plea of not guilty. The court appointed Dr. Smail to do the mental responsibility evaluation (43:3-4).

Smail's report, which did not support the insanity plea, is contained as an exhibit to Burton's postconviction motion (33:51-61). On November 20, Burton filed a motion to suppress his police statement (10). Burton retained Diane Lytton whose report is contained as an exhibit to Burton's postconviction motion (33:62-91).

Lytton's report opined:

> In my opinion, at the time of the alleged offenses, Mr. Burton clearly experienced several layers of fearfulness, some that could be termed normal, although perhaps exaggerated due to his deficit intelligence. Those normal and reality-based fears included that he was fearful of the gang members' on-going threats to kill him, which included an actual "pretend" shooting of Mr. Burton by one of the threatening gang members. He was fearful of police in general, due to what he viewed in movies. Those were normal fears. Of course, being approached from behind and taken off his bike, at the time of the event, would also certainly cause a fear reaction. However, superimposed upon his normal and reality-based fears was his extreme and increasing delusional paranoia, that resulted from active symptoms of a true psychotic disorder, at the time of the event. It is difficult for non-affected persons who do not suffer from schizophrenia symptoms, to fully understand psychotically-driven paranoia, and how it affects a person and their behaviors. Family members described some of Mr. Burton's increasingly bizarre behaviors as he attempted to deal with his paranoia, such as barricading himself in his home, and purchasing a gun. Although he said that he purchased the gun due

[3] The affirmative defense set forth in Wis. Stat. § 971.15 is referred to as not responsible by reason of mental disease or defect, not guilty by reason of mental disease or defect and an insanity defense. There is no substantive difference between the terms, which the State uses interchangeably.

> to the gang members' threats, my opinion is that he was also driven to buy the weapon due to his psychotic paranoia. His fiancée noted that they moved to another side of the city, where Mr. Burton did not know anyone. The gang members did not apparently reside on that side of the city, as Mr. Burton confirmed. However, his paranoia increased to eventually encompass almost everyone, including even his brother, and his sister, who is his closest sibling.
>
> Mr. Burton acknowledges that, at the time of the alleged offenses, he knew it was illegal to shoot police officers. However, in my opinion, due to the very substantial and significant effects of the schizoaffective disorder on his perceptions of reality and the events around him, he was unable to control his actions. He firmly believed that he would be killed by the officers, and lacked control of his behaviors. The fact that he later attempted to hide, and change his clothing, does not alter the fact that he was suffering from persecutory delusional beliefs that others would kill him, at the time the event was alleged to have occurred. He did understand that what he had allegedly done was illegal, and he deeply regrets his actions. However, at the time of the alleged events, he could not control his behaviors due to his extreme paranoia.

(33:90).

Court appointed expert, Dr. Smail, opined in his written report:

> Mr. Burton is an 18-year-old individual with an early childhood onset of severe emotional and behavioral disturbance documented from incidents at home and at school. At times, he has been described as "violent," "out of control," apt to "fly into rages," "aggressive and dangerous." These emotional and behavioral disturbances compromised his functioning at school such that he was placed in special education classes for the emotionally disturbed and his academically acquired skills lag behind grade placement. Diagnostic conditions of Attention Deficit/Hyperactivity Disorder and Borderline Intellectual Functioning also contributed to his overall poor school performance.

. . . .

There is not much objective evidence in his record to substantiate a diagnosis that may reflect psychosis. His observed behavior has not been clinically bizarre or been shown to have the pervasive disorganization of, for example, Schizophrenia. The only evidence to support any of the diagnoses that may reflect psychosis has been his self reported claim for auditory, visual or tactile hallucinations. The record is very thin with respect to any objective observations of him by trained clinical staff suggesting that what they observed was consistent with individuals who in fact experience hallucinations of any sort. . . . In regards to Mr. Burton's repeated assertions that he experiences auditory, visual or tactile hallucinations, there are non-psychotic reasons why someone may make that claim. It would appear just as likely that a scared or frightened psychologically unsophisticated individual may speak in those terms.

. . . His acquisition of the gun that he had apparently was motivated out of a sense that he needed to protect himself from conflicts that he had with neighbors. These and other behaviors seem to reflect chosen conduct that lies outside of pro-social attitudes and values.

. . . [O]n June 4, 2009 . . . Mr. Burton reported that the medication he was taking was having a positive effect in reducing his frustration and anger. He was described as being "calm." That observation is but five days before the alleged incidents of attempted first-degree intentional homicide. . . . [H]e had contact with the Milwaukee County Mental Health Complex on April 25, 2009 at which time he reported homicidal ideation, auditory, visual and tactile hallucinations. The disposition then was not to admit him for inpatient care, however, in part because the objective evidence of that hallucinatory phenomenon seemed quite vague. Instead, he was given a major tranquilizing drug and referred to the outpatient program just mentioned.

