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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP741-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAVIEN CAJUJUAN PEGEESE,

Defendant-Appellant-Petitioner.

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ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER AND THE HONORABLE JOHN M. WOOD PRESIDING

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# BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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## ISSUE PRESENTED

Defendant-Appellant-Petitioner Javien Cajujuan Pegeese pleaded guilty to robbery. When accepting his plea, the circuit court obtained Pegeese's waiver of his constitutional rights by relying on a plea questionnaire form listing those rights. It confirmed with Pegeese that he reviewed and understood the questionnaire's contents and the rights that he was waiving by his plea. Was this sufficient to show that Pegeese knowingly, voluntarily, and intelligently waived his rights?

The circuit court answered yes.

The court of appeals answered yes.

This Court should answer yes. The circuit court complied with the requirements of Wisconsin law that a court engage in a substantive colloquy with a defendant when using a plea questionnaire to assist it in ensuring that the defendant is validly waiving his rights.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has already set this case for oral argument. As with any case this Court has accepted for review, publication is warranted.

## INTRODUCTION

This case presents the question of what a circuit court must do to ensure that a defendant is knowingly, voluntarily, and intelligently waiving his constitutional rights when entering a guilty or no-contest plea.

Wisconsin case law establishes that a court may rely on a plea questionnaire form that lists the defendant's rights if the court engages in a substantive colloquy with the

defendant. For that colloquy to be sufficient, the court must confirm with the defendant that he has reviewed the rights on the form, understands those rights, and is aware that he is waiving them by his plea. The circuit court here relied on a plea questionnaire to obtain the waiver of Pegeese's rights, and the colloquy it conducted with Pegeese met this standard.

Pegeese disagrees. He maintains that the court's colloquy was insufficient. But he also argues that this Court should hold that the questionnaire-plus-colloquy option is inadequate to ensure a valid waiver. Pegeese asks this Court to require circuit courts to personally inform defendants of the constitutional rights that they are waiving. In support of his request, he contends that case law is unclear about the extent that a circuit court can rely on a plea questionnaire to obtain a waiver. Pegeese also claims that requiring the court to explain the rights in person is better than using a questionnaire to ensure waivers. He also asks this Court to remand for a hearing to determine whether he validly waived his rights despite what he claims are defects in the circuit court's plea colloquy.

This Court should affirm. The circuit court's colloquy and the plea questionnaire were sufficient under existing case law for the court to determine that Pegeese was knowingly, voluntarily, and intelligently waiving his constitutional rights.

The Court should also reject Pegeese's invitation to change the law. The law is clear about the colloquy circuit courts must use when relying on a plea questionnaire to obtain a waiver of rights. If there is any confusion, this Court can clear it up by confirming the State's interpretation of the law. And Pegeese is wrong that having the court explain the defendant's rights is necessarily better than using a questionnaire to ensure a valid waiver.

Finally, if this Court accepts Pegeese's proposal to require an in-person explanation of rights, or if it determines that the colloquy here did not comply with existing law, it should not grant Pegeese the evidentiary hearing he seeks. The circuit court's error, if there was one, does not constitute a manifest injustice because the record otherwise demonstrates that Pegeese validly waived his rights. For similar reasons, any error by the court was harmless. There is no reason for this Court to remand for a hearing.

## STATEMENT OF THE CASE

Pegeese and two others ordered pizzas and robbed the delivery driver at gunpoint. (R. 1.) He reached an agreement with the State to plead guilty to robbery by threat of force as a party to the crime. (R. 45:2.) The parties also agreed to jointly recommend three years of probation. (R. 45:2.)

Before accepting Pegeese's plea, the circuit court conducted a colloquy with him and his attorney. (R. 45:3–9.) The transcript of the colloquy states, in part:

> THE COURT: Have you had enough time to talk to Mr. Hoag [defense counsel] about your cases?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has he answered all the questions you've had?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you need more time to talk with him today?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Are you satisfied with his representation?
>
> THE DEFENDANT: Yes, sir.

THE COURT: You have provided me today with a Plea Agreement and Waiver of Rights document; correct?

THE DEFENDANT: Yes, sir.

THE COURT: That's your signature on the back side?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read that document before you signed it?

THE DEFENDANT: Yes, sir.

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

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about anything in that document?

THE DEFENDANT: No, sir.

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

MR. HOAG: I read it to him, Your Honor.

THE COURT: Do you believe he understands it?

MR. HOAG: I do.

THE COURT: Mr. [Pegeese], do you understand the Constitutional Rights you give up when you enter a plea today?

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about those rights?

THE DEFENDANT: No, sir.

(R. 45:3–4.)

The plea questionnaire and waiver of rights form that Pegeese completed is the standard, court-approved form, CR-227. (R. 12.) In the waiver of rights section, the form states, "I understand that by entering this plea, I give up the following constitutional rights." (R. 12:1.) It then lists the rights the defendant is giving up. (R. 12:1.) These are the rights: (1) to trial, (2) to remain silent, (3) to testify and present evidence at trial, (4) to subpoena witnesses for trial, (5) to a jury trial and a unanimous verdict, (6) to confront and cross-examine the State's witnesses, and (7) to make the State prove guilt beyond a reasonable doubt. (R. 12:1.) There is a check box next to each right, and all are checked. (R. 12:1.) The form also states, "I understand the rights that have been checked and give them up of my own free will." (R. 12:1.) Pegeese signed the questionnaire, which verified that he truthfully answered all questions on it and that either he or his counsel checked the form's boxes. (R. 12:2.)

