STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP002429-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHANNON OLANCE HENDRICKS,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction, Entered in the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding, and Order Denying Postconviction Relief, Entered in the Milwaukee County Circuit Court, the Honorable M. Joseph Donald, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

I. When a circuit court accepts a defendant's guilty plea to child enticement with intent to have sexual contact, do Wisconsin Statute § 971.08 and ***Bangert*** require the court to verify that the defendant understands the meaning of "sexual contact"?

The circuit court denied Mr. Hendricks' post-conviction ***Bangert***[1] motion for plea withdrawal without an evidentiary hearing. It held it was not required to ensure that Mr. Hendricks understood the meaning of "sexual contact" when he pled guilty to child enticement with intent to have sexual contact. (75;App.124-127).

The Court of Appeals affirmed the decision. (Ct. App. Op.;App.101-119). It held that if it were "writing on a clean slate," it would likely conclude that "the plea colloquy needed to include an inquiry into Hendricks' understanding of the meaning of 'sexual contact.'" (Ct. App. Op., ¶ 42;App.116). Nevertheless, it concluded that it was bound by its holding in ***State v. Steele***, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595. (Ct. App. Op., ¶ 31;App.112). It explained that it "fail[s] to understand the logic" of ***Steele*** but was not "at liberty to override or ignore that analysis." (Ct. App. Op., ¶¶ 30,40;App.111-112,115-116).

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[1] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to accept review reflects that oral argument and publication are warranted.

STATEMENT OF FACTS AND CASE

A. The Complaint and Guilty Plea

The State originally charged Mr. Hendricks with one count of second degree sexual assault of a child under sixteen (sexual contact), in violation of Wis. Stat. § 948.02(2). (2). The complaint alleged that Mr. Hendricks touched the breasts and buttocks of his girlfriend's then fourteen-year-old niece. (2).

Mr. Hendricks pled guilty to a reduced charge of child enticement under Wis. Stat. § 948.07(1). (56:3;App.157).

Defense counsel submitted a plea questionnaire form with attached jury instructions at the plea hearing. (12; App.171-175). The circuit court verified that Mr. Hendricks had reviewed the plea questionnaire form with his attorney earlier that day and signed it. (56:12;App.166).

The jury instructions attached to the plea questionnaire form, however, did not contain any indication of which subsection of child enticement (which of the six intended reasons for which a person may not entice a child) applied to Mr. Hendricks. (12:4-5;App.174-175).[2]

[2] The attached instructions mirrored the language of the pattern instruction set forth in Wis. JI-Crim. 2134 but did not include the footnotes or comments included in the pattern instructions. *Compare* (12;App.171-175) *with* Wis. JI-Crim. 2134.

The areas of the attached instructions concerning the applicable statutorily-prohibited intention were left blank: "Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who with intent to _____ causes any child…"; "[t]he defendant….with an intent to_____"; "[t]he phrase "with intent to" means that the defendant must have had the mental purpose to_____". (12:4-5;App.174-175).

The court verified with defense counsel that he discussed the elements of the offense with Mr. Hendricks: "Counsel, you discussed with your client the elements of this offense; you attached an element sheet, correct?" (56:7; App.161). Defense counsel answered yes, that they "did go over the elements." (56:7;App.161).

The circuit court later, however, noted that Mr. Hendricks had to plead to one of the specific subsections of child enticement (one of the prohibited intentions). (56: 10-11;App.164-165). After a sidebar, the court stated that Mr. Hendricks would be pleading to enticement for purposes of "sexual contact". (56:10-11;App.164-165).

Though the court explained to Mr. Hendricks that he would be entering a plea to child enticement "for the purpose of potentially having sexual contact with that child", (*see* 56:11;App.165), it did not explain to Mr. Hendricks—or verify that he understood—the meaning of the term "sexual contact." (*See generally* 56;App.155-170).

B. Post-Conviction Motion for Plea Withdrawal and Circuit Court Decision

Mr. Hendricks filed a post-conviction motion seeking plea withdrawal[3] because at the time he entered his plea, the court did not explain, and he did not understand, the meaning of "sexual contact." (69;App.128-145).[4]

In his post-conviction motion, Mr. Hendricks pointed to Court of Appeals' decisions holding that a defendant pleading guilty to a sexual assault by sexual contact must understand the meaning of "sexual contact." (69:13-14; App.140-141); *see also* ***State v. Jipson***, 2003 WI App 222, 267 Wis. 2d 467, 671 N.W.2d 18; ***State v. Nichelson***, 220 Wis. 2d 214, 582 N.W.2d 460 (Ct. App.1998).

He sought an evidentiary hearing on his motion. (69;App.128-145).

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[3] Prior to sentencing, Mr. Hendricks sought plea withdrawal on grounds that he was "too rushed" and not guilty. (15;16). After a series of hearings, the circuit court denied his pre-sentencing plea withdrawal motion. (58-63). The pre-sentencing plea withdrawal litigation did not address the court's failure to verify whether Mr. Hendricks understood the meaning of "sexual contact." (*See* 58-63). Mr. Hendricks provided a more detailed recitation of the issues discussed and evidence presented during the pre-sentencing plea withdrawal litigation in the fact-section of his post-conviction motion, which is included in the Appendix. (69:2-10;App.129-137).

[4] Mr. Hendricks, by undersigned counsel, previously filed a post-conviction motion for sentence modification which the court granted. (39;45). Counsel then filed a no-merit report, but subsequently moved to dismiss the no-merit report after the Court of Appeals flagged the circuit court's failure to ensure that Mr. Hendricks understood the meaning of "sexual contact." (*See* 66).