This examination yields the following diagnoses applying to Mr. Burton at the time of the alleged offenses: Mood Disorder NOS by history, Borderline Intelligence and Personality Disorder

> NOS with antisocial features. I do not believe that there is any evidence to reasonably sustain a diagnosis that would reflect a psychosis of any sort for Mr. Burton when he had the altercation with the police officers. These opinions are offered to a reasonable degree of professional certainty.
>
> It is also my opinion that the evidence ultimately fails to indicate that Mr. Burton, at the time of the offense, was substantially unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. The evidence indicates that he was a non-psychotic individual who had a history of explosive temper. He was not in the course of decompensation but in fact had been deemed to be doing quite well by his therapist only several days prior to this incident. The record is silent with respect to any inference that hallucinations or delusions compromised his functioning. When confronted by police he became scared, least (sic) they find the gun that he was carrying, and in some fashion sanction him for it. It was out of his sense of fear as to what the police may do that he took the gun from his waistband and fired over his shoulder at close range toward the police officers who were attempting to arrest him. The fact that Mr. Burton then turned around and fired several more shots at very close range at the officers was a reflection of his fear driven behavior. There is no indication that this behavior was out of his control but merely a response to his fear.
>
> Subsequent to the shooting, Mr. Burton fled the scene, discarded his outer garment as a manner of avoiding detection, and hid in a nearby basement. He apparently locked the door behind him and put on a garment to obscure his identity. He called relatives to say what he had done and that he had made a "mistake." All of that behavior indicates that Mr. Burton knew at the time of the alleged offense that what he had done was wrong.
>
> For the above stated reasons, I believe that there is no evidence to support a special plea. This opinion is also offered to a reasonable degree of professional certainty.

(33:59-61).

The competency evaluator opined:

> Mr. Burton presents a complicated clinical picture. His childhood history is significant for violent, aggressive outbursts, difficulties in attention and concentration, and social maladjustment. He reports a history of perceptual disturbances in the form of visual, auditory, and tactile hallucinations, and suicidal ideation and attempts, as well as nonsuicidal self-injury. Approaching adulthood, he has adjusted very poorly to the demands of independent living and social/occupational functioning. In the past three months, he has been assigned several diagnoses suggestive of a serious psychiatric disorder. The childhood course suggests a neurodevelopmental disorder of childhood progressing toward a serious mental disorder of perception and mood in adulthood. In the context of this evolving clinical presentation, there is substantial clinical evidence to support the conclusion that Mr. Burton is also malingering. In Mr. Burton's case, the evidence supports my opinion that, as opposed to the deliberate fabrication of symptoms, he is exaggerating the subjective severity of his symptoms in an effort to impress upon authorities the extent of his distress, in part reflecting his apprehension in anticipation of the serious consequences he may be facing, and in part reflecting a probable effort to support a special plea. However, his tendency to exaggerate does not automatically negate the presence of an actual psychiatric disorder.

(33:48).

The State made a written plea offer in which Burton would plead guilty to the two charged offenses of attempted first-degree intentional homicide while armed with a dangerous weapon. The State would make a global sentence recommendation of fifty years actual prison confinement time and no specific recommendation on extended supervision time. The victims would be free to make their own sentencing recommendations. The State would be free to argue aggravating and mitigating circumstances. The defense would be free to argue

sentencing, and the defendant would agree to make reasonable restitution (14).

Burton accepted the plea offer and a guilty plea hearing was held (46). The agreement was confirmed on the record (46:3-4).

Burton was sworn and the court conducted a thorough plea colloquy with him (46:4-23). The court had before it the written plea questionnaire and waiver of rights form that Burton and his attorney had signed earlier (15). The attached addendum to the form stated: "I understand that by pleading I am giving up defenses such as alibi, intoxication, self-defense, insanity" and the word insanity was underlined by hand (15:3). Burton confirmed on the record that he had gone over the entire form with counsel, he understood everything in it and he had signed it (46:8).[4]

The trial court advised Burton that it was not bound by the plea agreement sentencing recommendation, and it could impose any sentence up to the maximum of ninety years of initial confinement and forty years of extended supervision (46:6-7). The trial court advised Burton of the constitutional rights he was waiving by pleading guilty and Burton confirmed his understanding of those rights (46:10-11).

The trial court also conducted a personal colloquy with Burton regarding his decision to withdraw his insanity defense. Burton confirmed that he was withdrawing that plea and giving up the right to raise an insanity defense (46:13-15).

The trial court conducted an extensive discussion with defense counsel and Burton regarding Burton's understanding of the nature of the charges, and the effect of his guilty pleas:

[4] Burton mistakenly states he signed the form at the plea hearing. Burton's Br. at 12.

THE COURT: And counsel, are you satisfied that your client understands the nature of the charges, the effects of his plea and is making his plea freely and voluntarily?

MR. LAVOY (Defense Counsel): Yes. The Sheriff's Department provided both myself and Mr. Kim quite a bit of access to Mr. Burton. We have met with him a number of times about defenses, the trial issues, N.G.I. issues, motions. I believe that he's making this decision of his own free will.

We have explained to Mr. Burton we retained experts and the experts are prepared to testify, if necessary. But he's informed us he wishes to accept responsibility by entering the pleas, so I believe that he is doing this of his own free will.

THE COURT: Mr. Burton, did your attorney describe what your conversation, general summary of your conversation is with your attorney?

MR. BURTON: Yes.

THE COURT: So, you talked about this with your attorneys for the time they represented you since the very beginning of this case. Correct?

MR. BURTON: Yes.

THE COURT: And they came and talked with you and talked about your various options in this case. Correct?

MR. BURTON: Yes.

. . . .

MR. WILLIAMS (Prosecutor): Judge, there is a doctor that found Mr. Burton, would render that opinion that Mr. Burton was not guilty by reason of mental disease or defect. I'm assuming that Mr. Burton read that report, knows that report is available and that he has two competent lawyers that would present that if the matter did go [to] trial.

