STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2012AP307-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELY B. ROBLES,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND POSTCONVICTION ORDER ENTERED BY FOND DU LAC COUNTY CIRCUIT COURT JUDGE THE HONORABLE PETER GRIMM

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUE

Should Nely Robles' conviction be vacated because the circuit court did not personally advise her during her plea colloquy that she pled to a felony?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument because the parties set forth the relevant facts and law in their briefs. The state does not request publication because this case is controlled by already-existing precedent.

STATEMENT OF FACTS

Crime, Plea, and Conviction

Nely Robles and a friend went on a shopping spree, totaling more than $800, with a debit card they stole from an unlocked car (2:2).

Robles was charged as a party to the crime of two crimes:

- Count One: Misdemeanor theft, contrary to Wis. Stat. § 943.20(1)(a) and (3)(a);

- Count Two: Felony identity theft, contrary to Wis. Stat. § 943.201(2)(a) (2; 9).

Robles pled no contest to the felony identity theft charge in exchange for the misdemeanor theft charge being dismissed and read in for sentencing (19; 20; 52:2). She was sentenced to 2-years' probation with 75-days conditional jail time and sentence withheld (20).

Postconviction Motion

After sentencing, Robles moved to withdraw her plea (26). Robles claimed that she had not realized she was pleading to a felony (26). Robles raised two related claims regarding her alleged confusion:

1. *Bangert* Claim. Robles claimed, as she does on appeal, that the circuit court violated Wis. Stat. § 971.08 by not specifically informing her that she was pleading to a felony (26:4-6). The circuit court rejected Robles'

Bangert claim without an evidentiary hearing (53:9). The circuit court reasoned that "the law does not require the Court to use the magic words—the felony" (53:9). The circuit court also noted that "the transcript clearly indicates the Court reviewed the maximum penalties" with Robles (53:9). The circuit court also said, based on the law that "a felony . . . is defined by an offense by which you can go to prison," that it effectively told Robles she was pleading to a felony by telling her that "the maximum penalty is going to prison for so many odd years" (53:9).

2. *Bentley* Claim. Robles also claimed that her attorney was ineffective for "failing to advise her of the felony nature of her plea" (26:10-11). The circuit court held an evidentiary hearing on Robles' *Bentley* claim at which Robles, Robles' attorney, and a friend of Robles' testified (54-55). The circuit court denied the claim at the end of the evidentiary hearing, ruling: "the issue presented about ineffective assistance of counsel definitely has not been shown on this record by the requisite burden of proof" (55:90). The circuit court explained that Robles' "credibility is very poor" and found: "Nely Robles' testimony is just not credible, it's self-serving, it's inconsistent, and flat-out no basis for any credible contention of the version of facts" (55:90, 95). It pointed out "examples," of which it said there were "many," in which Robles' testimony was internally inconsistent and inconsistent with historical facts (55:90-96). It recounted that Robles acknowledged seeing the criminal complaint and that Robles also acknowledged knowing Count 2 was a felony (55:92). It further recounted that Robles "basically conceded . . . that, in part, . . . her desire to drop the felony is because the real consequences were internalized about its impact on her schooling" (55:92-93). It chalked up Robles' hope of a misdemeanor resolution to "wishful thinking" that "doesn't have any basis in the accuracy of the record" (55:95).

Robles appeals.

Robles has "abandon[ed]" her *Bentley* claim (Robles Br. at 9). But Robles continues to claim under *Bangert* that she should be allowed to withdraw her plea—and that her conviction should be vacated—because the circuit court did not specifically tell her during the plea colloquy that she pled to a felony (Robles Br. at 14-17).