The State agreed that Mr. Hendricks met his *prima facie* burden under ***Bangert*** entitling him to an evidentiary hearing. (71;App.146-152). The State asserted that at the hearing it would be able to prove that Mr. Hendricks nevertheless understood the meaning of "sexual contact." (71;App.146-152).

The circuit court, however, denied Mr. Hendricks' motion without an evidentiary hearing. (75;App.124-127).

The circuit court noted "[t]here is not a single case which holds that the meaning of sexual contact is an essential element of child enticement." (75:2;App.125). The court further reasoned that "[a]ctual sexual contact is not a required element" of child enticement. (75:3;App.126)(emphasis in original removed).

C. Court of Appeals Litigation and Opinion

Though at the circuit court level it agreed that Mr. Hendricks was entitled to an evidentiary hearing, on appeal, the State argued that the circuit court correctly denied the post-conviction motion without an evidentiary hearing. (State's Response Brief to the Court of Appeals at 1-12).

The State pointed to ***State v. Steele***, 2001 WI App 34, 241 Wis. 2d 269, 625 N.W.2d 595, in which the Court of Appeals used case law addressing jury unanimity (whether the jury must unanimously agree on alternative modes of committing an offense) to determine what a court was required to explain to ensure that a defendant entered a knowing guilty plea. (State's Response Brief to the Court of Appeals at 2-8).

The Court of Appeals affirmed the circuit court's decision. (Ct. App. Op.;App.101-119).

The Court noted that if it "were writing on a clean slate," it "would likely conclude that [***Nichelson*** and ***Jipson***] support the proposition that, because the State's theory here was that Hendricks enticed the child with intent to have sexual contact with her, the plea colloquy needed to include an inquiry into Hendricks' understanding of the meaning of 'sexual contact.'" (Ct. App. Op., ¶ 42;App.116).

The Court of Appeals stressed its concerns with its "short analysis" in ***Steele,*** (Ct. App. Op., ¶ 21;App.108-109), stating:

- "We agree with Hendricks that ***Steele***'s plea colloquy analysis is problematic." (Ct. App. Op., ¶ 18;App.107).

- "Like Hendricks, we fail to understand why it makes sense to look only to jury unanimity law to decide what is a necessary inquiry for plea colloquy purposes." (Ct. App. Op., ¶ 30; App. 111).

- "Thus, like Hendricks, we question ***Steele***'s reliance on the 'elements' law in the juror unanimity context". (Ct. App. Op., ¶ 31; App. 112).

The Court concluded that it nevertheless was bound by its "problematic" holding in ***Steele***. (Ct. App. Op., ¶¶ 18, 31; App.107,112).

Because ***Steele*** held that jury unanimity case law dictated what a court need and need not explain about the nature of the charge at a plea hearing, the Court looked at jury unanimity case law addressing the offense of child enticement. (Ct. App. Op., ¶¶ 23-24; App.109-110). In

Derango, this Court held that a jury need not unanimously agree on which of the alternative intents a defendant had to find the defendant guilty of child enticement. ***State v. Derango***, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833; (*see also* Ct. App. Op. ¶¶ 25-26;App.110). As a result of ***Steele***'s analysis and ***Derango***'s holding, the Court of Appeals concluded that it was required to hold that the court's plea colloquy was not deficient here. (Ct. App. Op., ¶¶ 27-28; App.111).

This Court granted Mr. Hendricks' petition for review.

ARGUMENT

I. This Court Should Hold That: (1) a Circuit Court Accepting a Guilty Plea to Child Enticement with Intent to Have Sexual Contact Must Verify that the Defendant Understands the Meaning of "Sexual Contact", and (2) Mr. Hendricks Is Entitled to an Evidentiary Hearing on His Post-Conviction Motion under ***Bangert***.

Introduction

One of a circuit court's most important duties when conducting a guilty plea colloquy is to verify that the defendant understands the nature of the charge. ***Bangert***, 131 Wis. 2d at 266 ("This Court cannot overemphasize the importance of the trial court's taking great care in ascertaining the defendant's understanding of the nature of the charge."). "A plea violates due process unless the defendant has a full understanding of the nature of the charges against him." ***State v. Bollig***, 2000 WI 6, ¶ 47, 232 Wis. 2d 561, 605 N.W.2d 199.

When Mr. Hendricks pled guilty to child enticement with intent to have sexual contact, the circuit court neither explained nor verified that he understood the meaning of "sexual contact." Had Mr. Hendricks pled guilty to the charge he originally faced—second degree sexual assault by sexual contact—the court's colloquy would have been deficient under ***Jipson*** and ***Nichelson***, which demand that a court ensure that a defendant pleading guilty to sexual assault by sexual contact understands the meaning of "sexual contact."

Yet, because Mr. Hendricks pled guilty to enticing a child with intent to have sexual contact, the circuit court concluded that its colloquy was not deficient and denied his post-conviction ***Bangert*** motion without an evidentiary hearing. The Court of Appeals—constrained by its own 2001 decision in ***Steele*** which it now acknowledges as flawed—reached the same conclusion.

Due process cannot on the one hand demand that a defendant pleading guilty to having committed an act must understand the meaning of the act, but on the other hand hold that a defendant pleading guilty to intending to commit that same act need not understand it.