There also is at least one doctor that finds Mr. Burton was not, was, did understand what he

was doing at the time and would contradict that opinion. But Mr. Burton is aware that there is an opinion from a doctor that he would, that he was not guilty by mental disease or defects at the time and he is waiving that right to present that defense.

THE COURT: Counsel, have you had that discussion with your client?

MR. LAVOY: Yes. The doctor that the State's referring to is Dr. Lytton. That is the doctor we retained. I had reviewed that report word for word with Mr. Burton. He is aware of her opinion and he is aware that she would be prepared to testify, if necessary, at trial. But he indicated to me that he wishes to again, accept responsibility and forego that issue.

He's also aware of the other opinions that have been presented by the other doctors referenced by the State. So, it is my opinion that his position is that he wishes to resolve the case with a plea today.

THE COURT: So, the not guilty by reason of mental disease or defect plea would be withdrawn at this time too?

MR. LAVOY: That is correct.

THE COURT: Mr. Burton, you heard what the State said and your counsel said. Do you disagree with anything that they have said so far?

MR. BURTON: No.

THE COURT: And they have had, your attorneys had that conversation with you. Correct?

MR. BURTON: Yes.

THE COURT: And you have gone through, there is a lot of information here. So, they have spent a lot of time with you, haven't they?

MR. BURTON: Yes.

THE COURT: And you specifically talked about your right to raise that

particular defense of mental disease or defect. Correct?

MR. BURTON: Yes.

(46:15-18).

With the consent of both counsel and Burton, the trial court used the criminal complaint, preliminary hearing and security videotape as the factual basis for the guilty pleas to two counts of attempted first-degree intentional homicide while armed with a dangerous weapon (46:19-20). The trial court accepted Burton's pleas, adjudged him guilty of the charged crimes, ordered a presentence investigation and set a date for sentencing (46:23-24).

At sentencing, the prosecutor, defense counsel and Burton personally confirmed the plea bargain, and the prosecutor recommended a global sentence of fifty years initial confinement with no recommendation on extended supervision, as promised (47:3-4). The prosecutor explained that it believed the plea agreement was fair and appropriate because the police officer victims and their families wanted closure and did not want to have to go through a trial, and the recommended sentence would be sufficient to protect the public (47:9-11). The prosecutor acknowledged that Burton had a history of mental health problems, but argued that Burton knew what he was doing and he knew it was wrong (47:7-8).

Defense counsel argued that Burton suffers from mental illness (47:42). Defense counsel explained that the issue of whether Burton was not guilty by reason of mental disease or defect never made it to the jury, which was Burton's choice (47:43). Defense counsel stated he wanted to make it very clear that it was Burton's choice that given his sentence exposure, Burton did not want to go forward with the insanity defense (47:45). Defense counsel stated he did not know if Burton was not guilty by reason of mental disease, but Burton did have a mental illness that played a role in the crimes (47:45). Defense

counsel stated that according to Burton, he was paranoid, panicked and thought the police would find the gun on him and then shoot him with it, so he shot them first (47:45). He summarized Burton's history of mental illness and stated that Burton's condition had stabilized while he was in jail. Medication had alleviated his symptoms and now he would not react the way he had reacted at the time of the incident (47:48-52).

Defense counsel stated that Burton had expressed extreme remorse (47:52). Defense counsel urged the court to give Burton credit for sparing everyone a trial (47:53). Defense counsel stated that no one knew if a jury would have found Burton not guilty by reason of mental disease or defect (47:53). He stated Burton had to make a choice whether to fight this to the bitter end or accept responsibility (47:53). Defense counsel explained that Burton decided to accept responsibility and one of the largest, if not the primary, reason he chose to do that was he was hoping the court would impose a sentence that would give him an opportunity not to die in prison but to get out of prison at some point in time (47:53-54).

Burton exercised his right of allocution, stating to the officers and their families that he was very sorry, he did what he did but it was wrong, he did not mean to do it, he had the gun because somebody was trying to kill him and he was scared (47:56-57).

In imposing sentence, the trial court considered the extreme seriousness of the offenses in which Burton struggled with the officers, shot two police officers several times point blank into their heads, then fled and hid (47:58). The court expressed concern because Burton had no business carrying a firearm and the police were just doing their job (47:58). Although Burton claimed he shot the officers because he was afraid of what they would do, the trial court concluded that Burton shot the officers because he did not want to be arrested and he knew he should not be carrying a gun (47:68). The court took into account the devastating, life-changing impact the crimes

had on the officers, their families and friends, the police department and the entire community (47:59-62; 67-72).

The trial court took into account Burton's mental health issues (47:62-64; 67-72). The trial court discussed Burton's mental health issues at length, and gave Burton credit for sparing the victims and their families a trial (47:62-65). The trial court also considered the needs of the community, and the risk Burton presented to the community (47:65-72).

The trial court imposed a sentence of fifty years on each count — forty years initial confinement and ten years extended supervision — each count consecutive to the other (47:72).

By present counsel, Burton filed a postconviction motion to withdraw his guilty pleas, asserting trial counsel was ineffective because: (1) he failed to pursue a defense of not guilty by reason of mental disease or defect and counseled defendant to plead guilty; (2) trial counsel failed to advise defendant that the court was not likely to follow the State's sentence recommendation; and (3) the trial court failed to advise defendant at the plea hearing that he could plead guilty and still have a jury trial on the insanity defense and therefore his guilty pleas were not voluntarily, knowingly and intelligently made (31:1-2). In the body of his motion, Burton asserted that a defendant is entitled to enter a plea of guilty to the crimes charged and then request a jury trial to determine whether he should be held not responsible because of mental disease or defect (31:18-19). He then stated: "In this case, there is nothing in the record to indicate that defense counsel had ever advised the defendant of the possibility of entering such a bifurcated plea." (31:19).

