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SUPREME COURT

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2018AP000731-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN L. NASH,

Defendant-Appellant-Petitioner.

Review of a Decision of the Court of Appeals
Affirming a Judgment of Conviction and an
Order Denying Postconviction Relief,
Both Entered in Waukesha County Circuit Court,
Judge Ralph M. Ramirez, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

> When accepting a guilty plea under *Alford v. North Carolina*, 400 U.S. 25 (1970), a circuit court may find there is a factual basis for the plea only if there is "strong proof of guilt." May a court find strong proof of guilt based only on the information contained in the criminal complaint, as happened in this case, or must the court hear additional evidence before it can make that finding?

The circuit court held there was a sufficient factual basis. (89:10-11; 99:25-26; App. 128-29, 157-58).

The court of appeals affirmed the circuit court's conclusion. (Slip op. ¶¶21-27; App. 109-12).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Because this case addresses a novel issue addressing how circuit courts must handle *Alford* pleas, both oral argument and publication are appropriate.

STATEMENT OF THE CASE AND THE FACTS

In October 2015, eight-year-old C.L.W. told a teacher that her brother, Kevin Nash, had sexually

assaulted her "a few years prior." (1:4; App. 114).[1] Police initiated an investigation, spoke with C.L.W.'s mother, and learned that two of Nash's sisters, C.L.W. and A.T.N., alleged Nash sexually assaulted them at the family's home in Pewaukee between November 2011 and November 2012. (*Id.*). During this time period, Nash, whose date of birth is November 26, 1997, was approximately 13 to 14 years old. (1:3; App. 113). A.T.N. was 8 to 9 years old, and C.L.W. was 4 to 5 years old. (1:3; App. 113). A third sister, M.K.N., also lived in the home during 2011-2012 and would have been 11 to 12 years old. (1:4; App. 114).

According to the complaint, all three sisters were interviewed shortly after C.L.W.'s initial report. (1:4; App. 114). C.L.W. stated that Nash forced her mouth to have contact with his penis in the basement of the family's home in Pewaukee. (*Id.*). A.T.N. reported that Nash had sexual intercourse with her in his room on multiple occasions and that he attempted to put his penis in her mouth on one occasion. (1:4-5; App. 114-15). M.K.N.'s interview is not fully described in the complaint; however, the complaint says that A.T.N. and M.K.N. described "acts of sexual intercourse" that occurred in

[1] This brief cites the initial complaint filed February 3, 2016. (1:3-5; App. 113-15). The state filed an amended complaint on March 3, 2016, which removed the mandatory minimum sentence allegation that appeared in the original complaint. (1:3-4; 8:1; App. 113-14, 116). There appears to be no difference between the facts alleged in the complaint and the amended complaint.

Milwaukee and that A.T.N. also reported that Nash attempted to sexually assault her at her grandmother's home in Georgia. (1:5; App. 115). The complaint indicates that the state would present the acts reported by A.T.N. and M.K.N. and that occurred outside of Waukesha County as "prior bad acts." (1:5; App. 115).[2]

Based on these allegations the state charged Nash, who was then age 18, with first degree sexual assault of a child under age 12 related to C.L.W. and repeated sexual assault of a child related to A.T.N. (1:3; 8:1; 9; App. 113, 116).

Following competency proceedings (6; 7; 95), Nash appeared for a plea hearing. (89; App. 119-36). Defense counsel explained to the court that Nash would plead no-contest to an amended information charging one count of second degree sexual assault of C.L.W. (32; 89:3; App. 121). Defense counsel further explained the nature of the plea:

> I reviewed a no-contest plea with my client. The basis for that will be that he is not going to contest that the State could present witnesses or other evidence that if believed by a jury would be sufficient to convict my client of the amended charge in the complaint.
>
> My client is not saying that he committed the offense outright and in a way it could be

[2] The circuit court subsequently granted the state's motion to introduce the sisters' allegations of sexual contact occurring in Milwaukee and Georgia. (14; 91:16-18).