SUMMARY OF ARGUMENT

Robles seeks to add a new, never-before-recognized requirement to plea colloquies: an obligation for circuit courts to tell defendants about charges' felony designation. The circuit court properly denied Robles' *Bangert* claim without an evidentiary hearing because such an added requirement is not supported by the Constitution, § 971.08, case law, or Wis. JI-Criminal SM-32 (1985). Moreover, even if with such a requirement were added to plea colloquies, Robles would not be entitled to relief because the circuit court has already rejected Robles' claimed ignorance about pleading to a felony. This finding would obviate the need for an evidentiary hearing even if Robles' had made a prima facie showing under *Bangert*.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED ROBLES' *BANGERT* CLAIM WITHOUT AN EVIDENTIARY HEARING BECAUSE ROBLES FAILED TO MAKE A PRIMA FACIE SHOWING THAT THE CIRCUIT COURT'S PLEA COLLOQUY DID NOT CONFORM WITH § 971.08 OR JUDICIALLY-MANDATED PROCEDURES.

A. Relevant law.

1. Constitutional mandate.

To be constitutional, a plea must be knowing, intelligent, and voluntary. *See Brady v. United States*, 397 U.S. 742, 756-58 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Howell*, 2007 WI 75, ¶ 23, 301 Wis. 2d 350, 734 N.W.2d 48; *State v. Hampton*, 2004 WI 107, ¶ 22, 274 Wis. 2d 379, 683 N.W.2d 14; *State v. Bangert*, 131 Wis. 2d 246, 265-69, 389 N.W.2d 12 (1986). A defendant must have "a sufficient understanding of the relevant circumstances and likely consequences" of a plea including the charge, the constitutional rights foregone by pleading, and the penalty and other direct consequences if convicted. *Brady*, 397 U.S. at 748; *Hampton*, 274 Wis. 2d 379, ¶ 22.

2. Section 971.08.

Section 971.08 advances the constitutional requirement that pleas be knowingly, intelligently, and voluntarily entered. *See State v. Hoppe*, 2009 WI 41, ¶ 31, 317 Wis. 2d 161, 765 N.W.2d 794; *Hampton*, 274 Wis. 2d 379, ¶ 23; *State v. Brown*, 2006 WI 100, ¶ 23, 293 Wis. 2d 594, 716 N.W.2d 906; *Bangert*, 131 Wis. 2d at 261. Section 971.08 is not itself a constitutional rule. *See id.* at 257, 260 & n.6. But it sets forth information that

circuit courts must convey to defendants during plea colloquies, some of which tracks the information defendants must have to satisfy the constitutional requirement. Relevant here, § 971.08 requires circuit courts to "[a]ddress 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." Wis. Stat. § 971.08(1)(b).

3. *Bangert* procedure.

The Wisconsin Supreme Court has developed different procedures for challenging pleas, depending on whether the basis for a defendant's challenge is internal or external to the plea colloquy. *See State v. Negrete*, No. 2010AP1702, 2012 WI 92, ¶¶ 15-21; __ Wis. 2d. __, ___ N.W.2d ___; *Howell*, 301 Wis. 2d 350, ¶¶ 25-77; *Hampton*, 274 Wis. 2d 379, ¶ 51. The supreme court set forth the procedure for challenges like Robles' claim, involving alleged plea colloquy deficiencies, in *State v. Bangert*, 131 Wis. 2d 246. It has summarized the *Bangert* procedure as follows:

> *Bangert* provides that a defendant may move to withdraw his plea when the procedures outlined in Wis. Stat. § 971.08 are not undertaken or other court-mandated duties at the plea hearing are not fulfilled. The initial burden rests with the defendant to make a pointed showing that the plea was accepted without the trial court's conformity with § 971.08 or other mandatory procedures. *Bangert*, 131 Wis.2d at 274, 389 N.W.2d 12. When the defendant's motion shows a violation of § 971.08(1)(a) or (b) or other mandatory duties *and* alleges that he in fact did not know or understand the information which should have been provided at the plea hearing, the burden shifts to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered. Under these circumstances, the circuit court must hold an evidentiary hearing at which the State and the defendant can offer evidence as to whether the defendant in fact knew the information that should been provided.

