STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP000741-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAVIEN CAJUJUAN PEGEESE,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction and Written Order Denying the Postconviction Motion Entered in the Rock County Circuit Court, the Honorable John M. Wood, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ISSUE PRESENTED

> Whether the circuit circuit's failure to personally ensure that Pegeese understood each constitutional right waived by his guilty plea entitled Pegeese to a *Bangert*[1] evidentiary hearing to determine whether his plea was knowing, intelligent, and voluntary.

How the lower courts ruled. Both the circuit court and the court of appeals held that that the plea judge's reference to the constitutional rights section of a plea questionnaire signed by Pegeese satisfied the judge's duty to "address the defendant personally and … inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights." *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are customary in cases heard by this court.

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[1] *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

STATEMENT OF THE CASE

I. Introduction

In this day and age, for most criminal defendants the proverbial "day in court" is a plea hearing. To help ensure that a defendant's plea is knowing, intelligent, and voluntary, as due process demands, both the legislature and this court charge the trial court with advising defendants of various consequences of their decision to enter a plea. *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906; Wis. Stat. § 971.08. Among these obligations is a duty to "address the defendant personally and … inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights." *Id*. at ¶35.

The question before the Court is whether this duty to "inform and verify" applies to *each* constitutional right given up by a plea, or whether it suffices that the judge verifies that the defendant signed a piece of paper that includes a description of each right. The rules governing plea colloquys in the federal courts and the courts of 42 states require judges to advise defendants of each right waived before accepting a plea. (*See infra* Argument Section I.A.).

Wisconsin law arguably requires judges to likewise "inform and verify" each constitutional right waived by a plea. This Court has held that a "Plea Questionnaire" signed by the defendant cannot

generally substitute for the plea colloquy, *State v. Hoppe*, 2009 WI 41, ¶38, 317 Wis. 2d 161, 182, 765 N.W.2d 794, 804, and that reliance on a statement in the Questionnaire or the attorney's representations cannot satisfy the court's duty to ensure the defendant understands that the court is not bound by a plea bargain, *State v. Hampton*, 2004 WI 107, ¶69, 274 Wis. 2d 379, 392, 683 N.W.2d 14, 20, and understands the nature of the charge, *Brown*, 2006 WI 100, ¶56. However, earlier cases held that the plea judge may "refer to some portion of the record or communication between defense counsel and defendant" that demonstrates the defendant's requisite knowledge. *Bangert*, 131 Wis. 2d at 270–72. As a consequence, the Wisconsin Court of Appeals has sometimes held that the plea judge must inform the defendant of each right waived by the plea, and other times has held that reference to the plea questionnaire sufficed. (*See infra* Argument Section I.C.).

Pegeese asks this Court to explicitly bring Wisconsin in line with the vast majority of courts in our country, and set a clear rule requiring plea judges to inform the defendant of each right waived by a plea, and verify that the defendant understands that each right is waived by the plea. As a practical matter, this will reduce the amount of postconviction litigation over whether the defendant understood his or her rights. Judges will have an opportunity to suss out the defendants who do not understand each right *before* they enter a plea, thus reducing the number of defendants who later seek to withdraw their plea

because they genuinely did not understand their rights. More importantly, it will respect the enormity of the decision to plead guilty and the significance of the constitutional rights waived by the plea. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Even if the Court does not hold that the duty to "inform and verify" applies to each individual constitutional right, here the plea judge did not sufficiently incorporate the constitutional rights section of the plea questionnaire during the plea colloquy to ensure that Pegeese understood his rights. The court separately asked whether Pegeese understood the plea questionnaire and understood the constitutional rights he was waiving, but did not ask if he understood the constitutional rights *in* the plea questionnaire. (*See infra* Argument Section II).