The trial court issued a written decision and order denying the postconviction motion without an evidentiary hearing. The trial court concluded that the record conclusively showed the plea of not guilty by reason of mental disease or defect was not abandoned for no reason;

Burton was fully advised of and aware that he could take the plea bargain or litigate the plea of not guilty by reason of mental disease or defect; and he chose to take the plea bargain (36:1-4). The trial court stated trial counsel had no duty to advise Burton that the trial court was not likely to follow the plea agreement sentence recommendation because trial counsel could not possibly have known whether the trial court would do so or not (36:4). The trial court also held that Judge McMahon, who presided over the guilty plea hearing

> had no duty to advise the defendant of the possibility of a bifurcated trial on his original plea when he was entering *guilty* pleas to the charges. She fulfilled her duties during the plea colloquy and was under no obligation to inform him of the benefits of his original plea when he was clearly not pursuing it at that time.

(36:4)(emphasis in original). The trial court also reviewed the sentencing transcript and found no erroneous exercise of discretion (36:4). The trial court did not address Burton's assertion in the body of his motion that the record does not indicate that defense counsel had ever advised Burton of the possibility of entering a guilty plea and having a jury trial on the defense of not guilty by reason of mental disease or defect.

In the court of appeals, Burton argued only: (1) that he was entitled to withdraw his pleas on grounds of ineffective assistance of counsel because there was no indication on the record that defense counsel had ever advised Burton that he could plead guilty to the two counts charged in the information and have a jury trial to determine whether he should be held not responsible due to mental disease or defect; and (2) he was entitled to withdraw his guilty pleas because the trial court did not advise him during the plea colloquy that he had a right to plead guilty to the crimes charged and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect and therefore his guilty

pleas were not knowingly, voluntarily and intelligently made.

In a *per curiam* decision, the Court of Appeals held Burton's postconviction motion was properly denied without an evidentiary hearing as to a claim that trial counsel did not advise him that he could plead guilty and have a trial on the lack of mental responsibility defense because that claim was inadequately pled. The Court of Appeals rejected Burton's claim that during the plea colloquy, the trial court was required to advise him that he had a right to plead guilty and then have the jury determine his mental responsibility because Burton did not claim he did not know that information. And the trial court had no duty to advise him of the right to an insanity defense or plea because there is no state or constitutional right to an insanity defense or plea *(State v. Julius Burton*, No. 2011AP450-CR, slip op. at ¶¶ 7-8 (Wis. Ct. App. Feb. 14, 2012)) (R-Ap. 104-05).

ARGUMENT

I. BURTON DID NOT HAVE A RIGHT TO PLEAD GUILTY TO THE CHARGED CRIMES AND STILL HAVE A JURY TRIAL ON THE INSANITY DEFENSE.

Burton claims that because Wis. Stat. § 971.06(1)(d) provides a criminal defendant the option to couple an insanity plea with either a guilty or not guilty plea, then he had a right to enter a guilty plea and still have a jury trial on the insanity defense. Burton reasons that because he had a right to enter a guilty plea and still have a jury trial on the insanity defense, then the trial court and his attorney were required to advise him of that right on the record during the plea colloquy.

The underlying premise of Burton's claim is wrong, however. A criminal defendant does not have an absolute statutory or constitutional right to plead guilty at all, because a trial court is not required to accept a guilty plea.

Although § 971.06 allows a criminal defendant to plead guilty or no contest and § 971.08 sets forth the duties the trial court must perform before accepting such pleas, those statutes do not give a criminal defendant an absolute right to enter a guilty or no contest plea that the trial court must accept. In *State v. Waldman*, 57 Wis.2d 234, 237, 203 N.W.2d 691 (1973), this court held that a trial court "has inherent power to refuse to accept a plea of guilty." This court rejected the notion that there is a statutory right to have a guilty plea accepted. Rather, this court explained:

> When presented with a guilty plea, a court may consider all matters which are relevant to its acceptance or its rejection and is not confined to the issue of whether the plea is knowingly made… The provisions of sec. 971.08 do not require a court to accept a plea of guilty, but merely prescribe the procedure to be followed by the court in exercising its legal discretion on whether to accept the plea.

Waldman, 57 Wis.2d at 237. In *State v. Conger*, 2010 WI 56, ¶¶ 3, 14-26 , 325 Wis.2d 664, 797 N.W.2d 341; *State v. Garcia*, 192 Wis.2d 845, 859, 532 N.W.2d 111 (1995); and *State v. Roubik*, 137 Wis.2d 301, 305-07, 404 N.W.2d 105 (Ct. App. 1987), this court and the court of appeals have held that a trial court may refuse to accept a plea pursuant to a plea agreement, an *Alford* plea, or a no contest plea if the trial court in the exercise of its discretion concludes the plea is contrary to the public interest or contrary to the interests of justice.