> To obtain an evidentiary hearing based upon defects in the plea colloquy, the defendant will rely on the plea hearing record. To rebut the defendant's motion to withdraw his plea because the plea was allegedly not knowing, voluntary, and intelligent, the state will likely rely on the totality of the evidence, much of which will be found outside the plea hearing record.

Hampton, 274 Wis. 2d 379, ¶¶ 46-47 (footnote and citations omitted).

B. Standard of review.

Whether the circuit court violated § 971.08 by not telling Robles during the plea colloquy that she pled to a felony and whether Robles knowingly, intelligently, and voluntarily pled are both questions of law for this court's independent review. *See Brown*, 293 Wis. 2d 594, ¶ 21.

C. Neither the Constitution nor § 971.08 nor precedent requires circuit courts to inform defendants about charges' felony designation.

Robles claims that felony designation is part of the "nature of the offense" that § 971.08 requires circuit courts to inform defendants of (Robles Br. at 15). Section 971.08 does not define the "nature of the offense." But the Wisconsin Supreme Court has consistently discussed the "nature of the offense" in terms of charges' legal elements and factual bases.

In *Bangert*, 131 Wis. 2d at 259, 265 the supreme court alternately discussed the "nature of the charge" as "an understanding of the law in relation to the facts" and "the elements." The supreme court then mandated, as an exercise of its "superintending and administrative authority over the circuit courts," that "trial judge[s] [ ] determine a defendant's understanding of the nature of the charge at the plea hearing" *id*. at 267, in one of three ways:

- By "summar[izing] the elements of the crime charged by reading from the appropriate jury instructions . . . or from the applicable statute," *id.* at 268;

- By "ask[ing] defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing," *id.*; or

- By "expressly refer[ring] to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea hearing" such as by inquiring "whether the defendant understands the nature of the charge" based on a prior reading of the criminal complaint or a signed statement of the defendant. *Id.*

The supreme court similarly characterized the "nature of the charge" as related to charges' legal elements and factual bases before *Bangert*. *See State v. Minniecheske*, 127 Wis. 2d 234, 241, 244, 378 N.W.2d 283 (1985); *State v. Cecchini*, 124 Wis. 2d 200, 204, 209, 368 N.W.2d 830 (1985); *Martinkoski v. State*, 51 Wis. 2d 237, 246, 186 N.W.2d 302 (1971). And the supreme court has continued defining the "nature of the offense" in such terms after *Bangert*. *See Howell*, 301 Wis. 2d 350, ¶¶ 37-51; *Brown*, 293 Wis. 2d 594, ¶¶ 12, 54-58.

Granted, the supreme court has never expressly addressed whether the "nature of the charge" encompasses charges' felony designation. But three sources indicate that the supreme court's exclusion of felony designation from what circuit courts must tell defendants about the "nature of the charge" is not just an accidental product of the claims with which the supreme court was presented:

- SM-32 of the Wisconsin Criminal Jury Instruction, which sets forth procedures for accepting pleas that the Wisconsin Supreme Court has "strongly encourage[d]" circuit courts to follow. *Brown*, 293 Wis. 2d 594, ¶ 23 n.11; *Hampton*, 274 Wis. 2d 379, ¶ 44; *Bangert*, 131 Wis. 2d at 272; Wis. JI-Criminal SM-32 (1985).

- United States Supreme Court precedent concerning the due process right to knowingly, intelligently, and voluntarily plead that § 971.08 helps safeguard. *See Henderson v. Morgan*, 426 U.S. 637 (1976); *Smith v. O'Grady*, 312 U.S. 329 (1941); *Brown*, 293 Wis. 2d 594, ¶ 23; *Bangert*, 131 Wis. 2d at 261;

- United States Supreme Court precedent concerning the version of Federal Rule of Criminal Procedure 11 on which § 971.08 is based. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Bangert*, 131 Wis. 2d at 260.