II. Factual Background

On June 24, 2015, the state filed a criminal complaint charging Pegeese with armed robbery as a party to a crime. Wis. Stats. §§ 943.32(2) and 939.05. (1). The complaint alleged that on April 24, 2015, three people came up to a pizza deliveryman, and that one of the three struck the deliveryman in the side of the head with a pistol and took money from his pocket. (1:1). Police spoke with the person who owned the phone that ordered the pizza, and she said that Pegeese was not at her house when the pizza was ordered. (1:2). However, she did overhear Pegeese and another person talking the next day about how one of them "pistol-whipped" the

deliveryman. (1:2). Pegeese turned 16 years old in February 2015, approximately two months before the robbery. (1).

Two months after he was charged, and when he was still just 16 years old, Pegeese pled guilty to robbery with threat of force as party to a crime. Wis. Stats. § 943.32(1)(b). (45). At the same hearing, the court withheld sentencing Pegeese and imposed three years of probation. (14; 45:11; App. 107).

Pegeese filed a postconviction motion requesting plea withdrawal on the grounds that the circuit court failed to explain, and he did not understand, the constitutional rights waived by his plea, specifically his rights to: (1) remain silent or testify, (2) use subpoenas to require witnesses to testify, (3) have a jury trial where all 12 jurors have to agree on guilt, (4) confront and cross-examine people who testify against him, and (5) make the state prove him guilty beyond a reasonable doubt. (31:2).

The entirety of the plea colloquy concerning Pegeese's constitutional rights was as follows:

> **Court**: You have provided me today with a Plea Agreement and Waiver of Rights document; correct?
>
> **Pegeese:** Yes, sir.
>
> **Court:** That's your signature on the back side?
>
> **Pegeese:** Yes, sir.

Court: Did you read that document before you signed it?

Pegeese: Yes, sir.

Court: Do you understand all the statements made in that document?

Pegeese: Yes, sir.

Court: Any questions about anything in that document?

Pegeese: No, sir.

Court: Mr. Hoag, you reviewed the Plea Questionnaire with him?

Mr. Hoag: I read it to him, Your Honor.

Court: Do you believe he understands it?

Mr. Hoag: I do.

Court: Mr. Pageese [*sic*], do you understand the Constitutional Rights you give up when you enter a plea today?

Pegeese: Yes, sir.

Court: Any questions about those rights?

Pegeese: No, sir.

(45:3-4; App. 111-112).

Pegeese's postconviction motion explained that he was 16 years old when he entered his plea, and that he had completed only the 10th grade and had not received a GED or HSED. (31:6). In addition, he had never entered a plea in adult court before he entered this plea. (31:6). The motion requested an evidentiary hearing pursuant to *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). (31:7).

The circuit court held that Pegeese failed to make a prima facie case that the plea colloquy was defective, and thus an evidentiary hearing was not necessary. (47:23; App. 114). The court reasoned there was no need for the court to separately review each constitutional right because the defendant and trial attorney stated at the plea hearing they went through the plea questionnaire form and Pegeese said he did not need more time to talk to his attorney. (47:25-26; App. 116-117). The court also found Pegeese's assertion that he did not understand his constitutional rights when he entered his plea insufficient because he did not attach an affidavit alleging the same. (47:23; App. 114).

The court of appeals upheld the circuit court's decision. The court held that even though the circuit court did not explicitly refer to the constitutional rights set out in the plea questionnaire, in context the court was referring to the form. (App. 102-103, ¶¶5-8). In addition, it rejected Pegeese's argument that the circuit court was obliged to inform Pegeese of each constitutional right waived by the plea. (App. 104-105, ¶¶10-17). The court of appeals did not address the circuit court's alternative holding that Pegeese was obliged to include an affidavit supporting the postconviction motion.

Pegeese filed a petition for review that this court granted on January 15, 2019.

ARGUMENT

I. The plea judge's failure to (1) inform Pegeese of each of his constitutional rights and (2) verify that he understood each would be waived by his plea entitled Pegeese to a *Bangert* hearing.

A. The applicable rules for the federal courts and forty-two states require judges to advise defendants of each constitutional right waived by a plea.

The Supreme Court has long recognized that a guilty "plea simultaneously waives several constitutional rights, including [the] privilege against compulsory self-incrimination, [the] right to trial by jury, and [the] right to confront … accusers." *McCarthy v. United States*, 394 U.S. 459, 465-466, n. 11 & 16 (1969) (collecting cases). The Due Process clause requires that these waivers be "voluntary and knowing." *Id*.