A criminal defendant has no constitutional right to have a guilty plea accepted. In *North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970), the Court held that a guilty plea can be constitutionally accepted even when the

defendant simultaneously asserts his innocence, makes no admission of guilt and pleads guilty to a lesser offense only to avoid a greater penalty. In the course of its decision, the Court stated:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see *Lynch v. Overholser*, 369 U.S. [705] at 719 [(1962)], 82 S.Ct. at 1072, 8 L.Ed. 2d 211 (by implication) . . . .

Alford, 400 U.S. at 38 n.11.

A criminal defendant has no absolute statutory or constitutional right to have a plea of guilty accepted. Because a criminal defendant does not have an absolute statutory or constitutional right to have a guilty plea accepted, he also does not have an absolute statutory or constitutional right to have a guilty plea to the charged offense accepted, and still have a jury trial on the defense of lack of mental responsibility.[5]

[5] There are cases in which defendants have pled guilty and had only an insanity trial, but not one of those cases holds a defendant has an absolute statutory or constitutional right to do so. *See e.g., Lewis v. State*, 57 Wis.2d 469, 204 N.W.2d 527 (1973); *Schultz v. State*, 87 Wis.2d 167, 274 N.W.2d 614 (1979); *State v. Shegrud*, 131 Wis.2d 133, 389 N.W.2d 7 (1986); *State v. Duychak*, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986); *State v. Vander Linden*, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987); *State v. Murdock*, 2000 WI App 170, 238 Wis.2d 301, 617 N.W.2d 175 (Ct. App. 2000).

In *State v. Francis*, 2005 WI App 161, ¶¶ 1, 14-27, 285 Wis.2d 451, 701 N.W.2d 632, the court of appeals held that when a criminal defendant initially pleads both not guilty and not guilty by reason of mental disease or defect, and later pleads guilty or no contest pursuant to a plea agreement, the trial court may accept her plea of guilty or no contest without conducting a personal colloquy with her to ensure that she knowingly, voluntarily and intelligently waived or abandoned her lack of mental responsibility plea. The court explained that a personal colloquy is required to protect criminal defendants against violations of fundamental constitutional rights. Because neither the federal nor the Wisconsin constitution confers a right to an insanity defense or plea, the trial court has no obligation to personally address the defendant with respect to the withdrawal of that plea that attends her plea of guilty or no contest. *Id*. ¶ 1.

In *Francis*, the court of appeals stated that although a personal colloquy is not a prerequisite to withdrawal of an insanity plea, such a colloquy is advisable to help satisfy the court the defendant is alert and aware of what is happening and to protect the record from later claims of ineffective assistance of counsel in which a convicted defendant might assert that trial counsel never discussed the insanity plea withdrawal with her. *Id*. ¶ 27 n.5.

In the instant case, as the factual summary in this brief demonstrates, trial counsel made a thorough record and the trial court conducted a thorough personal colloquy with Burton regarding the withdrawal of his insanity plea and the consequences of his guilty pleas. Burton has never contended that he did not know or understand that by entering his guilty pleas pursuant to the plea agreement, he was withdrawing his insanity plea and choosing to forego a jury trial on both the elements of the offense and the insanity defense.

There are sound policy reasons for recognizing that a trial court has inherent authority to refuse to accept a

guilty plea, *Alford* plea, no contest plea, or plea pursuant to a plea agreement, and that a trial court may refuse to accept such a plea in the exercise of its discretion when the trial court concludes such a plea is not in the public interest or is not in the interest of justice. *Waldman*, 57 Wis.2d at 237; *Garcia*, 192 Wis.2d at 859; *Roubik*, 137 Wis. 2d at 305-07; *Conger*, 325 Wis.2d 664, ¶¶ 3, 14-26. Those same policy reasons support the conclusion that a trial court has inherent authority to refuse to accept a guilty plea to the charged offense and give the defendant a jury trial on the insanity plea only. A trial court may refuse to accept a guilty plea and allow a trial only on insanity when the trial court concludes that so allowing would not be in the public interest or in the interest of justice.

In Burton's case, the prosecutor entered the plea agreement to make a global sentence recommendation of fifty years of initial confinement with no recommendation on extended supervision, in exchange for Burton's straight plea of guilty to two counts of attempted first-degree intentional homicide while armed with a dangerous weapon because the two seriously injured police officers and their families wanted closure and did not want to have to go through the trauma of a trial (47:9-10). Allowing Burton to plead guilty to the offenses and have a jury trial on the insanity defense would not have served the victims' goal of avoiding a trial. It would not have served the goal of closure, because if Burton did successfully present an insanity defense, the case would be subject to repeat rehearings on whether Burton had improved and should be released from commitment. The trial court could reasonably have considered the impact on the victims in evaluating whether such a plea is in the public interest.

Burton's apparent goal in pleading guilty to the underlying offenses and having a jury trial only on insanity would be to attempt to limit the State's proof of the underlying offenses. This could compromise the State's ability to provide sufficient facts to ensure that the jury reached the most accurate result on the insanity

question. This could be detrimental if the defendant told his expert a version of the offenses that was inconsistent with the facts of the crime that the State would present at a guilty trial from witnesses to the defendant's conduct immediately before, during and after the crime. The trial court could reasonably consider these factors in evaluating whether it would be in the public interest to allow the defendant to plead guilty to the charged offenses and have a jury trial only on the insanity defense.