Wis. JI-Criminal SM-32

The Wisconsin Supreme Court's characterization of the nature of the charge as relating to a charge's legal and factual bases is reflected in SM-32. SM-32 does not include anything about charges' felony designation. The only thing SM-32 recommends for felony charges is that circuit courts inform defendants charged with felonies that they "will not be allowed to possess a firearm" if convicted of a felony (Wis. JI-Criminal SM-32 at 3). SM-32 also avoids any possible confusion created by the phrase "nature of the charge" by replacing the phrase with a description of precisely what circuit courts are to tell defendants about charges. SM-32 instructs circuit courts to determine "the defendant's understanding of the crime charged" by saying: "By pleading guilty, you are admitting that you committed all the elements of the crimes of ___, which are as follows." Wis. JI-Criminal SM-32. SM-32 then continues:

> THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE CHARGE TO WHICH THE GUILTY PLEA IS BEING ENTERED. ONE WAY TO ACHIEVE THIS IS TO SUMMARIZE THE ELEMENTS OF THE CRIME CHARGED, RELATING THEM TO THE FACTS OF THE CASE. REFERRING TO THE UNIFORM INSTRUCTION FOR THE OFFENSE WILL BE HELPFUL IN IDENTIFYING THE ELEMENTS. THE COURT SHOULD INQUIRE OF DEFENSE COUNSEL REGARDING ANY SPECIAL ISSUES OR PROBLEMS THAT SHOULD BE EXPLAINED TO THE DEFENDANT.

Wis. JI-Criminal SM-32 at 6.

SM-32 is telling in several respects. SM-32 is not limited by constitutional requirements, by § 971.08 or other court-mandated procedures, or by the particular claims raised in the supreme court. SM-32 reflects an assessment of the best practices for plea colloquies—best practices that the supreme court has "strongly encouraged" circuit courts to follow and has admonished circuit courts for not. *Brown*, 293 Wis. 2d 594, ¶ 23 n.11; *Hampton*, 274 Wis. 2d 379, ¶ 44; *Bangert*, 131 Wis. 2d at 272; Wis. JI-Criminal SM-32. The fact that SM-32 does not call for circuit courts to inform defendants about charges' felony designation indicates that such information is not constitutionally, statutorily, or otherwise required or even recognized as good practice.

Constitutional Requirements

The understanding of the "nature of the offense" reflected in supreme court cases and SM-32 accords with the constitutional requirements § 971.08 advances. The United States Supreme Court has repeatedly tied the constitutional requirement that pleas be knowingly, intelligently, and voluntarily entered to defendants' knowledge of charges' legal and factual bases.

In *Smith v. O'Grady*, 312 U.S. 329, the Supreme Court considered a defendant's claim to have pled without ever being shown the charges against him. The Supreme Court cited numerous problems with the plea, if the defendant's claims were true. One of the alleged problems the Supreme Court noted was that the defendant "charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* at 334.

The Supreme Court relied on *Smith* in *Henderson v. Morgan*, 426 U.S. at 645. *Henderson* involved a defendant who pled "guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense." *Id.* at 638. The Supreme Court explained of the defendant's plea hearing: "There was no discussion of the elements of the offense of second-degree murder, no indication that the nature of the offense had ever been discussed with respondent, and no reference of any kind to the requirement of intent to cause the death of the victim." *Id.* at 642-43. The Supreme Court assumed there was overwhelming evidence of the defendant's guilt and that defense counsel was competent. *Id.* at 645. But it held that the defendant's plea was invalid. Relying on *Smith*, the Supreme Court stated: "And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* at 645 (citation omitted). The Supreme Court noted that there was "nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent." *Id.* at 646. It concluded: "Since respondent did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law." *Id.* at 647.