With this backdrop, the Supreme Court explained in *McCarthy* why Rule 11 of the Federal Rules of Criminal Procedure required the court "to address the defendant personally" before accepting the plea: "By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack." 394 U.S. at 466.

The same year that it decided *McCarthy*, the Supreme Court addressed a state court's failure to

ensure that a defendant understood the constitutional rights waived by a guilty plea. The court reversed the defendant's conviction, holding that "[w]e cannot presume a waiver of these … important federal rights from a silent record." *Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969). "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Id*.

The *Boykin* decision prompted amendment of the Federal Rules of Criminal Procedure to specifically require the district court to inform the defendant of each right waived by a plea. Fed. R. Crim. P. 11, Advisory Committee Notes, 1974 Amendments. The current version of Rule 11 requires federal district courts to "address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands" the following (among other consequences of a plea):

- "the right to plead not guilty, or having already so pleaded, to persist in that plea."
- "the right to a jury trial."
- "the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding."

- "the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses."

- "the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere."

Fed. R. Crim. P. 11(b)(1)(B)-(F).

The vast majority of the states have followed the federal court's example. Thirty states have adopted a statute or rule of criminal procedure requiring the plea judge to advise the defendant of each constitutional right waived by the plea.[2] The

[2] Ala. R. Crim. P. 14.4 (Alabama); Alaska R. Crim. P. 11 (Alaska); Ark. R. Crim. P. 24.4 (Arkansas); Col. R. Crim. P. 5(a)(2) & 11 (Colorado); Conn. Practice Book § 39-19 (Connecticut); Del. Super. Ct. Crim. R. 11 (Delaware); Fla. R. Crim. P. 3.172 (Florida); Ga. Unif. Super. Ct. R. 33.8 (Georgia); I.C.R. 11 (Idaho); ILCS S. Ct. Rule 402 (Illinois); Ind. Code Ann. § 35-35-1-2 (Indiana); Iowa R. Crim. P. 2.8 (Iowa); La. Code Crim. Proc. Ann. art. 556.1 (Louisiana); Me. R. Crim. P. 11 (Maine); Mass. R. Crim. P. 12 (Massachusetts); MCR 6.302 (Michigan); Minn. R. Crim. P. 15.01 & 15.02 (Minnesota); Miss. R. Crim. P. 15.3(d)(3) (Mississippi); Mo. Sup. Ct. R. 24.02 (Missouri); Mont. Code Ann. § 46-12-210 (Montana); N.C. Gen. Stat. Ann. § 15A-1022 (North Carolina); N.D. R. Crim. P. 11 (North Dakota); Ohio Crim. R. 11 (Ohio); Or. Rev. Stat. § 135.385 (Oregon); S.D. Codified Laws § 23A-7-4 (South Dakota); Tenn. R. Crim. P. 11 (Tennessee); Utah. R. Crim. P. 11 (Utah); Vt. R. Crim. P. 11 (Vermont); W. Va. R. Crim. P. 11 (West Virginia); Wyo. R. Crim. P. 11 (Wyoming).

courts in twelve other states have mandated that plea judges advise defendants of each constitutional right, based on the court's interpretation of a state statute or rule, the court's interpretation of *Boykin*, the court's supervisory role, or as some combination of the three.[3] The courts in only seven states have held there is no duty for the colloquy judge to go over each constitutional right waived by a plea, or appear to have not yet reached the question.[4]