Indeed, the very element of child enticement that transforms into a crime the otherwise innocuous and common behavior of causing a child to go to a particular or secluded place is the defendant's *intentions.*

As our appellate courts have done for sexual assault offenses involving sexual contact, this Court should here too construe the definition of "sexual contact" as an element of the offense of child enticement with intent to have sexual contact, requiring explanation pursuant to Wis. Stat. § 971.08 and ***Bangert***. *See* ***Jipson***, 267 Wis. 2d 467; ***Bollig***, 232 Wis. 2d 561; ***Nichelson***, 220 Wis. 2d 214.

This Court should therefore hold that a court accepting a guilty plea to child enticement with intent to have sexual contact must explain that "sexual contact" means "intentional touching for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." *See, e.g.,* ***Jipson***, 267 Wis. 2d 467, ¶ 13; *see also* Wis. Stat. § 948.01(5)(a).

This Court should further hold that jury unanimity case law—law addressing whether a jury must agree on which alternative mode of commission the State proved at trial—does not set the parameters of a court's obligations to ensure a defendant's understanding of the nature of the offense at a plea hearing.

As such, this Court should overturn the Court of Appeals' decision in ***Steele***. To fail to do so would run counter to the central holding of ***Bangert*** and would undermine this Court's cornerstone holdings mandating that circuit courts ensure that defendants pleading guilty to offenses as party to a crime understand party-to-a-crime liability.

Yet, even if this Court declines to overturn ***Steele***, this Court should still hold that a circuit court accepting a guilty plea to child enticement with intent to have sexual contact must ensure that the defendant understands the meaning of "sexual contact".

Mr. Hendricks' post-conviction motion met his *prima facie* burden under ***Bangert***. As such, he is entitled to the sole relief he asks of this Court: an order for an evidentiary hearing on his post-conviction motion.

Principles of Law and Standard of Review

In order to withdraw a plea after sentencing, a defendant must show by clear and convincing evidence that the withdrawal is necessary to correct a "manifest injustice." ***State v. Brown***, 2006 WI 10, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant meets this burden by showing that his plea was not knowingly, voluntarily, and intelligently entered. ***Id.***

To show that a plea was not knowingly, voluntarily, and intelligently entered, the defendant must make a *prima facie* showing that (1) a deficiency in the plea colloquy exists and (2) the defendant did not "know or understand the information that should have been provided at the plea hearing." ***State v. Hoppe***, 2009 WI 41, ¶ 4, n.5, 317 Wis. 2d 161, 765 N.W.2d 794 (discussing the requirements of ***Bangert***).

If a defendant "alleges sufficient material facts that, if true, would entitle the defendant to relief," the defendant is entitled to an evidentiary hearing on the post-conviction motion. ***State v. Love***, 2005 WI 116, ¶ 42, 284 Wis. 2d 111, 700 N.W.2d 62.

"Once the defendant files a ***Bangert*** motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy." ***Hoppe***, 317 Wis. 2d 161, ¶ 44.

Whether Mr. Hendricks has properly alleged "deficiencies in the plea colloquy that establish a violation of Wis. Stat. § 971.08 or other mandatory duties at a plea hearing is a question of law" that this Court reviews de novo. ***Brown***, 293 Wis. 2d 594, ¶ 21. Whether he has sufficiently alleged that he did not understand that which the court failed to explain is also a question of law. ***Id***.

A. In Accordance with ***Nicholson***, ***Bollig***, and ***Jipson***, this Court Should Hold that Wis. Stat. § 971.08 and ***Bangert*** Require a Circuit Court to Verify that a Defendant Pleading Guilty to Child Enticement with Intent to Have Sexual Contact Understands the Meaning of "Sexual Contact."

Wis. Stat. § 971.08(1) and ***Bangert*** require that, prior to accepting a guilty plea, a circuit court must verify that a defendant is entering a plea "voluntarily with understanding of the nature of the charge". Wis. Stat. § 971.08(1)(a); ***Bangert***, 131 Wis. 2d at 267-68.

The crime of child enticement, as set forth in Wis. Stat. 948.07, provides that "[w]hoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room, or secluded place is guilty of a Class D felony." Wis. Stat. § 948.07.

The statute then provides six subsections of prohibited intended "acts", one of which is "[h]aving *sexual contact* or sexual intercourse with the child in violation of s. 948.02,

948.085, or 948.095". Wis. Stat. § 948.07(1)(emphasis added).[5]

Wis. Stat. § 948.01(5)[6] provides the legal definition of "sexual contact" for Chapter 948 offenses:

> (a) Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:
>
> 1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.
>
> 2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.
>
> (b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

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[5] The other five acts are: (2) "[c]ausing the child to engage in prostitution"; (3) "[e]xposing a sex organ to the child or causing the child to expose a sex organ in violation of s. 948.10"; (4) "[r]ecording the child engaging in sexually explicit conduct"; (5) "[c]ausing bodily or mental harm to the child"; or (6) "[g]iving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961". Wis. Stat. § 948.07.

[6] All citations to the Wisconsin Statutes reference the 2011-12 statutes unless otherwise indictated.

> (c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

Wis. Stat. § 948.01(5).[7]

i. Pursuant to ***Nichelson***, ***Bollig***, and ***Jipson***, this Court should construe the meaning of "sexual contact" as an essential element of the offense of child enticement with intent to have sexual contact for purposes of compliance with Wis. Stat. § 971.08 and ***Bangert***.

In ***Nichelson***, the Court of Appeals granted plea withdrawal after concluding that the circuit court failed to comply with Wis. Stat. § 971.08 because it failed to ensure that the defendant, charged with one count of first-degree sexual assault of a child, understood that one of the "essential elements" that the State would have to prove was that "his purpose in sexually touching the child was his own sexual gratification". 220 Wis. 2d at 220-225.