The court accepted Pegeese's plea and placed him on probation for three years. (R. 14; 45:9–11.)

Pegeese then filed a motion to withdraw his plea. (R. 33.) In it, he argued that the circuit court violated its duty under *Bangert* to ensure that he understood the constitutional rights that he was waiving by pleading guilty. (R. 33:4–6.) Pegeese noted that the court never went over the rights with him in person, and although he signed a plea questionnaire, the court did not specifically ask him if he understood the rights on it. (R. 33:5.) The existence of the questionnaire itself, he argued, was not enough to show that he validly waived his rights. (R. 33:4–6.)

The circuit court denied the motion. (R. 39; 47:22–29.) It concluded that the record of the plea hearing did not show that it violated *Bangert* regarding Pegeese's constitutional rights. (R. 47:22–29.) The court noted that it had ensured that Pegeese understood the contents of the plea questionnaire

and then asked him if he understood his constitutional rights. (R. 47:26.) The court concluded that this was sufficient to comply with *Bangert* because "I don't think . . . that there is a need to refer back to [the plea questionnaire] at every question." (R. 47:26.) Rather, the court explained:

> The Plea Questionnaire, Waiver of Rights form is not -- you're correct, it is not a substitute for sufficient and adequate plea colloquy. It is a tool to be used to ascertain whether or not the defendant understands what he is doing by entering a plea. And I believe that's exactly what Judge Werner did in this particular case. He used that plea colloquy as a tool to have this conversation on the record with the defendant. Judge Werner asked, Did you have any questions about those Constitutional Rights? And the defendant said, No, he had no questions.

(R. 47:26–27.)

Pegeese appealed to the court of appeals, where he again argued that he should be allowed to withdraw his plea. The court affirmed, concluding that the plea colloquy was adequate to show that Pegeese had knowingly, voluntarily, and intelligently waived his constitutional rights. *State v. Pegeese*, No. 2017AP741-CR (Wis. Ct. App., Dist. IV, June 21, 2018) (Pet. App. 101–06.)

## STANDARD OF REVIEW

Whether a plea-withdrawal motion points to deficiencies in the plea colloquy that show a violation of Wis. Stat. § 971.08 or other mandatory procedures is a question of law this Court reviews de novo. *State v. Brown*¸ 2006 WI 100, ¶ 21, 293 Wis. 2d 594, 716 N.W.2d 906.

# ARGUMENT

**The circuit court's use of the plea questionnaire and a colloquy was sufficient to ensure that Pegeese knowingly, voluntarily, and intelligently waived his constitutional rights when he pleaded guilty.**

## A. Law governing the circuit court's duty to ensure that a pleading defendant is validly waiving his constitutional rights and the defendant's ability to withdraw his plea based on the failure to comply with that duty.

### 1. A circuit court may use a plea questionnaire plus a substantive colloquy to obtain a waiver of rights from a pleading defendant.

Wisconsin Stat. § 971.08, *Bangert*, and subsequent cases require that courts follow certain procedures to make sure that defendants knowingly, voluntarily, and intelligently enter guilty pleas. *See State v. Taylor*, 2013 WI 34, ¶ 27, 347 Wis. 2d 30, 829 N.W.2d 482; *Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986).

One of these duties, established by *Bangert*, is determining that the defendant is knowingly, voluntarily, and intelligently waiving the constitutional rights he is giving up by pleading guilty. *State v. Hampton*, 2004 WI 107, ¶ 24, 274 Wis. 2d 379, 683 N.W.2d 14 (citing *Bangert*, 131 Wis. 2d at 270–72.)

The court must either "inform the defendant of the constitutional rights that are waived by a plea, or determine whether the defendant already possesses this knowledge, and then ascertain whether the defendant understands that he is giving up these rights by entering a plea." *Hampton*,

274 Wis. 2d 379, ¶ 24 (citing *Bangert*, 131 Wis. 2d at 270–72). "The defendant need not specifically waive each right, but the record or other evidence must show that he entered his plea voluntarily and knowingly with understanding of the rights he was waiving." *Id.* (citation omitted).

A circuit court may use a plea questionnaire when discharging this duty. *State v. Hoppe*, 2009 WI 41, ¶ 31, 317 Wis. 2d 161, 765 N.W.2d 794; *Hampton*, 274 Wis. 2d 379, ¶ 25; *State v. Moederndorfer*, 141 Wis. 2d 823, 828–29, 416 N.W.2d 627 (Ct. App. 1987). The standard plea questionnaire form "set[s] out a defendant's constitutional rights in detail and provide[s] a place on the form where the defendant acknowledges that these rights are being waived." *Hampton*, 274 Wis. 2d 379, ¶ 25.

The court may not rely exclusively on the questionnaire to ensure a valid waiver. *Hoppe*, 317 Wis. 2d 161, ¶ 31. The court must also follow up on the record by engaging in a substantive in-court colloquy with the defendant about the waiver of his rights. *Id.*; *Hampton*, 274 Wis. 2d 379, ¶ 25; *State v. Hansen*, 168 Wis. 2d 749, 755, 485 N.W.2d 74 (Ct. App. 1992). The use of the form lessens the extent and degree of the colloquy required. *See Hansen*, 168 Wis. 2d at 755. The court must "make a record demonstrating the defendant's understanding that the plea results in the waiver of the applicable constitutional rights." *Id.* at 756.