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[3] *State v. Levario*, 577 P.2d 712 (Ari. 1978) (partly defining "constitutional rights" language in Ariz. R. Crim. P. 17.2); *People v. Cross*, 347 P.3d 1130, 1132 (Cal. 2015) (California); *State v. Solomon*, 111 P.3d 12, 23 (Haw. 2005) (Hawai'i); *State v. Anziana*, 840 P.2d 550, 552 (Kan. 1992) (reading specific constitutional rights into statutory "consequences of plea" language) (Kansas); *Edmonds v. Com.*, 189 S.W.3d 558, 565 (Ky. 2006) (Kentucky); *State v. Irish*, 394 N.W.2d 879, 883 (Neb. 1986) (Nebraska); *Richard v. MacAskill*, 529 A.2d 898, 900 (N.H. 1987) (New Hampshire); *State ex rel. T.M.*, 765 A.2d 735, 739-740, 744 (N.J. 2001) (New Jersey); *State v. Garcia*, 915 P.2d 300, 303 (N.M. 1996) (New Mexico); *King v. State*, 553 P.2d 529, 534–35 (Okla 1976) (Oklahoma); Pa. R. Crim. P. 590 and *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977) (Pennsylvania); *Zigta v. Com.*, 562 S.E.2d 347, 350–51 (Va. App. 2002) (citing Form 6 of the Rules of the Virginia Supreme Court, which enumerates individual constitutional rights).

[4] *Gross v. State*, 973 A.2d 895, 914 (Md. App 2009) (Maryland); *State v. Freese*, 13 P.3d 442, 448 (Nev. 2000) (Nevada); *People v. Tyrell*, 4 N.E.3d 346, 351 (N.Y. 2013) (New York); *State v. Feng*, 421 A.2d 1258, 1269 (R.I. 1980) (Rhode Island); *Roddy v. State*, 528 S.E.2d 418, 421 (S.C. 2000) (South Carolina); *Gardner v. State*, 164 S.W.3d 393, 399 (Tex. Crim. App. 2005) (Texas); *Wood v. Morris,* 554 P.2d 1032 (Wash. 1976) (Washington).

B. The history of a plea judge's duties in Wisconsin.

The Wisconsin rules covering a judge's duties at a plea colloquy, and the consequences for not following them, have taken a number of twists and turns since *Boykin*.

Two years after *Boykin*, the Wisconsin Supreme Court held that there was no automatic right to withdraw a guilty plea if the court had not reviewed each right "seriatim," so long as the defendant did actually know the constitutional rights being waived. *Edwards v. State*, 51 Wis. 2d 231, 235, 186 N.W.2d 193, 195 (1971). "If a defendant knows the constitutional rights which are automatically waived by a plea of guilty, the plea cannot be invalidated on the ground that each of these constitutional rights were not specifically waived as such on the record." The court pointed to Edwards' long criminal record, as well as his failure to claim that he did not understand the constitutional rights being waived. 51 Wis. 2d at 235-236.

In 1983, the supreme court held that the defendant was entitled to withdraw his plea because "[t]here was no affirmative showing that the defendant was apprised of his privilege against self-incrimination and his right to confront and cross-examine witnesses against him, or that he knew that those rights would be waived by a plea of guilty." *State v. Bartelt*, 112 Wis. 2d 467, 485, 334 N.W.2d 91,

99 (1983). Neither the court nor defense counsel had explained these rights to the defendant.

Then, in 1985, the court "conclude[d] that in reviewing the constitutional validity of a guilty plea, the reviewing court may only look to the plea hearing transcript itself to determine whether the defendant possessed a constitutionally sufficient understanding of the nature of the charge." *State v. Cecchini*, 124 Wis. 2d 200, 210, 368 N.W.2d 830, 836 (1985). Because the plea judge had failed to properly advise the defendant of the nature of the charge, the defendant was entitled to withdraw his plea.

It only took one year for the supreme court to modify its holdings in *Cecchini* and *Bartelt* (among others), with its decision in *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The prior cases were overruled to the extent that they suggested there was a *constitutional* requirement that the plea judge make specific admonitions before accepting a plea, and that a failure to abide by the requirements mandated plea withdrawal. Instead, the court held that there is a set of six *statutory* duties to inform the defendant of various consequences of the plea. *Bangert*, 131 Wis. 2d at 261-262 (*citing* Wis. Stat. § 971.08).