Federal Rule of Criminal Procedure 11

The "nature of the charge" language from *Smith* and *Henderson* made it into Federal Rule of Criminal Procedure Rule 11, which sets forth the plea procedures for federal courts. *See McCarthy v. United States*, 394 U.S. at 460, 463. In *McCarthy v. United States*, the Supreme Court discussed the "nature of the charge" language in Rule 11. Echoing its discussions in *Smith* and *Henderson*, the Supreme Court tied Rule 11's requirement that courts inform defendants about the "nature of the charge" to pleas' function as an admission of guilt, explaining: "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466 (footnote omitted).

The constitutional and federal statutory requirements provide key insight into understanding what § 971.08 requires because § 971.08 is founded upon them. Section 971.08 was created to help safeguard the constitutional rights the Supreme Court recognized in *Smith* and *Henderson*, and § 971.08 is based on the version of Rule 11 the Supreme Court discussed in *McCarthy*. *See Brown*, 293 Wis. 2d 594, ¶ 23; *Bangert*, 131 Wis. 2d at 261.

D. Requiring circuit courts to inform defendants about charges' felony designation would either be an empty exercise or would conflict with case law establishing that defendants need not be informed of pleas' collateral consequences.

Robles claims only to be arguing that circuit courts must inform defendants about charges' felony designation. But such a designation, by itself, does not

mean much. It is just a word. Requiring a defendant to be informed of charges' felony designation, with nothing else, would be a rather empty exercise: a requirement for "magic words."

For such a requirement to be meaningful, it would have to come with an explanation of what a felony designation means. At the plea stage, this could include information that:

- Penalties are tied to charges' felony designation. *See* Wis. Stat. § 939.50.

- Felonies are "punishable by imprisonment in the Wisconsin state prisons." *See* Wis. Stat. § 939.60.

- Felonies trigger collateral consequences including exposure for repeater liability and restrictions on firearms possession, voting, and jury service. *See* Wisconsin Constitution, art. III, § 2(4)(a); Wis. Stat. §§ 6.03(1)(b), 756.02, 941.28.

The first two of these possible requirements are non-issues. Both the Constitution and § 971.08 require circuit courts to inform defendants of the maximum penalties they face if convicted. The circuit court asked Robles if she understood that the charge she pled to had a maximum penalty of "up to 6 years' imprisonment," and Robles confirmed that she did by answering "yes" (52:5).

So the only thing left is the collateral consequences of felony convictions. But it is well-established that defendants do not have to be informed of collateral consequences when pleading. *See Brady*, 397 U.S. at 756-58; *State v. Bollig*, 2000 WI 6, ¶¶ 16-27, 232 Wis. 2d 561, 605 N.W.2d 199; *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, ¶¶ 34-48, 579 N.W.2d 698 (1998) ("Defendants do not have a due process right to be informed of consequences that are merely collateral to their pleas."). Requiring circuit courts to inform defendants about such collateral consequences would

directly contradict this case law. Moreover, such a requirement could be difficult to implement. It is unclear where the limits of such a requirement would be and whether a circuit court would have to inform a defendant of all collateral consequences, just a few, or just ones pertinent to a particular defendant. This practical difficulty is underscored by Robles' claim. Robles is not concerned about generally-applicable collateral consequences. She is instead concerned about something unique to her and removed from this case: how a felony conviction will affect her ability to go into law enforcement (in ways her other misdemeanor convictions and a misdemeanor conviction in this case would not). Plea colloquies would be interminable—confusing—affairs if circuit courts had to go into such detail about every such possible ramification of felony convictions.

E. The cases Robles cites are inapposite and do not have anything to do with § 971.08 or the requirements for pleas.

Robles relies on two cases—*State v. Harms*, 36 Wis. 2d 282, 153 N.W.2d 78 (1967), and *State v. Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984)—in support of her claim that § 971.08 requires circuit courts to inform defendants of charges' felony designation. But neither case has anything to do with § 971.08 or the constitutional requirement that pleas be knowing, intelligent, and voluntary. In both cases, defendants claimed they were entitled to preliminary hearings for misdemeanor charges because they faced penalty enhancers that they claimed changed the misdemeanors to felonies. The Wisconsin Supreme Court disagreed with both defendants and held that the penalty enhancers did not change the "nature of the crimes" or "offenses." *Denter*, 121 Wis. 2d at 125-26; *Harms*, 36 Wis. 2d at 285. The supreme court did not consider anything related to circuit courts' duties during plea colloquies let alone even refer to § 971.08 or use the term "nature of the *charge*."