#### 2. If a court fails to comply with a mandatory duty at a plea hearing, the defendant may move to withdraw his plea.

To withdraw a plea after sentencing, a defendant must establish "by clear and convincing evidence" that refusal to allow withdrawal would result in a manifest injustice. *Taylor*, 347 Wis. 2d 30, ¶ 24 (citing *Brown*, 293 Wis. 2d 594, ¶ 18). A

plea that is not knowingly, voluntarily, or intelligently entered creates a manifest injustice. *See Taylor*, 347 Wis. 2d 30, ¶¶ 24–25.

A defendant may move to withdraw his plea if the court fails to comply with Wis. Stat. § 971.08 or other mandated procedures at the plea colloquy. *State v. Howell*, 2007 WI 75, ¶ 27, 301 Wis. 2d 350, 734 N.W.2d 48. When alleging a violation of required procedures at the plea colloquy, the defendant bears the initial burden of: (1) making an initial showing of a violation; and (2) alleging that the defendant did not, in fact, know or understand the information that the court should have provided. *Taylor*, 347 Wis. 2d 30, ¶ 32 (citing *Bangert*, 131 Wis. 2d at 274).

If the defendant meets this burden, he may get an evidentiary hearing where the State has the burden of proving the plea was knowing, voluntary, and intelligent despite the error during the colloquy. *Taylor*, 347 Wis. 2d 30, ¶ 32; *State v. Cross*, 2010 WI 70, ¶ 39, 326 Wis. 2d 492, 786 N.W.2d 64.

### B. By relying on the plea questionnaire and its in-court colloquy, the circuit court ensured that Pegeese was knowingly, voluntarily, and intelligently waiving his constitutional rights.

This Court should conclude that the circuit court adequately found that Pegeese was validly waiving his constitutional rights when he pleaded guilty. Wisconsin law requires that when a court relies on a plea questionnaire to obtain a waiver of rights, the court must determine that the defendant has reviewed the rights on the form, understands them, and knows that he is waiving them by his plea. The court's colloquy here met this standard.

### 1. Case law establishes that the court must determine in its colloquy that the defendant has reviewed the plea questionnaire, understands its contents, and is aware that he is waiving the constitutional rights on it.

This Court has stated that a circuit court must engage in a "substantive colloquy" with a defendant when using a plea questionnaire to obtain a waiver of rights. *Hoppe*, 317 Wis. 2d 161, ¶ 42. Case law shows that this colloquy requires the court, at a minimum, to make sure that the defendant reviewed the rights listed on the plea questionnaire form, understood them, and knew that he was waiving them.

The first Wisconsin decision to address the use of plea questionnaires was *Moederndorfer*. There, the circuit court explained to the defendant at the plea hearing, "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. Your attorney has filed this on your behalf. Have you read this three-page form?" *Moederndorfer*, 141 Wis. 2d at 828 n.1. Moederndorfer said he read the form, understood its contents, signed it, and did not have any questions about it. *Id*. He also confirmed that he had initialed next to each of the rights listed on the form and that this indicated he understood those rights. *Id*. at 828 n.1.

The court of appeals determined that the circuit court had complied with its duty to ensure Moederndorfer understood the rights he was waiving. *Moederndorfer*, 141 Wis. 2d at 828–29. Thus, the colloquy in *Moederndorfer* was sufficient to satisfy *Bangert*.

The court of appeals later distinguished *Moederndorfer* in *Hansen*, where it held that the circuit court's colloquy in conjunction with a plea questionnaire was inadequate. In *Hansen*, the circuit court asked Hansen if he had gone over

the plea questionnaire with his attorney, if he had signed it, and whether he understood it. 168 Wis. 2d at 752. The court of appeals concluded that Hansen had made a preliminary showing under *Bangert* because, in contrast to *Moederndorfer*, the court's colloquy did not establish that he understood that he was waiving his constitutional rights. *Id.* at 755–56. The court acknowledged that the *Moederndorfer* colloquy was brief. *Id.* at 756. But it also showed that the defendant knew that he was waiving the rights on the questionnaire, "a subtle, but important, requirement." *Id.*[1]

This Court addressed the use of plea questionnaires in *Hampton*, though the case was not about the defendant's waiver of his constitutional rights. Instead, at issue was the court's duty to ensure that the defendant knows that the court was not bound by the parties' plea agreement. *Hampton*, 274 Wis. 2d 379, ¶ 42. The Court held that circuit courts had an obligation to personally inform the defendant of this. *Id.* It is not enough, the Court held, that this information is also on the plea questionnaire. *Id.* ¶¶ 67–69. The Court explained that, while a questionnaire can aid a court, "the court must ask the question that ascertains that the defendant understands what he has been told." *Id.* ¶ 69.