The *Bangert* court also held that the court's failure to fulfill each duty did not entitle the defendant to automatic plea withdrawal. However, if there was a defect in the colloquy, and the defendant alleged that he or she did not understand the

corresponding consequence of the plea, the defendant would be entitled to an evidentiary hearing at which it would be the state's burden to prove with clear and convincing evidence that despite the defects, the defendant's plea was nonetheless knowing, intelligent, and voluntary. 131 Wis. 2d at 274-275.

In addition to describing the statutory duties of a plea judge, the *Bangert* court exercised its "supervisory powers" to impose a "seventh" duty on plea judges, namely to determine that the defendant knows and understands the constitutional rights waived by a plea. To fulfill this duty, the court must either:

> follow the provisions set forth in Wis. JI-Criminal SM-32 (1985), Part V, Waiver of Constitutional Rights, or specifically refer to some portion of the record or communication between defense counsel and defendant which affirmatively exhibits defendant's knowledge of the constitutional rights he will be waiving. The court must then, as before, ascertain whether the defendant understands he will be waiving certain constitutional rights by virtue of his guilty or no contest plea.

Bangert, 131 Wis. 2d at 270–72.

The special materials referred to by the *Bangert* court set out a detailed script to ensure that a defendant understands the rights waived by a plea:

> By pleading guilty you admit that you committed the crime and, thus, you relieve the state of proving at a trial that you committed the crime,

and by pleading guilty you also waive-that is, you give up-important constitutional rights.

"First, you give up your right to have the state prove that you committed each element of the crime. The state must convince each member of the jury beyond a reasonable doubt that you committed the crime. Do you understand that?

You have a constitutional right not to incriminate yourself, which means, you have a right not to admit to a crime, not to say anything that will subject you to a criminal penalty. By pleading guilty you waive this privilege not to incriminate yourself, and if the court accepts your plea of guilty, you will be convicted and the court can impose sentence against you.

Do you understand that?

You have a constitutional right to be tried by a jury. If your plea of guilty is accepted by the court, you will not be tried by a jury. That is, you will waive-give up-a jury trial.

Do you understand that?

You have a constitutional right to confront your accusers, which means you have the right to face the witnesses against you, to hear their sworn testimony against you, and to cross-examine them by asking them questions to test the truth and accuracy of their testimony. If the court accepts your plea of guilty, you surrender your right to confront your accusers.

Do you understand that?

You have the right to present evidence in your own behalf and to require witnesses to come to court and testify for you.

Do you understand that?

> Knowing that by pleading guilty you waive your constitutional right to a trial by jury, your constitutional right not to incriminate yourself, and your constitutional right to confront the witnesses against you and to subpoena witnesses, do you still wish to plead guilty?"

Bangert, 131 Wis. 2d at 272, n. 5.

Although the supreme court in *Bangert* allowed the possibility of the plea judge relying on some other portion of the record rather than a personal colloquy for each right, the court subsequently disapproved of the plea judge relying on a document or an attorney's representations to fulfill its other duties before accepting a plea.

First, in 2004 the court observed that the "appearance of *Bangert's* seventh duty has led to plea questionnaires that set out a defendant's constitutional rights in detail and provide a place on the form where the defendant acknowledges that these rights are being waived. *The court then follows up on the record*." *State v. Hampton*, 2004 WI 107, ¶25, 274 Wis. 2d 379, 392, 683 N.W.2d 14, 20 (emphasis supplied). The court then approved of a colloquy quoted in an earlier case, where the court reviewed each specific constitutional right waived by the plea. *Id*. (*quoting State v. Trochinski*, 2002 WI 56, ¶11 n. 6, 253 Wis.2d 38, 644 N.W.2d 891).

The *Hampton* court's approval of the plea judge using the questionnaire to supporting the judge's own inquiry into the defendant's understanding of each right waived was key to the court's ultimate holding.

The court held that the plea judge's failure to personally warn the defendant that he was not bound by the plea agreement was not saved by a similar warning in the plea questionnaire:

> The circuit court cannot satisfy its duty by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea agreement. The court must make certain through dialogue that the defendant understands that the court is not bound by other people's promises. The plea questionnaire may be used to aid the court (or the prosecutor or defense counsel) in explaining, on the record at the plea hearing, the court's role in sentencing. But the court must ask the question that ascertains that the defendant understands what he has been told.