A few years later in ***Bollig***, this Court held that one of the "essential elements" of attempted sexual contact with a

[7] In his explanation of the definition of "sexual contact" in his post-conviction motion, Mr. Hendricks cited the language set forth in Wis. Stat. § 939.22(34). (69:17;App.144). While substantively the same as 948.01(5), the statutes are structured a bit differently. *Compare* Wis. Stat. § 948.015(5) *with* Wis. Stat. § 939.22(34). Wis. Stat. § 939.22 explains that its definitions apply in Chapters 939 to 948 unless "the word or phrase is defined in s. 948.01 for purposes of ch. 948." Wis. Stat. § 939.22. Thus, because "sexual contact" is defined in § 948.01, the proper statute to reference for the definition of "sexual contact" in this matter is Wis. Stat. § 948.01(5).

child was that the "alleged contact was for the purpose of the defendant's sexual gratification or the victim's humiliation." 232 Wis. 2d 561, ¶ 50. In so doing, this Court noted that while the jury instruction for the offense (attempted sexual assault of a child) "indicates only two elements of the charge, it incorporates by reference the definition of sexual contact, which includes the added sexual gratification element." ***Id.***, ¶ 50, n.8.

Then, in ***Jipson***, the Court of Appeals held a plea colloquy deficient where the circuit court failed to ensure that the defendant understood what "sexual contact" meant. The defendant pled no contest to one count of second-degree sexual assault of a child by sexual contact. 267 Wis. 2d 467, ¶ 2. Post-conviction, the defendant sought plea withdrawal on grounds that he did not understand the meaning of "sexual contact" at the time he entered his plea. ***Id.***, ¶ 4. The State argued that there was "no requirement that the defendant understand the exact legal terms of each element." ***Id.***, ¶ 10.

Citing ***Nichelson***, the Court of Appeals rejected the State's argument and explained that to "understand the nature of the charge, the defendant must be aware of all the essential elements of the crime." ***Id.***, ¶ 9 (citing ***Nichelson***, 220 Wis. 2d at 218).

The Court recognized that while the "purpose of the sexual contact is not an element of the crime listed under Wis. Stat. § 948.02(2), but rather is a definition of the element 'sexual contact' found in Wis. Stat. § 948.01(5), the courts have nevertheless crafted this to be an element of the offense." ***Id.***, ¶ 9.

Thus, had Mr. Hendricks pled guilty to the charge he originally faced (the charge he presumably would have faced had he gone to trial)—second degree sexual assault by sexual

contact—the court's colloquy would have been controlled by and deficient under the ***Jipson*** line of cases.

This Court should hold that ***Jipson***, ***Bollig***, and ***Nichelson*** equally apply here and construe the meaning of "sexual contact" as an essential element of child enticement with intent to have sexual contact for purposes of Wis. Stat. § 971.08 and ***Bangert***. If a defendant cannot knowingly enter a plea to having "sexual contact" without understanding the meaning of "sexual contact," neither can a defendant knowingly enter a plea to enticing a child with intent to have "sexual contact" without that understanding.

Consistent with the requirements of ***Nichelson*** and ***Jipson***, this Court should accordingly hold that when a defendant pleads guilty to child enticement with intent to have sexual contact, a circuit court must ensure that a defendant understands that this means that the State would have to prove that there was "intentional touching for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." *See, e.g.,* ***Jipson***, 267 Wis. 2d 467, ¶ 13; *see also* Wis. Stat. § 948.01(5)(a).

The pattern jury instructions for child enticement also reflect that the meaning of "sexual contact" is essential to understanding the offense of child enticement with intent to have sexual contact:

- One of the required elements listed in the instruction is that the defendant "caused (name of victim) to go into a (vehicle) (building) (room) (secluded place) *with intent to* _____." Wis. JI-CRIM 2134 (emphasis added);

- The instructions cite to a footnote directing that the following should be included in the blank space (*"with intent to*_____"):
    - "Here identify the conduct specified in subsecs. (1) to (6) of § 948.07. Care should be taken to provide a complete description of what the conduct requires, *including a definition of terms where necessary*." Wis. JI-CRIM 2134, n.5 (emphasis added).
- The Jury Instruction Committee suggests that a court read the following where the defendant is charged child enticement with intent to have "sexual contact":
    - …with intent to "…have sexual contact with (name of victim). Sexual contact is an intentional touching by the defendant of an intimate part of another, done for the purpose of (sexual arousal or gratification)(sexually degrading or humiliating that person)." ***Id.***

The circuit court denied Mr. Hendricks' post-conviction motion based on its conclusion that because the required element for child enticement is "only the intent to have sexual contact"—because *"[a]ctual sexual contact is not a required element"*—the court had no obligation to explain the meaning of "sexual contact". (75:3;App.126) (emphasis in original).

The circuit court's logic was flawed and its conclusion is wrong. By this same logic, a circuit court would not need to verify that a defendant pleading guilty to attempted first

degree intentional homicide understands what "intentional homicide" means. Similarly, if the circuit court's logic is correct, then this Court's decision in ***Bollig*** is wrong: there the defendant pled guilty to only *attempted* sexual contact with a child, yet this Court held that the meaning of "sexual contact" was indeed an essential element of the offense. ***Bollig***, 232 Wis. 2d 561, ¶ 50.

If anything, it is seemingly more important for a court to ensure that a defendant who is pleading guilty to a crime of *intending* to commit another act (instead of committing the act itself) understands exactly what it is the State would have to prove he was intending to do.