*Hoppe* is this Court's most recent decision addressing the use of a questionnaire to discharge a circuit court's duties when accepting a plea. There, the circuit court asked Hoppe if he had gone over the plea questionnaire with counsel and whether he understood everything on it. *Hoppe*, 317 Wis. 2d 161, ¶ 25. Hoppe said he did. *Id.* The court then asked him, "In your opinion are you going to be freely, knowingly, and

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[1] This Court is bound by both *Moederndorfer* and *Hansen* because it did not hear either case, and it has not subsequently withdrawn or disavowed language from the decisions. *See State v. Hayes*, 2004 WI 80, ¶ 14 n.9, 273 Wis. 2d 1, 681 N.W.2d 203.

voluntarily entering your pleas pursuant to agreement with all your rights in mind?" *Id.* Hoppe answered yes. *Id.*

Hoppe argued that the plea colloquy in his case was deficient for four reasons, including that it did not inform him of his constitutional rights. *Hoppe*, 317 Wis. 2d 161, ¶¶ 19–23. This Court determined that Hoppe had made preliminary *Bangert* showings of at least two violations. *Id.* ¶ 34. It did not, though, specifically find an error involving the waiver of his rights. *Id.* ¶ 34.

Even though this Court in *Hoppe* did not determine whether the colloquy there was insufficient to establish a waiver of rights, it compared the colloquy generally to those in *Hansen* and *Moederndorfer*. *Hoppe*, 317 Wis. 2d 161, ¶¶ 36–42. The colloquy in *Hoppe*, the Court held, was like the one in *Hansen* because the circuit court did little more than determine that Hoppe generally understood the plea questionnaire when fulfilling its duties. *Id.* ¶ 38. In contrast, the Court said that the circuit court in *Moederndorfer* used a "substantive colloquy during the plea hearing to establish Moederndorfer's understanding of the information that Moederndorfer claimed on appeal not to understand." *Id.* ¶ 42.

The rule that can be derived from these cases, and the one that this Court should apply here, is the one that the State articulated at the beginning of this section. When a circuit court relies on a plea questionnaire to obtain a defendant's waiver of rights, the court must engage in a substantive colloquy with the defendant. The colloquy in *Moederndorfer*, while brief, was substantive. *Hoppe*, 317 Wis. 2d 161, ¶ 42; *Hansen*, 168 Wis. 2d 756. That colloquy established three specific things: (1) that the defendant reviewed the rights on the plea questionnaire, (2) that he understood the rights, and (3) that he was aware that his plea would waive those rights.

The cases also establishes what is not a substantive colloquy. Merely confirming that the defendant read and understood the questionnaire is not enough. *Hoppe*, 317 Wis. 2d 161, ¶ 38; *Hansen*, 168 Wis. 2d at 752, 755–56. The court must specifically confirm the defendant's understanding of his rights and that his plea waives them. *Hoppe*, 317 Wis. 2d 161, ¶ 42; *Hansen*, 168 Wis. 2d at 756. This is the "subtle, but important requirement" that is crucial to making the colloquy substantive. *See Hansen*, 168 Wis. 2d at 756.

### 2. The circuit court's colloquy complied with these requirements.

The circuit court ensured that Pegeese validly waived his rights by using a combination of the plea questionnaire and a substantive colloquy. Pegeese thus has not made a preliminary showing that the circuit court violated its duty to ensure that he was validly waiving his constitutional rights. He is not entitled to a *Bangert* hearing.

The circuit court relied in part on the plea questionnaire when determining that Pegeese understood his constitutional rights. The plea questionnaire was the standard, court-approved questionnaire. (R. 12.) It lists all the rights that Pegeese claimed in his postconviction motion that he did not understand when he pleaded guilty. (R. 12:1; 31:5–6.) The form states, "I understand that by entering this plea, I give up the following constitutional rights." (R. 12:1.) There is a check box next to each right, and each one is checked. (R. 12:1.) Below the rights and checked boxes, the form states, "I understand the rights that have been checked and give them up of my own free will." (R. 12:1.) By signing the form, Pegeese acknowledged that he answered everything on the form truthfully. (R. 12:2.)

The court also conducted a colloquy to ensure that Pegeese understood his rights. When it accepted Pegeese's plea, the court asked him if he had read the plea questionnaire and signed it. (R. 45:3–4.) Pegeese said that he had and that he understood all the statements in it. (R. 45:3–4.) He also said that he had no questions about the form. (R. 45:4.) And his attorney told the court that he had read the form to Pegeese and believed that he understood it. (R. 45:4.) The court then immediately asked Pegeese if he understood the rights he was giving up by his plea. (R. 45:4.) Pegeese said yes. (R. 45:4.)

This ensured a valid waiver under Wisconsin law. It was consistent with the colloquy in *Moederndorfer*. The court here determined that Pegeese had read the questionnaire, understood its contents, and had signed it. The court also asked Pegeese if he understood the constitutional rights he was waiving by pleading guilty. That is the substantive colloquy case law requires.

Pegeese disagrees, claiming that the colloquy was a "far cry" from the one in *Moederndorfer*. (Pegeese's Br. 25.) But the differences he points to are insignificant.

Pegeese first argues that the sequence of the circuit court's questions during the colloquy distinguishes his case from *Moederndorfer*. (Pegeese's Br. 25–26.) He claims that the court did not reference the questionnaire when asking him if he understood the rights he was waiving. (Pegeese's Br. 25.) Instead, he contends, the court's reference to the questionnaire came in earlier questions, and in between, the court spoke to defense counsel. (Pegeese's Br. 25.) Pegeese maintains that most defendants would not have understood the court's question about waiving rights to be referring to the rights listed on the questionnaire. (Pegeese's Br. 25.)