Hampton, 2004 WI 107, ¶69.

The next significant case was *Brown*, where the court held that defense counsel's representation that he had explained the nature of the charges against Brown did not make up for the court's failure to enumerate or discuss the elements before accepting Brown's plea. The court observed that the "admission by Brown's original attorney that he may not have fully prepared Brown to plead guilty to the sexual assault charge also helps to explain why a court cannot rely very heavily upon mere statements from defense counsel that he or she has reviewed the nature of the charges with a defendant." *Brown*, 2006 WI 100, ¶56.

The *Brown* court also held that the plea colloquy with respect to Brown's constitutional rights was inadequate in light of Brown's illiteracy. The court contrasted the perfunctory review of Brown's rights, which elicited only one-word answers, with the more "probing" colloquy conducted by the court commissioner when Brown waived a preliminary examination. ¶¶73-77.

The court returned to the proper use of a plea questionnaire in *State v. Hoppe*, 2009 WI 41, ¶38, 317 Wis. 2d 161, 182, 765 N.W.2d 794, 804. The plea judge relied heavily on the defendant's review of the plea questionnaire in lieu of personally reviewing a number of consequences of the plea, including the defendant's waiver of constitutional rights.

The court emphasized that "the point of the substantive in-court plea colloquy is to ensure that the defendant's guilty plea comports with the constitutional requirements for a knowing, intelligent, and voluntary plea." *Hoppe*, 2009 WI 41, ¶31. Thus,

> [a]lthough a circuit court may refer to and use a Plea Questionnaire/Waiver of Rights Form at the plea hearing, the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in Brown. …[T]he Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant.

Id., ¶¶31-32.

Significantly, the court approved of an earlier court of appeals case, *State v. Hansen*, 168 Wis.2d 749, 752, 485 N.W.2d 74 (Ct.App.1992), holding that ascertaining that the defendant read and understood a Questionnaire was insufficient to fulfill the plea judge's duty to determine that the defendant understood the constitutional rights waived by the plea. "*Hansen* demonstrates that it is not enough for the circuit court to ascertain that a defendant generally understands the contents of the Plea Questionnaire/Waiver of Rights Form." *Hoppe*, 2009 WI 41, ¶38.

The court also approved the 1987 court of appeals decision in *State v. Moederndorfer*, 141 Wis. 2d 823, 828-29, n. 1, 416 N.W.2d 627 (Ct. App. 1987), approving a colloquy where (a) the defendant initialed each constitutional right described in a Questionnaire and affirmed to the court that he read and understood "each and every one" and (b) the court confirmed that the defendant understood that he was waiving those constitutional rights. *Hoppe*, ¶¶39-42.

C. The extent to which a plea judge may rely on the "waiver of rights" section of a plea questionnaire is unclear.

Hampton held that a plea judge's duty to personally determine that the defendant understood that the judge was not bound by the plea agreement cannot be discharged by a statement on a plea questionnaire signed by the defendant. 2004 WI 107,

¶69. *Brown* held that an attorney's avowal that he reviewed the nature of the charge did not fulfill the judge's independent duty to determine that the defendant understood the nature of the charge. 2006 WI 100, ¶35. And, *Hoppe* made clear that the court cannot discharge all of its duties by "ascertain[ing] that a defendant generally understands the contents of the Plea Questionnaire/Waiver of Rights Form." 2009 WI 41, ¶38.

Based on these holdings, it would seem that a judge cannot meet his or her duty to ensure that the defendant understands the constitutional rights waived by a plea just by ascertaining that the defendant understands the constitutional rights section of the questionnaire. After all, if, as *Hoppe* holds, referring to the entire questionnaire does not fulfill the judge's obligation to personally ensure that the defendant understands the consequences of the plea, why would referring to one section satisfy the one corresponding duty? There is no logical reason why referring to the entire document fails to satisfy the court's obligations, but referring to a specific section does.