The circuit court's logic begs the question: How can a defendant knowingly and intelligently plead guilty to causing a child to go into a secluded place with the intent to do "X" if he need not understand what "X" is?

Adults cause children to go into vehicles, buildings, rooms, or secluded places all the time. But not all adults are guilty of child enticement. It is the adult's intentions which make the act criminal. As such, this Court should hold that pursuant to ***Jipson***, ***Bollig***, and ***Nichelson***, a circuit court accepting a guilty plea to child enticement with intent to have sexual contact must verify that the defendant understands the meaning of "sexual contact."

B. This Court Should Overturn the Court of Appeals' 2001 Decision in ***Steele*** and Hold that Jury Unanimity Case Law Does Not Govern a Circuit Court's Requirements Under Wis. Stat. § 971.08 and ***Bangert***.

This Court has never before held that jury unanimity case law—case law addressing whether jurors must

unanimously agree on which of alternative modes of commission of one offense the State proved—either does govern or should govern a circuit court's requirements under Wis. Stat. § 971.08 and ***Bangert***.

i. Wis. Stat. § 971.08(1)(a) and ***Bangert*** require that a circuit court accepting a guilty plea ensures that the defendant understands the nature of the charge. The court's colloquy may not be perfunctory and may not elevate form over substance.

Wis. Stat. § 971.08(1)(a) requires that a circuit court at a guilty plea hearing must "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge". Wis. Stat. § 971.08(1)(a).

This Court in ***Bangert*** made it "mandatory upon the trial court to determine a defendant's understanding of the nature of the charge" and held that court must (1) either inform the defendant of the nature of the charge or ascertain that the defendant "possesses accurate information about the nature of the charge" *and* then (2) "ascertain the defendant's understanding of the nature of the charge as expressly required by Section 971.08(1)(a)." 131 Wis. 2d at 267.

Thus, ***Bangert*** requires that a court make sure that the defendant has both been given an explanation of the nature of the offense and understands that explanation.

This Court held that a "perfunctory affirmative response by the defendant that he understands the nature of the offense", without more, will not suffice. ***Id.*** at 268-269. If so, "[f]orm would be elevated over substance":

"[u]nderstanding must have knowledge as its antecedent; knowledge, like understanding, cannot be inferred or assumed on a silent record." ***Id.*** at 269.

ii. The Court of Appeals in ***Steele*** applied jury unanimity case law to determine what a court must explain to a defendant about the nature of the offense to comport with Wis. Stat. § 971.08 and ***Bangert***.

The defendant in ***Steele*** entered a plea to burglary with "the intent to commit a felony." 241 Wis. 2d 269, ¶¶ 1-10; *see also* Wis. Stat. § 943.10(2)(a) (1997-98). The defendant argued that the court had an obligation to inform him at the plea hearing of the nature of the specific "underlying felony". ***Id.***, ¶ 8.

Prior to ***Steele***, the Court of Appeals held in ***State v. Hammer***, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997), that a jury in a burglary with the intent to commit a felony case does not have to unanimously agree as to what particular felony the defendant intended to commit to find the defendant guilty. 241 Wis. 2d 269, ¶ 9 (discussing ***Hammer***).

As the Court of Appeals explained in its decision here, its "short analysis in ***Steele*** consisted of looking to a jury unanimity case addressing whether, as to a burglary charge, the underlying felony was an essential element of the crime." (Ct. App. Op., ¶ 21;App.108).

"We noted in ***Steele*** the much-repeated language from ***Bangert*** requiring courts to inform defendants of, or ascertain that they have been informed of, the essential elements of the crime and then also ascertain that the defendant understands the essential elements of the crime." (Ct. App.

Op., ¶ 20;App.108). "Thus, the question, as we framed it in ***Steele***, was whether this omission was a plea colloquy defect because the specific felony was an 'essential element' of the burglary charge." (Ct. App. Op., ¶ 20;App.108).

Without any explanation as to *why* jury unanimity case law would govern ***Bangert*** requirements, the Court in ***Steele*** found that its holding in ***Hammer*** reflected that the nature of the underlying felony did not have to be explained for the court to comply with Wis. Stat. § 971.08(1)(a). ***Steele***, 241 Wis. 2d 269, ¶ 9.[8]

iii. The Court of Appeals here determined that it was required by ***Steele*** to look to case law concerning jury unanimity requirements at child enticement trials to determine what the court was required to explain about the nature of the offense to comport with Wis. Stat. § 971.08 and ***Bangert***.

The Court of Appeals here concluded that "[i]f [it] were writing on a clean slate, [it] would likely conclude" that ***Nichelson*** and ***Jipson*** "support the proposition that, because the State's theory here was that Hendricks enticed the child with intent to have sexual contact with her, the plea colloquy needed to include an inquiry into Hendricks' understanding of the meaning of 'sexual contact.'" (Ct. App. Op., ¶ 42;App. 116).

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[8] This Court did not have the opportunity to review the Court of Appeals' decision in ***Steele***, as the petition for review was not timely filed and thus dismissed. *See* Wisconsin Court System Supreme Court and Court of Appeals Access, Appeal Number 2000AP000190-CR, ***State v. Earl Steele III*** (noting that the petition for review was dismissed as untimely).

Though the Court of Appeals could not "override or ignore that analysis", it now "fail[s] to understand the logic" of its own decision in ***Steele***. (Ct. App. Op., ¶¶ 30-31;App. 111-112).

The Court of Appeals concluded that ***Steele*** required it to "ascertain whether the particular act Hendricks allegedly intended to commit, sexual contact, is an essential element of child enticement." (Ct. App. Op., ¶ 24;App.110). And, pursuant to ***Steele***, the Court of Appeals looked at jury unanimity case law concerning child enticement. (Ct. App. Op.;App.101-119).