This is, as the court of appeals explained, an unreasonable reading of the record. *Pegeese*, No. 2017AP741-CR, ¶ 5; (Pet. App. 102.) The only reasonable way to understand the court's question about the rights Pegeese was waiving is as a reference to the rights listed on the form that the court and Pegeese had just discussed. The court did not mention any other topic between its questioning Pegeese about the questionnaire and its asking whether he understood the constitutional rights that he was waiving. (R. 45:3–4.) Thus, the link between the questionnaire and the question about waiver is "present by virtue of the sequence of questions." *Pegeese*, No. 2017AP741-CR, ¶ 8; (Pet. App. 103.) "Read as a whole, the court was clearly asking Pegeese whether he understood the rights that had been described on the form." *Pegeese*, No. 2017AP741-CR, ¶ 8; (Pet. App. 103.)

Pegeese also attempts to distinguish *Moederndorfer* because there, the defendant initialed next to each right on the form and said that this meant he understood his rights. (Pegeese's Br. 26.)

This does not make the circuit court's colloquy here insufficient. Pegeese told the court that he understood everything on the form and the rights he was waiving. (R. 45:3–4.) The box on the questionnaire next to each constitutional right is checked. (R. 12:1.) The form states that Pegeese understands the rights checked and that he is giving them up of his own free will. (R. 12:1.) The form also states that by pleading guilty, Pegeese was giving up the rights listed. (R. 12:1.) Pegeese, by signing the form, indicated that either he or his attorney had checked the boxes. (R. 12:2.) And counsel told the court that he went over the form with Pegeese. (R. 45:4.)

Thus, the questionnaire shows that Pegeese was telling the court that he fully understood each of his rights and was waiving them. It is no different than the representation that

Moederndorfer made to the court by initialing next to each right. The colloquy here complied with *Moederndorfer* and was sufficient to ensure that Pegeese knowingly, voluntarily, and intelligently waived his rights.

### C. This Court should not adopt Pegeese's proposal to require circuit courts to advise defendants of their constitutional rights during plea colloquies.

Pegeese asks this Court to require circuit courts, as part of their mandatory duties during plea colloquies, to personally advise defendants of the constitutional rights they are waiving. (Pegeese's Br. 8–25.) He contends that the case law is unclear about extent to which a court may rely on the plea questionnaire to obtain a waiver. (Pegeese's Br. 19–22.) Pegeese further argues that there are "both practical and principled reasons" to impose this duty. (Pegeese's Br. 22–25.)

This Court should reject these arguments. The law is not unclear. And Pegeese cannot show that requiring courts to inform defendants of their rights is necessary to ensure valid waivers.

#### 1. The extent to which a court can rely on a plea questionnaire to obtain a waiver of rights is clear.

Pegeese argues that this Court's decisions make unclear the extent to which a court may use a plea questionnaire to ensure that a defendant is validly waiving his rights. (Pegeese's Br. 19–22.) He points to this Court's decisions in *Hampton*, *Brown*, and *Hoppe* as suggesting that questionnaires are disfavored. But he also notes that *Bangert* endorses the use of outside documents during plea colloquies and that *Hoppe* approvingly cited *Moederndorfer's* use of a questionnaire. (Pegeese's Br. 21.) Pegeese contends that this

makes it "difficult to draw a line" between the proper and improper use of a questionnaire. (Pegeese's Br. 21.)

This is not a reason for this Court to require circuit courts to advise defendants of their rights. As the State has argued, the law establishes how a court can use a plea questionnaire to ensure a valid waiver of a defendant's rights. To the extent there is a lack of clarity in the law, this Court can fix it by stating that the law is what the State has described. This Court should decline Pegeese's request.

The State mentions three other matters in response to Pegeese's argument.

First, Pegeese relies on this Court's decision in *Brown* to show that the law is unclear. (Pegeese's Br. 20.) *Brown* has little relevance here. The circuit court did not use a plea questionnaire in that case. *Brown*, 293 Wis. 2d 594, ¶¶ 12 n.8, 54, 76. And the circuit court *did* advise Brown of his constitutional rights at the plea colloquy. *Id.* ¶¶ 70–71. The problem in *Brown* was that Brown's limited mental abilities made this colloquy insufficient to show that he truly understood the rights he was waiving. *Id.* ¶ 76. There is no similar concern here.[2]

Second, Pegeese points to four decisions of the court of appeals in his attempt to show that the law is unclear. (Pegeese's Br. 21–22.) Two are unpublished and uncitable decisions of the court of appeals. The State does not believe

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[2] The plea questionnaire states that Pegeese was 16 years, had completed tenth grade, and did not have a high school diploma, or a GED or HSED when he entered his plea. (R. 12:1.) Pegeese also noted these things in his postconviction motion. Those characteristics describe many, if not most, 16-year-olds. Pegeese does not assert that he had any mental limitations that required the court to take special care when accepting his plea.

that the rules of appellate procedure allow it to address these cases here. *See* Wis. Stat. § (Rule) 809.23(3)(b).