> construed as an *Alford* plea, but that is the basis of the no-contest plea and we would like to resolve the case in that matter and the State has no objection.

(89:3; App. 121).

The court, however, did not accept Nash's plea due to Nash's uncertainty about entering a plea and his refusal to agree that the state had enough evidence to prove the charge to which he was pleading. (89:4-5, 8-9, 12, 14-16; App. 122-23, 126-27, 130, 132-33).

Specifically, Nash hesitated when the court asked whether he understood the nature of the plea agreement; he stated: "Yes, sir. Yes[]" only after being instructed by trial counsel to answer affirmatively. (89:4-5; App. 122-23). Nash also hesitated and then conferred with his attorney before agreeing that he was not being forced to give up his trial rights to enter a plea. (89:8-9; App. 126-27).

After the court asked Nash questions typical to a plea colloquy (for instance, about his understanding of the penalties and the plea agreement; his level of comprehension; the rights he was waiving (89:4-9; App. 122-27), the following exchange took place:

> THE COURT: All right. Do you acknowledge that State has enough evidence to prove this charge?
>
> [Mr. Nash]: No.

> THE COURT: Do you believe you are not guilty of these charges?
>
> [Mr. Nash]: Yes, I do.
>
> [Defense Counsel]: That was in essence the no-contest Alford part.

(89:12; App. 130).

The court had defense counsel summarize the nature of his conversations with Nash about the plea process. (89:12-13; App. 130-31). Defense counsel told the court that he had explained to Nash what the prosecutor had just stated: if the case went to trial, the state would call as witnesses "the three sisters," who "if they testified as to what was in the discovery materials, were going to say that he had sexual contact with them and/or sexual intercourse," and that the state would also perhaps call staff of the child advocacy center where interviews with the victims had occurred. (89:13; App. 131).

The court then asked Nash again if he believed the state had enough evidence to convict him. (89:14; App. 132). Nash again stated that he did not believe there was enough evidence to convict him, adding: "I'm not saying I did it at all. I'm not going to say I did something that I didn't do, sir, at all." (89:14; App. 134). Nash later reiterated: "Sir, I'm telling you right now I never did none of this and I don't want to keep going through it." (89:16; App. 134).

The court then said that "[i]f Mr. Nash wishes to enter a plea of no-contest of an Alford type taking advantage of the State's offer but indicating that he is not guilty of the offense, I don't have a clear indication from Mr. Nash that that's exactly what he wants to do and there is a great deal of difficulty here." (89:16; App. 134). The court left the trial date on its calendar and informed the parties it would recall the case if needed. (89:17; App. 135).

The next day the parties were back in court, and this time Nash entered a plea to the amended charge of second degree sexual assault of a child. (90:8; App. 114). Before accepting Nash's plea, the court inquired of his understanding of an *Alford* plea. (90:10-11; App. 146-47). Specifically, the court asked:

> Do you understand what it is when we say an Alford plea? It's a person's name but it's a plea that means I'm going to plead guilty or no-contest, I'm going to accept responsibility for the charge, I'm not necessarily admitting that those facts occurred but I understand that the State has got enough evidence where I could be found guilty at trial? Is that what is going on here?

Nash responded: "Yes, sir." (90:11; App. 147).

The court also asked Nash whether he understood the charge to which he was pleading. (90:6; App. 142). The court asked Nash if his attorney reviewed "the elements of the offense that the State would have to prove before you could be found guilty?" (*Id.*). Nash responded: "Yes, sir." (*Id.*). The

plea questionnaire indicates Nash was pleading to second degree sexual assault of a child in violation of Wis. Stat. § 948.02(2) and the elements of that offense are attached to the form. (31:1, 3).