Burton did not have a right to plead guilty and still have a trial jury trial on the insanity defense. He had a statutory option to offer such a plea under § 971.06(1)(d). Burton had no right to require the trial court to allow him to exercise that option. Burton's guilty pleas to two counts of attempted first-degree intentional homicide while armed with a dangerous weapon and his waiver of his insanity defense were not invalid because the trial court and trial counsel did not advise him on the record during the plea colloquy about an option that he had no absolute, unilateral right to exercise.

II. THE TRIAL COURT PROPERLY DENIED BURTON'S POSTCONVICTION MOTION WITHOUT AN EVIDENTIARY HEARING.

Burton's postconviction motion asserted that he was entitled to withdraw his guilty pleas to two counts of attempted first-degree intentional homicide by use of a dangerous weapon based on both a claim of ineffective assistance of trial counsel and a claim that the plea colloquy was defective (31). The pleading requirements sufficient to require an evidentiary hearing for each type of claim are different, although a defendant may file both claims in a single postconviction motion. *State v. Howell*, 2007 WI 75, ¶ 73, 301 Wis.2d 350, 734 N.W.2d 48.

A. The Trial Court Properly Denied Burton's Postconviction Motion Asserting Ineffective Assistance Of Counsel Without An Evidentiary Hearing.

The trial court did not err in failing to hold an evidentiary hearing on Burton's motion to withdraw his guilty pleas based on ineffective assistance of trial counsel, which is denominated a *Nelson/Bentley* claim, referring to *Nelson v. State*, 54 Wis.2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996).

Based on the contents of his postconviction motion, Burton was not entitled to an evidentiary hearing. A criminal defendant is not entitled to an evidentiary hearing on a postconviction motion simply because he requests one. *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis.2d 568, 682 N.W.2d 433. To require an evidentiary hearing, the motion must allege sufficient material facts that, if true, would warrant relief. Whether a motion meets this standard is a question of law the appellate court reviews de novo. A*llen*, 274 Wis.2d 568, ¶¶ 9, 14. The defendant is not entitled to an evidentiary hearing if key allegations are merely conclusory or if the record conclusively demonstrates that the defendant is not entitled to relief. *Allen*, 274 Wis.2d 568, ¶¶ 9, 12, 15.

A criminal defendant asserting ineffective assistance of trial counsel must allege that his trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis.2d 259, 635 N.W.2d 838. To prove prejudice, a postconviction motion to withdraw a guilty plea based on ineffective assistance of counsel must allege that but for counsel's

alleged errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Bentley*, 201 Wis.2d at 312.

In order to meet this pleading requirement, "[a] defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." *Bentley*, 201 Wis.2d at 313. The defendant must allege "facts that allow the reviewing court to meaningfully assess his or her claim" of prejudice. *Bentley*, 201 Wis.2d at 314. This means the motion must allege a specific explanation of why the defendant would not have pled guilty and would have gone to trial if trial counsel had properly advised him. *Bentley*, 201 Wis.2d at 313-17.

Burton's postconviction motion was woefully inadequate to require an evidentiary hearing. His postconviction motion did not even allege that, in fact, trial counsel never told Burton that he had the option to plead guilty to the charged offenses and have a jury trial on the affirmative defense of not responsible by reason of mental disease or defect.

Burton's postconviction motion alleged *only* that the record did not show that trial counsel had informed Burton of this option.

In this court, Burton reasserts that limited claim. He never asserts that, in fact, trial counsel did not tell him of this option. Contrary to Burton's apparent assumption, the fact that the record does not reveal all of the information trial counsel provided to Burton in regard to his plea choices does not mean that trial counsel did not advise Burton that the statute gave him the option of pleading guilty to the charged offenses and going to trial on his insanity plea.

A criminal record ordinarily does not and should not spell out all of the information that trial counsel provided to the defendant. At a guilty plea hearing, the defendant and trial counsel may choose to provide the trial court with some information about their discussions which help demonstrate the defendant's guilty plea is knowing, intelligent and voluntary. Trial counsel may do so to try to protect himself from subsequent bogus ineffective assistance of counsel claims. There is no expectation, however, that the plea hearing record would contain a detailed recital of all of the information counsel provided to the defendant, nor would it be appropriate for the record to contain such detail. The fact that the record does not contain exactly what information trial counsel provided to the defendant about all of his plea choices does not fairly give rise to the inference that trial counsel failed to provide any specific piece of information to the defendant.

Burton's motion was also fatally defective because it did not allege that, in fact, Burton did not know that he had the option to plead guilty to the charged offenses and go to trial on his insanity defense. Accordingly, the motion failed to allege the most essential, basic facts necessary to make a sufficient allegation of deficient performance to obtain an evidentiary hearing.

Burton's motion also failed to allege sufficient facts to prove prejudice because he failed to allege that if counsel had advised Burton of the option that he could plead guilty to the charged offenses and go to trial on the insanity defense, Burton would have chosen that option.

The motion did not contain objective, factual allegations setting forth a specific explanation of why Burton would not have accepted the plea agreement, pled guilty and withdrawn his insanity plea if he had been advised he had the option to plead guilty to the charged offenses and still have a jury trial on the defense of insanity.

Furthermore, the record conclusively establishes that Burton is not entitled to relief on his ineffective assistance of counsel claim. The plea hearing record makes it abundantly clear that Burton knew and understood that by entering his guilty pleas pursuant to the plea agreement, he was giving up his right to present his insanity defense, and he made this choice because he wanted the State's favorable sentence recommendation. Although the statute may provide a criminal defendant the option to plead guilty to the charged offenses and go to jury trial on the insanity plea, in order to do so in this case, Burton would have had to reject the State's plea offer. The State made the plea agreement because the two police officer victims of the crime and their families wanted to avoid a trial (47:9-11). The State obviously would not have agreed to make a favorable sentence recommendation if defendant went to jury trial on the insanity plea and lost, because that would not achieve the goal of avoiding a trial.