The State notes, though, that it discussed all of these cases in its response to Pegeese's petition for review. It argued that the cases were all consistent with the rule the State has articulated in this brief. (State's response to petition for review 6–9.) The parties properly discussed the uncitable cases in the petition for review and response because Pegeese was relying on them to support his argument that the law was unclear. *See State v. Higginbotham*, 162 Wis. 2d 978, 997–98, 471 N.W.2d 24 (1991).

The two citable cases that Pegeese relies on are also consistent with the rule the State has articulated.

Pegeese contends that in *State v. Lopez*, 2010 WI App 153, 330 Wis. 2d 487, 792 N.W.2d 199, the court of appeals held that a plea colloquy was defective when the circuit court did not explain Lopez's rights to him. (Pegeese's Br. 21–22.) The court of appeals noted that the circuit court "merely confirmed that Lopez had signed and understood the plea questionnaire and the rights therein." *Lopez*, 330 Wis. 2d 487, ¶ 3.

It is not clear, though, that the circuit court actually referred to Lopez's rights during the colloquy or asked him if he understood them. Again, that is the "subtle, but important requirement" that is crucial to making the colloquy substantive. *Hansen*, 168 Wis. 2d at 756.

Later in its opinion, the court described the colloquy as deficient because the circuit court "merely ask[ed] Lopez whether he had read the plea questionnaire and understood its contents." *Lopez*, 330 Wis. 2d 487, ¶ 10. The court did not say in this part of the opinion whether the circuit court had asked Lopez if he understood the rights he was waiving. Further, according to the fact section in Lopez's brief, the circuit court

did not mention his constitutional rights at all during the colloquy. (*See State v. Lopez*, No. 2009AP2727-CR, Brief of Defendant-Appellant at 4, available at https://bit.ly/2L8npwh.) Thus, it appears that the colloquy in *Lopez* was insufficient because the court never mentioned Lopez's rights or asked whether he understood them.

The court's opinion in *State v. Harris*, No. 2012AP518-CR, 2012 WL 3966446 (Wis. Ct. App. Sept. 12, 2012) (unpublished), is also consistent with the State's articulation of the law. (Pegeese's Pet. 8; Pet. App. 133–36; R-App. 101–04.) There, the circuit court, after determining that Harris went over the plea questionnaire with his attorney, "confirmed that Harris understood the constitutional rights on the form and that by pleading guilty he was giving up those . . . rights." *Harris*, 2012 WL 3966446, ¶ 8. (Pet. App. 134; R-App. 102.) The court of appeals held that this was an adequate colloquy. *Harris*, 2012 WL 3966446, ¶ 9 (Pet. App. 134; R-App. 102.)

Pegeese notes that the circuit court in *Harris* did not personally mention each right when taking the plea. (Pegeese's Br. 22.) But as argued, that is not required. *Harris* thus is consistent with the State's interpretation of the law.

Third, Pegeese points out that many states and the federal court system require courts by rule to inform the defendant of the rights being waived by a plea. (Pegeese's Br. 8–11.) Some of the states' rules, though, permit use of forms or other sources to assist the court in ensuring valid pleas. *See* Ala. R. Crim. P. 14.4(d) (form); Ga. Unif. Super. Ct. R. 33.8(D) (information may come from court, prosecutor, defense counsel, or combination); Idaho Crim. R. 11(e) (form); Ind. Code. Ann. § 35-35-1-2(b) (form can be used in misdemeanor pleas); Mich. Ct. R. 6.302(5) (form); Minn. R. Crim. P. 15.01(1)(6) (court must ensure counsel has informed defendant of rights and defendant understands them); Mont. Code Ann. § 46-12-21(2) (written

acknowledgement). Thus, not all of these states require courts to personally explain to defendants the rights that they are waiving.

**2. Pegeese's remaining reasons for imposing the requirement are not persuasive.**

This Court should also reject Pegeese's "practical and principled" arguments in support of his proposal. (Pegeese's Br. 22.)

Pegeese contends that requiring courts to review a defendant's constitutional rights at the plea hearing will lead to fewer postconviction claims that defendants did not understand their rights. (Pegeese's Br. 23.) He notes that some defendants might feel pressured to enter a plea, which could lead them to do so without fully understanding their rights. (Pegeese's Br. 23.) Reviewing the rights in court, Pegeese contends, will provide defendants the chance to get clarification if needed. (Pegeese's Br. 23.)

A circuit court's listing the defendant's rights in person is not, though, the cure-all that Pegeese claims that it is. If a plea questionnaire is used, a defendant will have already reviewed and discussed his constitutional rights with defense counsel. And the court—by making sure the defendant understood what is on the form—already gives defendants the opportunity to ask questions or get clarification.

In addition, the State suspects that Pegeese's proposal will not substantially reduce claims that a defendant did not understand the constitutional rights he waived. If defendants are willing to disavow their statements to the court that they understood the rights on the plea questionnaire, why would they be any less willing to do the same for their acknowledgements that they understood the court's in-person explanation? In any event, this Court should not be crafting

new plea-colloquy requirements based upon speculation about a reduced number of claims. The Court's focus should be on whether a defendant's constitutional rights are already met by existing law. And they are.