In ***Derango***, this Court concluded that due process did not require a jury to unanimously agree as to which of a few alternative intentions a defendant may have had to cause a child to go to a secluded place. 236 Wis. 2d 721, ¶ 25. Only a few of the six alternative intended "acts" in the child enticement statute—only modes of committing sexually-related offenses—could be supported by the facts presented at trial. ***Id.***, ¶ 25. This Court concluded that the offenses were not so "conceptually distinct" as to require unanimity. ***Id.***, ¶¶ 24-25.

In light of ***Derango***, the Court of Appeals here concluded that ***Steele*** required it to hold that the plea colloquy was not deficient. (Ct. App. Op.;App.101-119).

iv. Jury unanimity case law is inapplicable to the question of what a circuit court must explain to ensure that a defendant enters a knowing guilty plea. The Court of Appeals now agrees.

As the Court of Appeals now recognizes, however, its analysis in ***Steele*** was flawed: "We agree with Hendricks that

Steele's plea colloquy analysis is problematic." (Ct. App. Op., ¶ 18;App.107).

The question of jury unanimity presents a far different legal question than what a court must explain to a defendant in order for the defendant's plea to be knowingly entered.

Unlike at trial, when a defendant enters a guilty plea, he waives his constitutional trial rights and in so doing waives his opportunity to hold the State to its burden of proof. As such, the law requires that the Court ensure, among other things, that "the plea is made voluntarily with understanding of the nature of the charge". Wis. Stat. § 971.08.

Thus, where jury unanimity case law concerns whether all jurors have to agree to one particular mode of committing an element of a crime among alternative options to *find the defendant guilty* of the offense beyond a reasonable doubt, ***Bangert*** case law concerns what a circuit court must explain to a defendant to ensure that he *knowingly enters a plea*.

Jury unanimity does not involve the same questions and thus should not govern a circuit court's requirements under ***Bangert*** and Wis. Stat. § 971.08.

The Court of Appeals agrees: "Like Hendricks, we fail to understand why it makes sense to look only to jury unanimity law to decide what is a necessary inquiry for plea colloquy purposes." (Ct. App. Op., ¶ 30;App.111).

The Court explained:

> Jury unanimity cases address whether juries must agree on a single means of committing a crime. Plea colloquy law addresses what defendants must understand in order

> to enter a knowing plea. Generally speaking, the latter involves an inquiry into a defendant's understanding of what the State needs to do in order to prove a crime beyond a reasonable doubt.

(Ct. App. Op., ¶ 30;App.111-112).

The Court of Appeals concluded: "Thus, it does not seem to logically follow that, just because jurors need not agree on alternative means of the commission of a crime, a defendant does not need to understand the alternative or alternatives the state must prove in order to enter a knowing plea." (Ct. App. Op., ¶ 30;App.112).

The Court of Appeals explained that its decision in ***Steele*** to use jury unanimity law to decide whether a court complied with Wis. Stat. § 971.08 appears to have been motivated "by language from ***Bangert*** requiring courts to inform defendants of, or ascertain that they have been informed of, the *essential elements* of the crime". (Ct. App. Op., ¶ 20;App.108)(emphasis added).

For the Court of Appeals to have reached its holding in ***Steele***, it had to rely on the incorrect proposition that if alternative means exist for a defendant to have committed one "intent" element, that element is not an "essential element" of the offense for purposes of Wis. Stat. § 971.08 and ***Bangert***. The Court of Appeals was wrong.

First, importantly, this Court made clear in ***Derango*** that a jury *does* have to find that the State proved that the defendant had one of the alternative prohibited intentions beyond a reasonable doubt. *See* 236 Wis. 2d 721, ¶ 25. The same was true in ***Hammer*** (the jury unanimity burglary case relied upon in ***Steele***). (Ct. App. Op., ¶ 22;App.109)("To be

clear, there is no suggestion in ***Hammer*** that the jury did not need to be instructed on which underlying felonies were alleged or on the elements of those underlying felonies").

Thus, at a trial for child enticement, though the jury does not have to agree on *which* of the alternative intentions the defendant had, it does have to agree that the State proved at least *one* of the statutorily-prohibited intentions to find the defendant guilty beyond a reasonable doubt. As such, the "intent element" *is* essential to the State's burden of proof. *See* ***Derango***, 236 Wis. 2d 721, ¶ 51.

Similarly, ***Hammer*** did not provide that the nature of the underlying felony was not an "essential element" for burglary—that is simply how the Court of Appeals construed ***Hammer***'s holding in ***Steele*****:** "It follows from our conclusion in ***Hammer*** that the nature of the particular underlying felony is not an essential element of a burglary charge". ***Steele***, 241 Wis. 2d 269, ¶ 9. But as the Court of Appeals noted in its decision here, at a trial for burglary with intent to commit a felony, the State *would* have to prove the nature of the underlying felony. (*See* Ct. App. Op., ¶ 22;App.109).

To say that a defendant need not understand what he intended to do to enter a knowing plea based on case law addressing a separate and inapplicable question of law elevates form over substance—something this Court denounced in ***Bangert***, 131 Wis. 2d at 269.

Further, neither the plain language of Wis. Stat. § 971.08 nor ***Bangert*** equate an "understanding of the nature of the charge" or an "essential element" with jury unanimity.