Robles also relies on two cases—*State v. Squires*, 211 Wis. 2d 876, 565 N.W.2d 309 (Ct. App. 1997), and *State v. Fields*, 2001 WI App 297, 249 Wis. 2d 292, 638 N.W.2d 897—in which this court again used the term "nature of the offense" to refer to felony designation. These cases also do not have anything to do with § 971.08 or the constitutional requirements for pleas. Both involved the particularity with which the state must allege repeater allegations. The Wisconsin Supreme Court had previously held that the state must include charges' whether earlier convictions were felonies or misdemeanor because such designations affected the length of penalty enhancement a defendant faced. *See* Wis. Stat. § 939.62; *State v. Gerard*, 189 Wis. 2d 505, 508 n.3, 525 N.W.2d 718 (1995). In *Squires*, this court mentioned the nature of the charge language in passing and focused on whether the state erred by failing to mention periods between the defendants' crimes in which the defendant was incarcerated (which tolled the time for calculating the interval between offenses). In *Fields*, 249 Wis. 2d 292, ¶ 1, this court considered whether the "pre-plea submission of a certified copy of prior convictions constituted an amendment to the information, thereby curing its defects and providing Fields with the requisite notice of his repeater status before he pled to the charges." In neither case, did this court consider anything about plea colloquies, § 971.08, or circuit courts' duty to inform defendants who plead, or use the term "nature of the *charge*" at all.

II. THE RECORD SHOWS THAT ROBLES KNEW SHE PLED TO A FELONY, SO ROBLES WOULD NOT BE ENTITLED TO RELIEF EVEN IF CIRCUIT COURTS HAD TO INFORM DEFENDANTS ABOUT CHARGES' FELONY DESIGNATION.

The state maintains that the circuit court properly denied Robles' *Bangert* motion without an evidentiary

hearing because Robles failed to make a prima facie showing that her plea colloquy was deficient. The state addresses the remedy if Robles' had established a deficiency for completeness's sake and to avoid forfeiting an argument if this court disagrees with the state's argument concerning the plea colloquy requirements.

Normally, the remedy if a circuit court improperly denies a *Bangert* motion without an evidentiary hearing is an evidentiary hearing. *See, e.g.*, *Howell*, 301 Wis. 2d 350, ¶ 70. This case is in a unique posture, however, because the circuit court held an evidentiary hearing on Robles' *Bentley* claim. The supreme court set forth the procedure for challenges like Robles' abandoned ineffective assistance claim, involving problems outside the plea colloquy, in *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Though Robles' *Bentley* and *Bangert* claims were distinct, they involved the same basic issue: whether Robles knowingly, intelligently, and voluntarily pled despite her alleged confusion about pleading to a felony. The record from the evidentiary hearing on Robles' *Bentley* claim, in turn, would eliminate the need for remand *if* a *Bangert* hearing were required.

The Wisconsin Supreme Court's decision in *State v. Hoppe*, 317 Wis. 2d 161, makes the lack of need for an evidentiary hearing clear.