Pegeese also argues that informing defendants of their rights will give judges and attorneys a better opportunity to determine whether the defendant truly understands those rights. (Pegeese's Br. 23.) But again, the court and the prosecutor already have the ability to do this during the colloquy. And if defense counsel used a plea questionnaire, counsel should have a firm understanding by the time of the colloquy whether the defendant knows his rights.

Next, Pegeese claims that his proposal will make the law clear. (Pegeese's Br. 24.) But as the State has argued, the law is already clear. And if this Court agrees with the State's interpretation of the case law, it can use its opinion in this case to clear up any ambiguity that might exist.

Finally, Pegeese argues that reviewing the rights in court will add just a minute or two to the plea colloquy. (Pegeese's Br. 24). This, he claims, is a low price to pay given the amount of time litigating claims of invalid waivers takes in postconviction proceedings and on appeal. (Pegeese's Br. 24.) And he maintains that the gravity of a person's deciding to plead to a crime deserves this procedural protection. (Pegeese's Br. 24–25.)

But again, it is not clear that Pegeese's proposal will reduce litigation or that it is preferable to the use of a plea questionnaire plus a substantive colloquy. The court's observation in *Moederndorfer* is apt: "People can learn as much from reading as listening, and often more." 141 Wis. 2d at 828. "In fact, a defendant's ability to understand the rights being waived may be greater when he or she is given a written form to read in an unhurried

atmosphere, as opposed to reliance upon oral colloquy in a supercharged courtroom setting." *Id*. Some defendants might be better off reading their rights or having counsel explain them than reviewing them in court. That, combined with a substantive colloquy from the court, is sufficient to ensure a valid waiver of those rights.

### D. Even if the Court rejects the State's arguments, Pegeese is not entitled to a *Bangert* hearing.

Should this Court adopt Pegeese's proposal, or if it concludes that the colloquy here did not comply with the State's interpretation of the law, it should nonetheless deny Pegeese a *Bangert* hearing for two similar reasons. First, Pegeese cannot show that the circuit court's colloquy or its not informing him of his rights was a manifest injustice. Second, any error by the court was harmless. Under either analysis, the record shows that Pegeese entered his plea with an understanding of the rights he was waiving. There is no reason to remand for a hearing.

#### 1. Not all *Bangert* violations constitute a manifest injustice.

To withdraw a plea after sentencing, a defendant must prove "by clear and convincing evidence" that failure to withdraw the plea will result in a manifest injustice. *Taylor*, 347 Wis. 2d 30, ¶ 24. A defendant's not knowingly, voluntarily, and intelligently enter a plea is one way to prove a manifest injustice. *Id*.

Not every violation of a *Bangert* duty amounts to a manifest injustice. If a circuit court fails to comply with a mandatory duty at a plea hearing, a "defendant *may* be entitled to withdraw his plea." *Cross*, 326 Wis. 2d 492, ¶ 19 (emphasis added). "The *Bangert* requirements exist as a

framework to ensure that a defendant knowingly, voluntarily, and intelligently enters his plea." *Id.* ¶ 32. But "requiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights." *Id.* This Court does "not embrace a formalistic application of the *Bangert* requirements that would result in the abjuring of a defendant's representation in open court for insubstantial defects." *Id.*

**2. The harmless-error doctrine applies to violations of a court's mandatory duties at a plea hearing.**

Wisconsin Stat. § 971.26 provides that no criminal judgment or other proceeding shall "be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." And the civil harmless-error statute requires the court to "disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Wis. Stat. § 805.18. This statute applies to criminal proceedings. *See* Wis. Stat. § 973.11(1); *State v. Reyes Fuerte*, 2017 WI 104, ¶ 28, 378 Wis. 2d 504, 904 N.W.2d 773. The State has the burden of proving that an error is harmless. *See State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500.

This Court and the court of appeals have applied the harmless-error doctrine to violations of a court's mandatory duties at plea hearings. This Court applied it to the circuit court's failure to strictly comply with the immigration warning in Wis. Stat. 971.08(1)(c). *Reyes Fuerte*, 378 Wis. 2d 504, ¶¶ 30–36. And the court of appeals held in *State v. Johnson*, 2012 WI App 21, ¶¶ 14–15, 339 Wis. 2d 421, 811 N.W.2d 441, that a court's failure to warn a defendant that it is not bound by the plea agreement can be harmless.

In both cases, the courts determined that because the error was harmless, the defendant was not entitled to a *Bangert* hearing. *Reyes Fuerte*, 378 Wis. 2d 504, ¶ 17; *State v. Reyes Fuerte*, 2016 WI App 78, ¶ 4, 372 Wis. 2d 106, 887 N.W.2d 121 (noting that the circuit court had held a non-evidentiary hearing on the defendant's plea-withdrawal claim); *Johnson*, 339 Wis. 2d 421, ¶¶ 7, 16.

Other jurisdictions that require courts to inform pleading defendants of their rights also hold that violations of the requirement can be harmless. For example, Federal Rule of Criminal Procedure 11(b)(1)(B)–(F) requires district courts to inform pleading defendants of their constitutional rights. But subsection (h) of the rule says that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." *See also Reyes Fuerte*, 378 Wis. 2d 504, ¶ 35; *Cross*, 326 Wis. 2d 492, ¶ 36 (both noting Rule 11(h)). In addition, several states that have required courts by rule to inform defendants of their constitutional rights have harmless-error provisions in their rules. *See, e.g.,* Fla. R. Crim. P. 3.172(j); La. Code Crim. P. Ann. Art. 556.1.E; N.D. R. Crim P. 11 (explanatory note) and R. 52; Utah R. Crim. P. 11(l); W. Va. R. Crim. P. 11(h); Wyo. R. Crim. P. 11(h).