The statute requires a court to "[a]ddress the defendant personally and determine that the plea is made voluntarily with *understanding of the nature of the charge*". Wis. Stat. § 971.08 (emphasis added). It does not provide that the court must ensure that the defendant understands only those elements upon which a jury must unanimously agree in order to find him guilty.

In ***Bangert***, this Court reaffirmed this statutory requirement and noted that "[a]n understanding of the nature of the charge must include an awareness of the essential elements of the crime." 131 Wis. 2d at 267. But ***Bangert*** does not equate "essential element" with jury unanimity. *See generally* ***id***.

Consider party-to-a-crime liability: The method of complicity (whether the person was the direct actor or was ready or willing to assist, etc.) is *not* an "essential element of the offense upon which the jury must unanimously agree" at trial. ***May v. State***, 97 Wis. 2d 175, 239 N.W.2d 478 (1980); *see also* ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979).

Yet, this Court has repeatedly held that a circuit court fails to comply with Wis. Stat. § 971.08 and ***Bangert*** if it fails to ensure that the defendant understands the meaning of party-to-a-crime liability. ***State v. Brown***, 293 Wis. 2d 594, ¶ 55; ***State v. Howell***, 2007 WI 75, ¶¶ 37-55, 301 Wis. 2d 350, 734 N.W.2d 48. And in ***Brown***, this Court explicitly referred to the "concept of party to a crime" as "an essential element of the charges." 293 Wis. 2d 594, ¶ 55. As such, affirming the rationale of ***Steele*** would undermine this Court's cornerstone holdings in ***Brown*** and ***Howell***.

This Court should hold that jury unanimity standards do not govern a court's requirements under Wis. Stat. § 971.08 and ***Bangert***.

C. Even if This Court Declines to Overturn ***Steele***, This Court Should Nevertheless Hold that a Circuit Court Must Verify that a Defendant Pleading Guilty to Child Enticement with Intent to Have "Sexual Contact" Understands the Meaning of "Sexual Contact."

Even if this Court declines to overturn the Court of Appeals holding in ***Steele***, key differences exist between ***Steele*** and this case such that this Court may recognize that Mr. Hendricks is entitled to a hearing without issuing a decision in conflict with ***Steele*** or ***Derango***.

First, Wisconsin's burglary statute (at issue in ***Steele***) provides that whoever "intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony" is guilty of burglary. Wis. Stat. § 943.10. The statute does not limit the offense to only certain intended felonies.

Unlike burglary with intent to commit a felony, the child enticement statute has six specifically listed "acts", one of which a defendant must have intended to commit to be guilty of child enticement: Wis. Stat. § 948.07 ("[w]hoever, with intent to commit any of the following acts…). One of these six specific intended acts set forth in the statute is "[h]aving sexual contact or sexual intercourse with the child". Wis. Stat. § 948.07(1). Another, for example, is "[g]iving or selling to the child a controlled substance analog in violation of ch. 961." Wis. Stat. § 948.07(6).

Importantly, these intentions are what transform the otherwise commonplace behavior of causing a child to go to a particular place into a crime. Thus, while a defendant who unlawfully enters a home or other building without consent has—by those actions alone—likely committed a crime, *see, e.g.,* Wis. Stats. §§ 943.14 (criminal trespass to dwellings) and 943.15 (criminal entry into locked and enclosed building), the same is not true for child enticement.

Stated differently, if a court explains to a defendant pleading guilty to burglary that the State at trial would have to prove that he "intentionally entered the home of another without consent and with intent to commit a felony," the court has—without more—arguably communicated the nature of the offense to the defendant.

On the other hand, a court that explains that "the State would have to prove that you, with the intent to commit any of the following acts, caused or attempted to cause a child under 18 to go into any vehicle, building or secluded place"—without more—has not. The circuit court here acknowledged as much: "the plea under 948.07 needs to be entered to child enticement but under a specific subsection." (56:10;App.164).

Second, like the term "party to a crime," "sexual contact" is an obscure term with a particular legal definition. Indeed, in ***Jipson***, the Court of Appeals acknowledged that while the meaning of sexual contact is not in fact "an element of the crime [of child sexual assault] listed under Wis. Stat. § 948.02(2), but rather is a definition of the element 'sexual contact' found in Wis. Stat. § 948.01(5), the courts have nevertheless crafted this to be an element of the offense." 267 Wis. 2d 467, ¶ 9.

Though the rationale behind this crafting was given "little explanation because the State agreed", the ***Jipson*** line of cases reflects the complex nature of the term "sexual contact" and the need for circuit courts to explain its meaning to ensure that a defendant has entered a knowing plea.

Thus, just as our appellate courts have "crafted" the legal meaning of "sexual contact" to be an element of the offense for sexual assault offenses, this Court could here distinguish ***Steele*** by holding that "sexual contact" has a particular—and not immediately apparent or understood—legal definition requiring a court's explanation to comply with Wis. Stat. § 971.08 and ***Bangert***.

D. Mr. Hendricks Met His *Prima Facie* Burden under ***Bangert***. The Circuit Court Must Hold an Evidentiary Hearing on His Post-Conviction Motion.

Importantly, whether to grant a ***Bangert*** hearing is not left to the court's discretion—if the motion establishes a *prima facie* violation and makes the requisite allegations, "the court *must* hold a postconviction evidentiary hearing". ***Brown***, 293 Wis. 2d 594, ¶ 40 (emphasis added).

Bangert required that Mr. Hendricks make a *prima facie* showing that (1) a deficiency in the plea colloquy exists; and (2) he did not understand the information that should have been provided at the plea hearing. *See* ***id.*** (discussing the requirements of ***Bangert***).