The defendant in *Hoppe* brought a dual-purpose *Bangert/Bentley* plea-withdrawal motion. *Id.* ¶ 3. The circuit court held an evidentiary hearing, but it was unclear whether the circuit court had proceeded under *Bangert* or *Bentley*. *Id.* ¶ 49. The supreme court noted "irregularities in the evidentiary hearing" but held:

> [U]nder the circumstances of the present case we need not remand the matter to the circuit court for further evidentiary proceedings under *Bangert* in order to determine whether the State carried its burden of proof at the evidentiary hearing. The circuit court record permits only one result in this case. The transcript of the evidentiary hearing is

> replete with evidence relating to the defendant's *Bangert* motion. The circuit court considered this evidence and made findings of historical or evidentiary fact that this court accepts; they are not clearly erroneous. The evidence in the record and the circuit court's findings are sufficient for this court to determine as a matter of law that the State proved by clear and convincing evidence that the defendant's guilty plea was entered knowingly, intelligently, and voluntarily despite the defects in the plea colloquy.

Id. ¶ 50.

The same analysis works here.

The circuit court rejected Robles' *Bentley* claim based on its conclusion that Robles' credibility regarding being misinformed about pleading to a felony charge was "very poor" (55:90). The circuit court found: "Nely Robles' testimony is just not credible, it's self-serving, it's inconsistent, and flat-out no basis for any credible contention of the version of facts" (55:95).

The circuit court's finding is not clearly erroneous and is overwhelmingly supported by the record. Among other things, the record establishes:

- The charge to which Robles pled (Count 2) was described as a "Class H felony" on both the criminal complaint and information (2:1; 9);

- The circuit court referred to Count 1 as a misdemeanor and Count 2 as a "Class H felony with a $10,000 fine and six years in prison or both" at Robles' initial appearance (48:2);

- Robles signed a plea questionnaire/waiver of rights form that specified Robles was pleading to Count 2 and that the maximum penalty she faced was "$10,000 fine or 6 yrs imprisonment" and explained that people convicted of felonies were

subject to various restrictions on voting, firearms possession, and body armor possession (19);

- Robles signed a voter ineligibility notice right before she pled, at the same time she filled out the plea questionnaire/waiver of rights form, that referenced her "felony" cases and sentences, again without comment or surprise (18; 54:41);

- The circuit court informed Robles during the plea colloquy that she was pleading to Count 2, that the charge was based on Robles' use of a debit card without the owner's permission, that the charge had a maximum penalty of "$10,000 and up to 6 years' imprisonment or both" and confirmed that Robles' attorney went over the plea questionnaire/waiver of rights form with Robles (52:4-5);

- At the sentencing hearing that took place right after Robles plea, defense counsel said that Robles "now has a felony conviction," without Robles commenting or expressing surprise (52:12);

- At the evidentiary hearing, defense counsel testified that Robles and he talked before the preliminary hearing about Robles' hopes for a misdemeanor resolution but that he later told Robles that the prosecutor had "rejected a misdemeanor" and "a deferred prosecution agreement on the felony charge as well" (54:46-47). Defense counsel also stated that he told Robles that she had a right to a preliminary hearing because she was charged with a felony and that he believed based on his common practice that he would have read Robles the consequences of felony convictions listed on the plea questionnaire/waiver of rights form (54:11, 20-21, 30).

The combination of all these facts leads to one conclusion: Robles knew she pled to a felony. The circuit court's finding rejecting Robles' claimed ignorance would eliminate the need for an evidentiary hearing on Robles' *Bangert* claim even if Robles had made a prima facie showing under *Bangert*.

Robles' *Bangert* claim, like Robles' *Bentley* claim, concerns whether Robles should be allowed to withdraw her plea based on her claimed ignorance about pleading to a felony. The circuit court's factual finding concerning Robles' credibility—and rejection of Robles' claim not to have known she pled to a felony—is just as decisive for Robles' *Bangert* claim as for Robles' *Bentley* claim. In both contexts, it undermines Robles' claim not to have knowingly, intelligently, and voluntarily pled.

CONCLUSION

The state respectfully asks this court to affirm Robles' judgment of conviction and the circuit court's order denying Robles' post-conviction motion.

Dated: July 25, 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 4,838 words.

Dated: July 25, 2012.

_____
Rebecca Rapp St. John
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: July 25, 2012.

_____
Rebecca Rapp St. John
Assistant Attorney General