**3. Pegeese is not entitled to a hearing because he cannot show prove a manifest injustice; in addition, any error by the circuit court was harmless.**

If this Court enacts Pegeese's rule, or if it concludes that the court's colloquy here did not comply with the State's interpretation of the law, it should not remand for a *Bangert* hearing. The record shows that Pegeese was aware of and understood his constitutional rights when he entered his plea. Pegeese cannot show that the court's colloquy or its not

informing him of his rights led to a manifest injustice. And any error by the circuit court was harmless.

A hearing that might result in Pegeese's withdrawing his plea is not necessary to correct a manifest injustice. Importantly, the circuit court cannot have violated a clear duty to inform Pegeese of his constitutional rights if no such duty existed at the time of the plea hearing. Pegeese is asking this Court to adopt such a requirement now. (Pegeese's Br. 22–25.) He contends that case law is not clear on the court's obligations. Thus, the court's failure to inform Pegeese of his rights was, at the time it happened, not a *Bangert* violation and should not potentially lead to plea withdrawal.

Pegeese also cannot show a manifest injustice because the record shows that he validly waived his constitutional rights. Even if the court's colloquy did not strictly comply with case law, it was sufficient to show that Pegeese understood his rights and that he was waiving them. The plea questionnaire listed his rights. (R. 12:1.) Pegeese signed the questionnaire and, by doing so, admitted that he reviewed and understood its contents. (R. 12:2.) He also told the court these things in person. (R. 45:3–4.) The court's only error, if there was one, was not specifically asking Pegeese if the rights he was waiving were the ones listed on the plea questionnaire form. But as the court of appeals explained, it is unreasonable to understand the court to have been referring to any other rights than those on the form. *Pegeese*, No. 2017AP741-CR, ¶¶ 5–9; (Pet. App. 102–04.)

Thus, giving Pegeese a hearing is not necessary to correct a manifest injustice. The record shows that he validly waived his constitutional rights despite any possible error by the circuit court. It is inappropriate to give Pegeese a hearing where he would repudiate what he told the circuit court in person and on the plea questionnaire when those same things refute his claim that his plea was invalid. *See Cross*,

326 Wis. 2d 492, ¶ 32; *see also Wozny v. Grams*, 539 F.3d 605, 609–10 (7th Cir. 2008).

Alternatively, but for the same reasons, any error by the court was harmless. Again, the court's failure, if there was one, was that its colloquy did not comply with existing case law. The court could not have violated Pegeese's proposed requirement that courts personally inform defendants of their rights because it was not the law at the time.

Further, any error by the court did not affect Pegeese's substantial rights. The plea questionnaire indicates that he understood his rights and was giving them up by entering his plea. He told the court that he signed, read, and understood the form. Even if the circuit court should have specifically said that it was referring to the rights listed on the questionnaire, the record still shows that Pegeese knowingly, voluntarily, and intelligently waived his rights.

Decisions of the Seventh Circuit's support the State's position. The court has held that a district court's failure to comply with a requirement of Federal Rule of Criminal Procedure 11 when accepting a plea is harmless under Rule 11(h) when the written plea agreement fulfills the omitted duty. *See United States v. Driver*, 242 F.3d 767, 771 (7th Cir. 2001); *United States v. Cross*, 57 F.3d 588, 591 (7th Cir. 1995). In particular, the court has determined that the failure to advise a defendant of some of his constitutional rights was harmless when he "executed a written plea agreement acknowledging these rights and the other trial rights he waived by pleading guilty." *See United States v. Beason*, 493 Fed. Appx 747, 748 (7th Cir. 2012).[3] This Court should

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[3] Several states also recognize that violations of a rule requiring courts to explain constitutional rights to pleading defendants are not reversible error unless the defendant is

reach the same conclusion. Any error by the circuit court in obtaining Pegeese's waiver of rights is harmless. Pegeese should not get a *Bangert* hearing.

## CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 6th day of March, 2019.

Respectfully submitted,

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prejudiced or when the record as a whole otherwise shows a valid waiver. *See, e.g., State v. Levario*, 577 P.2d 712, 713 (Ariz. 1978); *People v. Howard*, 824 P.2d 1315, 1341 (Cal. 1992); *Lacy v. People*, 775 P.2d 1, 5 (Colo. 1989); *Lewis v. State*, 748 S.E. 2d 414, 416–17 (Ga. 2013); *People v. Dougherty*, 915 N.E.2d 442, 446–47 (Ill. App. 2009); *State v. Shelton*, 621 So. 2d 769, 776 (La. 1993); *State v. Wiley*, 420 N.W.2d 234, 237 (Minn. Ct. App. 1988); *State v. Salvetti*, 687 S.E. 2d 698, 704 (N.C. Ct. App. 2010).

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7516 words.

AARON R. O'NEIL
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

Dated this 6th day of March, 2019.

AARON R. O'NEIL
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