In addition, if the specific duties to ensure that the defendant understands that the defendant understands the judge is not bound by the plea deal and understands the nature of the charge cannot be met by referring to the plea (*Hansen*) or relying on the attorney (*Brown*), why wouldn't the same logic apply to ensuring that the defendant understands the constitutional rights waived by the plea? It is not as

if constitutional rights are conceptually easier to understand than the nature of a charge or the court's freedom to ignore the terms of a plea bargain.

On the other hand, *Bangert* does sanction referral to a document such as a questionnaire when the plea judge determines that the defendant understands the constitutional rights being waived, in lieu of reviewing each individual right. And, the *Hoppe* court endorsed *Moderndoerfer*, where the court neither referred just to the constitutional rights section nor reviewed each right, but determined that the defendant did discuss and understand each right in the questionnaire. 141 Wis. 2d at 828-29, n. 1

It has thus been difficult to draw a line between when the plea court is improperly substituting in the constitutional rights section a la *Hoppe*, or properly relying on the questionnaire as contemplated by *Bangert*.

Indeed, the court of appeals has not been consistent on this point. For example, in the only published opinion on the issue, the court of appeals held that a plea colloquy was defective because the circuit court "did not explain or list [the defendant's] constitutional rights at the plea hearing; it merely confirmed that [he] had signed and understood the plea questionnaire and the rights therein." *State v. Lopez*, 2010 WI App 153, ¶3, 330 Wis. 2d 487, 491, 792 N.W.2d 199, 201. Similarly, the court held that a plea colloquy was defective because the court relied upon the constitutional rights section of the plea

questionnaire without reviewing the individual rights waived, but ultimately agreed that there was no merit to an appeal because the court had reviewed each of the rights in a proceeding less than one week prior to the plea colloquy. *State v. Cox*, No. 2013AP2497-CRNM, 2015 WL 13123096, at *1 & n. 3 (Wis. Ct. App. Feb. 11, 2015) (unpublished) (App. 129).

On the other hand, the court of appeals held here that the court's reference to the plea questionnaire and to Pegeese's "constitutional rights" sufficed, even though the court did not review each right individually. (App. 104-106, ¶¶10-17). The court came to the same conclusion in *State v. Allen*, No. 2016AP1509-CR, 2017 WL 4015050, ¶13 (Wis. Ct. App. Sep. 12, 2017) (unpublished) (App. 123) and *State v. Harris*, No. 2012AP518-CR, 2012 WL 3966446, ¶¶7-8 and n. 2 (Wis. Ct. App. Sep. 12, 2012) (unpublished) (App. 134-35).

D. The court should adopt a clear rule that the plea judge has a duty to inform and verify that the defendant understands each constitutional right waived by the plea.

There are both practical and principled reasons for the court to clarify that the duty to "address the defendant personally and … inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights" applies to each constitutional right. *State v. Brown*, 2006 WI 100, ¶35.

As a practical matter, it will reduce the substantial amount of postconviction litigation over whether a defendant should be allowed to withdraw a plea because they did not understand their constitutional rights. Indeed, defendants – especially those who have been in custody for a significant amount of time because they cannot post bail – are under an enormous amount of pressure to accept a plea deal, and it is only human for many of them to do so without fully understanding the rights they are waiving. The process of reviewing each right in court will give the defendant who does not actually understand one or more right the opportunity to speak up, and ask for clarification or additional time to consult with his attorney.

Similarly, reviewing each right will better allow the judge to gauge whether the defendant truly understands the rights waived by a plea. A puzzled look or a hesitating answer can convey more information about a defendant's understanding of a right than a signature on a piece of paper. A conscientious defense attorney may also realize that their client does not understand their rights, and ask for time to advise them. And an attentive prosecutor may point out that the plea judge has inadvertently neglected to review one of the rights, allowing the court to correct its error before accepting the defendant's plea.

Thus, by requiring the plea judge to independently review each right, the court will more often catch the defendants who do not understand

their rights before entering a plea, reducing the number of defendants who seek to withdraw their plea after the fact because they genuinely did not understand their rights.