Mr. Hendricks met that burden. Mr. Hendricks simply seeks the evidentiary hearing that both parties before the circuit court agreed should occur. (*See* 69,71;App.128-152).

First, Mr. Hendricks sufficiently alleged a deficiency in the plea colloquy: as argued above and in his post-conviction motion, the circuit court was required to ensure that Mr. Hendricks understood the meaning of "sexual contact". *See infra* Argument I.A.-C; (*see also* 69;App.128-145).

As Mr. Hendricks alleged in his post-conviction motion, the circuit court failed to do so. (69;App.128-145). The circuit court at no point ever advised Mr. Hendricks that "sexual contact" meant the "intentional touching for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." (*See generally* 56;App.155-170); *see also, e.g.,* ***Jipson***, 267 Wis. 2d 467, ¶ 13; *see also* Wis. Stat. § 948.01(5)(a). The circuit court accordingly also never asked Mr. Hendricks if he understood this definition. (*See generally* 56;App.155-170).

This definition was not included in the plea questionnaire form or attached jury instructions (indeed, the plea questionnaire form and attached instructions did not contain any indication of which subsection of child enticement—which "intent"—applied to Mr. Hendricks). (*See* 12;App.171-175).

It was not until after the circuit court realized that Mr. Hendricks needed to plead to a particular subsection that the parties agreed he would plead to child enticement with intent to have "sexual contact." (56:10-11;App.164-165). The court subsequently verified that Mr. Hendricks understood that he was admitting to child enticement "for the purpose of potentially having sexual contact with that child and that's indicated in the complaint, indicated in this case," and Mr. Hendricks agreed. (56:11;App.165). It still, however, did

not explain to Mr. Hendricks what "sexual contact" means, nor did it verify whether Mr. Hendricks understood the meaning. (*See generally* 56;App.155-170).

Second, as stated in his post-conviction motion, "Mr. Hendricks asserts, and at a hearing would testify, that at the time he entered his plea, he did not understand the statutory meaning of 'sexual contact.'" (69:18;App.145).

Mr. Hendricks therefore alleged facts sufficient to support his *prima facie* burden, which entitled him to an evidentiary hearing. The circuit court erred in denying his request for this evidentiary hearing.

If the State believes that it could prove that Mr. Hendricks understood the meaning of "sexual contact" despite the deficiency in the colloquy and the allegations in his post-conviction motion, the State must do so at the evidentiary hearing. *See, e.g.*, ***Brown***, 293 Wis. 2d 594, ¶ 79 (remanding to the circuit court for an evidentiary hearing on a ***Bangert*** motion "at which the State will have an opportunity to present evidence" that the defendant understood the nature of the charge despite the deficiency).

Importantly, under ***Bangert***, Mr. Hendricks was not required to make a *prima facie* showing of why his lack of understanding of the meaning of "sexual contact" would have altered his decision to enter his plea. Such an allegation is only required if a defendant alleges an off-the-record error where there was a sufficient on-the-record plea colloquy (a ***Nelson/Bentley***[9] motion). *See* ***State v. Howell***, 301 Wis. 2d

[9] ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972); ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

350 (contrasting the less stringent requirements of a ***Bangert*** motion with the more stringent requirements of a ***Nelson/Bentley*** motion).

Mr. Hendricks's post-conviction motion established an on-the-record ***Bangert*** deficiency. "We require less from the allegations in a ***Bangert*** motion because the circuit court bears the responsibility of preventing failures in the plea colloquy." ***Howell***, 301 Wis. 2d 350, ¶ 28.

As such, the circuit court was required to hold an evidentiary hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶ 40 ("If the motion establishes a prima facie violation of Wis. Stat. § 971.08 or other court-mandated duties and makes the requisite allegations, the court *must hold* a postconviction evidentiary hearing…".)(emphasis in original).

Finally, it is worth noting that many of the cornerstone cases in which this Court has held that a circuit court improperly denied a plea withdrawal motion without an evidentiary hearing have originated, as here, in Milwaukee County. *See, e.g.* ***Howell***, 301 Wis. 2d 350; ***Brown***, 293 Wis. 2d 594; ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14.

Mr. Hendricks recognizes that the Milwaukee County circuit courts handle high caseloads. *See e.g.,* ***Green v. State***, 75 Wis. 2d 631, 636-637, 250 N.W.2d 305 (1977) (discussing the congestion in the Milwaukee courts in the context of a speedy trial challenge). But the ***Bangert*** standard requiring an evidentiary hearing when a defendant meets his *prima facie* burden must apply with equal force in Milwaukee as in the rest of the State.

This Court should not permit Milwaukee County to abdicate its responsibility to hold required ***Bangert*** hearings. To do so would undermine judicial efficiency by taxing our appellate courts with litigation to obtain legally-required evidentiary hearings. *See, e.g.,* ***Chen v. Warner***, 2005 WI 55, ¶ 43, 280 Wis. 2d 344, 695 N.W.2d 758 (discussing the respective roles of appellate and circuit courts in the context of standards of review and explaining that the standards are appropriate given "[c]oncerns of judicial administration—efficiency, accuracy, and precedence").

Mr. Hendricks met his *prima facie* burden entitling him to an evidentiary hearing on his post-conviction motion.

CONCLUSION

For these reasons, Mr. Hendricks respectfully requests that this Court reverse the Court of Appeals and remand this matter for an evidentiary hearing on his ***Bangert*** post-conviction motion.

Dated this 14th day of June, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,777 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 14th day of June, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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* Undersigned counsel's copy of this transcript, which she has included in the Appendix, contains markings (underlines) which are not present in the original transcript.