There is no reasonable probability to believe that Burton would have given up the plea agreement, which yielded him a very favorable sentence recommendation from the State, in order to plead guilty with no sentence recommendation, and take his chances that he could convince a jury to find him not responsible by reason of mental disease.[6] Burton relies on the fact that at a jury trial on mental responsibility, he could have presented his history of mental health problems and the opinion of his retained expert (Lytton).

Burton ignores the fact that it would not have been enough for him to simply present his evidence. The State would have presented the contrary expert opinion reached by the independent, court-appointed expert (Smail), and the opinion evidence from the competency evaluator,

[6] The question is whether there is a reasonable probability Burton would have made a different choice at the time he entered his guilty pleas, based on the facts that existed at that time. The fact that the trial court subsequently imposed a greater sentence than that recommended by the State does not inform this question.

which was consistent with Smail's opinion and inconsistent with Lytton's opinion on relevant points. In order to succeed in obtaining a jury verdict of not responsible by reason of mental disease or defect, Burton would have had to convince the jury to a reasonable degree by the greater weight of the credible evidence that at the time he committed the crimes, he suffered a mental disease or defect (which does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct) and as a result of that mental disease or defect, he lacked the substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Wis. Stat. § 971.15.

Although Burton could have presented a favorable expert opinion, that opinion was not persuasive. Lytton's report did not explain how Burton's paranoia caused him to be substantially unable to conform his conduct to the requirements of the law, even though he knew the two men he shot in the face at close range were police officers. He knew it was wrong to shoot them and he evidenced his knowledge that it was wrong by running away and hiding. Burton never claimed that when he shot the officers he heard a voice telling him to shoot them or that at the moment of the shooting he was having any visual or auditory hallucination.

The jury would have had to find the defense evaluator's opinion more persuasive and accurate than the competency evaluator's opinion on malingering and the court appointed expert's opinion that at the time of the crime, Burton did not have a mental disease or defect that caused him to lack substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. The jury might well have doubted Lytton's credibility because she was retained by the defense, she put significant weight on Burton's self-reports, and Burton admitted that he lied to the court-appointed expert when he said he had no memory of the crime.

For all of these reasons, Burton's motion was insufficiently pled and the trial court was not required to grant him an evidentiary hearing. For the same reasons, Burton has failed to demonstrate that the trial court erroneously exercised its discretion in denying an evidentiary hearing. Accordingly, this court should affirm the trial court's order denying Burton's postconviction *Nelson/Bentley* claim without an evidentiary hearing.

B. The Trial Court Properly Denied Burton's Postconviction Motion Asserting A Defective Plea Colloquy Without An Evidentiary Hearing.

Under *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986), a criminal defendant is entitled to an evidentiary hearing on a motion to withdraw guilty plea only if he makes a prima facie showing that the trial court that accepted his guilty plea failed to comply with the statutory procedures set forth in Wis. Stat. § 971.08 or procedures mandated by this court and if he "alleges that he in fact did not know or understand the information which should have been provided at the plea hearing." *Bangert*, 131 Wis.2d at 274. If his motion adequately asserts both a defective plea colloquy and that he actually did not know or understand the omitted information, then the defendant is entitled to an evidentiary hearing at which the State would bear the burden of proving by clear and convincing evidence, based on any available information including testimony of the defendant and his counsel, that notwithstanding the defective plea colloquy, his guilty plea was knowingly, voluntarily and intelligently entered. *Bangert*, 131 Wis.2d at 274-75.

The reviewing court must determine whether, as a matter of law, the defendant's motion sufficiently alleged that he did not know or understand the information that he

claims should have been provided at the plea hearing. *Howell*, 301 Wis.2d 350, ¶ 31. A *Bangert* motion is properly denied without an evidentiary hearing if the defendant fails to allege in the motion that he did not, in fact, know or understand the information he claims the trial court should have provided during the plea colloquy. *State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis.2d 379, 683 N.W.2d 14; *State v. Giebel*, 198 Wis.2d 207, 216-17, 541 N.W.2d 815 (Ct. App. 1995).

Burton's motion was insufficient to require an evidentiary hearing because it did not allege that at the time his pleas were accepted at the plea hearing, he did not, in fact, know or understand that he had an option to enter a plea of guilty to the charged crimes and have a jury trial on the defense of lack of mental responsibility. This requirement is not a mere technicality; it is a necessary prerequisite to an evidentiary hearing. As this court explained:

> [I]f 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.
>
> . . . .
>
> 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.

State v. Brown, 2006 WI 100, ¶¶ 63, 65, 293 Wis.2d 594, 716 N.W.2d 906.[7]

Because Burton failed to allege that, in fact, he did not know or understand that he had an option to plead guilty to the charged offenses and still have a jury trial on the defense of lack of mental responsibility, his motion was insufficient to require the trial court to hold an evidentiary hearing, and denial of the motion was justified on that ground alone.