A clear duty to "inform and verify" each right will also end litigation over the fuzzy question of whether the judge's words were a proper reliance on the questionnaire, or an improper substitution. For example, here the court asked whether Pegeese understood the plea questionnaire, and later asked whether he understood his rights, without expressly referring to the constitutional rights described in the questionnaire. (*See also* the cases discussed in Section II.C. above).

In addition, there are no practical downsides to requiring the plea judge to review each right. The additional minute or two it would take to review each right is insignificant to the amount of time taken up by postconviction litigation. Plus, all federal courts and the courts in 42 states review each right with the defendant before accepting a plea, demonstrating that it is not an unduly burdensome requirement.

But beyond these practical considerations is the significance of the constitution rights being waived in our system of justice and to the defendant in particular. The decision to plead guilty to a crime, to face jail or prison, to be branded a *criminal* for all time, has to be one of the most difficult and momentous decisions any person may have the misfortune to make. Requiring the circuit court to

review with a defendant the constitutional rights waived by a plea respects the enormity of the defendant's decision, and the importance of ensuring that the decision truly is knowing, intelligent, and voluntary.

II. The circuit court incorrectly held that *Moederndorfer* controlled.

Even if the court does not adopt Pegeese's proposed rule, the circuit court erroneously held that this case was controlled by *Moederndorfer*.

Here, the court asked the defendant if he understood the contents of the plea questionnaire, then asked his attorney if he thought Pegeese understood the questionnaire, and then went back to Pegeese asking about his constitutional rights, without referring to the questionnaire. (45:3-4; App. 111-12). The court then moved on to give Pegeese the immigrations warnings without referring to the questionnaire again. (*Id*.)

Any person in Pegeese's shoes would have thought that by asking Pegeese's *attorney* about Pegeese's understanding the questionnaire after asking Pegeese about the questionnaire, the court was signaling that it was concluding its questions about the Questionnaire and moving onto a new topic.

The court's colloquy was a far cry from the one in *Moederndorfer*. The plea questionnaire form used by the circuit court in *Moederndorfer* detailed each

constitutional right and directed the defendant to "individually initial each paragraph explaining the particular constitutional right being waived if the paragraph is understood." 141 Wis. 2d at 827. As part of the colloquy on constitutional rights, the court specifically referred to the plea questionnaire and asked: "By entering that plea of guilty, Mr. Moederndorfer, you give up rights, and these rights have been detailed in this three-page waiver of rights form." *Id.* at 828-829, n.1. The form had the defendant's initials next to the constitutional rights. *Id.* at 828, n.1. The circuit court asked the defendant whether his initials signified that he "read each of the paragraphs" and understood them before initialing them, and the defendant answered: "Yes, Your Honor, on each and every one." *Id.* at 828, n.1. This Court found the court's colloquy to be sufficient. *Id.* at 828-829.

And, even though the *Hoppe* court assumed without deciding that the plea colloquy was defective with respect to the defendant's constitutional rights, the court of appeals makes too much of this fact. (App. 105, ¶15). *Hoppe* clearly states that the Form cannot be a "substitute" for a substantive plea colloquy, because [t]he point of the substantive in-court plea colloquy is to ensure that the defendant's guilty plea comports with the constitutional requirements for a knowing, intelligent, and voluntary plea." *Hoppe*, 2009 WI 41, ¶31. When the court is relying on the constitutional rights section of a questionnaire, it is failing to fulfill its duty under

Brown to ensure that the defendant understands the constitutional rights waived by the plea.

Finally, the circuit court's alternate basis for denying the postconviction motion, that Pegeese did submit an affidavit averring that he did not understand the constitutional rights waived by his plea, was explicitly rejected by this Court in *Brown*. 2006 WI 100, ¶62 ("A defendant is not required to submit a sworn affidavit to the court[.]").

CONCLUSION

For the reasons stated above, the case should be remanded to the circuit court for an evidentiary hearing under *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Dated this 14th day of February, 2019.

Respectfully submitted,

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516
Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 2661971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,002 words.

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.

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.

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 one or more initials or other appropriate pseudonym or designation 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.

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 February, 2019.

Signed:

THOMAS B. AQUINO
Assistant State Public Defender

APPENDIX

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