Burton's motion was also insufficient to require an evidentiary hearing because he failed to allege a deficiency in the plea colloquy. The reviewing court determines de novo as a question of law whether the defendant's motion adequately alleged a deficiency in the plea colloquy that establishes a violation of court mandated procedures or a violation of § 971.08. *Brown*, 293 Wis.2d 594, ¶ 21. Burton did not allege that during the plea colloquy the trial court failed to undertake any of the procedures mandated by this court or any of the procedures mandated by § 971.08. He alleged only that the trial court was required to inform him that he had a right to plead guilty to the charged offenses and still have a jury trial on the defense of lack of mental responsibility. This allegation is not sufficient because there is no such statutory or court-mandated requirement. Burton's motion did not allege a deficient plea colloquy because the trial court had no duty to inform him during the plea colloquy that he had a right to plead guilty to the crimes charged and still have a jury trial to determine whether he was not responsible by reason of mental disease or defect. The trial court's failure to do so did not render Burton's guilty pleas unknowing, unintelligent or involuntary.

[7] In *State v. Brown*, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, this court made a rare exception to this pleading requirement under the facts of that specific case, in which the motion had indirectly alleged that the illiterate defendant did not understand the nature of the charges and defense counsel did not provide an affidavit from the defendant because he was illiterate. No such circumstances exist here.

What Burton labels a due process right to enter a plea of guilty to the crimes charged and still have a jury trial on the affirmative defense of lack of mental responsibility due to mental disease or defect is merely a statutory option.

Burton had only a statutory option to pursue an insanity defense, whether coupled with a guilty plea or a not guilty plea. He had no constitutional right to pursue an insanity defense. *Francis*, 285 Wis.2d 451, ¶¶ 19-21.

The trial court had no obligation to inform Burton of all of the plea options provided in § 971.06. Wisconsin Stat. § 971.08 does not provide that during the plea colloquy the trial court must inform the defendant of the options in § 971.06.

In *Bangert*, the Wisconsin Supreme Court did not mandate that trial courts must inform criminal defendants of the statutory plea options set forth in § 971.06. Indeed, it could be perceived as an interference in the plea bargaining process and an interference in the confidential consultations between trial counsel and the defendant for a trial court to tell a defendant who has chosen to accept a plea agreement, plead guilty and abandon his insanity defense, that he has another option which is to reject the plea agreement, plead guilty to the charged offenses and have a jury trial on his insanity defense.

The court of appeals correctly held that as a matter of law, trial courts are not required to engage defendants in a personal colloquy before allowing them to abandon an insanity plea. *Francis*, 285 Wis.2d 451, ¶ 14. The court explained that a personal colloquy is required only when the right involved is a fundamental constitutional right and there is no federal or Wisconsin constitutional right to an insanity plea; the plea is purely statutory. *Francis*, 285 Wis.2d 451, ¶¶ 15-22. Furthermore, the court recognized that this holding was bolstered by the fact that a criminal defendant need not personally withdraw his

insanity plea. Trial counsel can withdraw a defendant's insanity plea unless the defendant affirmatively objects. *Francis*, 285 Wis.2d 451, ¶¶ 23-24. Indeed, the court recognized that it can be said that a validly entered guilty plea automatically and implicitly waives the insanity defense, just as it automatically waives any other affirmative defense and the right to present evidence on any issue. *Francis*, 285 Wis.2d 451, ¶¶ 25-26.

Francis holds that a trial court has no constitutional or court-mandated obligation to conduct a personal colloquy with a defendant who wishes to enter a guilty plea after having previously entered pleas of not guilty and not guilty by reason of insanity before allowing the defendant to thereby abandon the insanity defense. *Francis*, 285 Wis.2d 451, ¶¶ 1, 15-26. Because the trial court has no constitutional or court-mandated obligation to conduct a personal colloquy with a defendant at a guilty plea hearing before allowing the defendant to thereby abandon the plea of not guilty by reason of mental disease at all, the trial court obviously also has no constitutional or court-mandated obligation to advise the defendant that he has a statutory option to reject the plea agreement, plead guilty to the charged offenses without benefit of a plea agreement, and have a jury trial on the insanity defense.

For all of these reasons, Burton's assertion that he is entitled to withdraw his guilty pleas because the trial court did not advise him of the statutory option to plead guilty to the charged offenses and have a jury trial on the lack of mental responsibility defense is without merit.

Burton's motion was insufficient to require the trial court to hold an evidentiary hearing on his claim that the plea colloquy was defective. For all of the same reasons, Burton has failed to show that the trial court erroneously exercised its discretion in declining to hold an evidentiary hearing. Accordingly, this court should affirm the trial court's order denying Burton's postconviction *Bangert* claim without an evidentiary hearing.

In the alternative, if Burton is entitled to relief, he is entitled only to an evidentiary hearing. If he is entitled to relief following an evidentiary hearing, he would at most be entitled to a trial on his insanity defense. He would not be entitled to withdraw his guilty pleas to the crimes charged because he is not challenging his guilty pleas per se. He is asserting only a right to a jury trial on the insanity defense, coupled with guilty pleas to the underlying charges.

CONCLUSION

Based on the record and the legal theories and authorities presented herein, the State asks this court to affirm the Court of Appeals decision, judgment of conviction and order denying postconviction motion entered below.

Dated this 3rd day of December, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,059 words.

Dated this 3rd day of December, 2012.

_____
Sally L. Wellman
Assistant Attorney General

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

I hereby certify that:

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

I further 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 this 3rd day of December, 2012.

_____
Sally L. Wellman
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 this 3rd day of December, 2012.

_____

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