As to the factual basis requirement, at the originally scheduled plea hearing the court had asked the state for "a factual basis, an offer of proof." (89:10; App. 128). In response the prosecutor said:

> …. Last fall I believe the defendant's three sisters, who are here in court, made outcries to the Village of Pewaukee Police Department, that between the dates roughly of November 1st, 2011, and November 1st, 2012, when the four of them and their mother and stepfather lived … in the Village of Pewaukee, that the defendant had engaged in sexual intercourse with two of the three sisters.
>
> All three sisters were under the age of sixteen at the time. In fact, even though we have just alleged one act of sexual assault, sexual intercourse of a child under the age of sixteen, and that is C[.L.W.], there were multiple acts of sexual intercourse, penis to vagina, at that address all in Waukesha County, State of Wisconsin, sir.

(89:10-11; App. 128-29). The court confirmed with the state at the second plea hearing that it intended to rely on its prior offer of proof as well as the complaint and amended complaint in regard to factual basis. (90:9-10; App. 145-46). The court indicated: "I will find a sufficient factual basis based on the contents of the complaint and the offer of proof." (90:15-16;

App. 151-52). After accepting Nash's plea and finding Nash guilty, the court ordered a presentence investigation and scheduled a sentencing hearing. (90:16-18; App. 152-54).

At sentencing the circuit court imposed and stayed an eight-year prison sentence comprised of three years of initial confinement followed by five years of extended supervision and then placed Nash on probation for five years with various conditions, including jail time. (92:27-28).[3]

Following sentencing, Nash filed a motion for postconviction relief seeking plea withdrawal. (69:1). Nash asserted that the circuit court did not find strong proof of guilt as required before accepting an *Alford* plea and that the record does not contain strong evidence of guilt of the second degree sexual assault of a child charge. (69:5-9).[4] The circuit court denied the motion after a hearing, explaining that it believed the state had set forth strong proof of guilt

[3] Nash's probation was subsequently revoked and he began serving the stayed sentence. (63:1).

[4] Nash raised an alternative ground for plea withdrawal based on the incorrect use of the domestic abuse modifier on the charge to which he pled. (69:9-14). At the postconviction hearing the circuit court agreed the modifier should not have been attached to that count, but held that the remedy for the error was to strike the modifier from the judgment of conviction rather than allow plea withdrawal. (80:1; 81:1; 99:10-11, 17, 24, 26; App. 156, 158). Nash did not renew this claim on appeal so that issue is not before this court.

on the record of the second degree sexual assault of a child charge to which Nash pled:

> …. There is a strong proof of guilt set out on the record in this Court's estimation. I did not look just at the complaint or say, hey, you guys agree that there is enough in the complaint[?] I said, give me a factual basis.
>
> The record is abundantly clear that I took time. Efforts were made to give the knowledge that we had about Mr. Nash and his deficiencies to make sure that the plea was done in an appropriate basis. There wasn't any hurrying through anything here. Two days were taken. The Court asked and there was a recitation of the facts.
>
> Again, we are looking at the nature of this offense and it was made clear on the record before I accepted the plea of what the allegations were, who was involved, and what was done.
>
> We didn't just say, there was some sort of facts. There was something sexual going on or some sort of touching. It was stated on the record that there was sexual intercourse and the nature, the specific nature of the sexual intercourse. The people involved. The ages. The location. Using as well the information set out in the complaint.
>
> In addition to that, I think that this record demonstrates that there was strong proof of actual guilt. That this Court did consider all the things that were brought to its attention at the time of the plea colloquy….

(99:25-26; App. 157-58).

Nash appealed. The court of appeals affirmed in a *per curiam* decision. *State v. Nash*, No. 2018AP000731-CR (WI App May 2, 2019) (unpublished) (App. 101-12). The court of appeals held that the criminal complaint and the representations of the prosecutor described strong proof of guilt on each of the two elements of the offense—sexual intercourse and age of the victim. (Slip op. ¶21; App. 109). The court also concluded that the other-acts evidence that had been deemed admissible strengthened the state's case. (*Id.*). Finally, it rejected Nash's arguments that reliance on the complaint and the prosecutor's "offer of proof" was not sufficiently detailed and specific enough to show strong proof of guilt. (Slip op. ¶¶24-27; App. 111-12).

Nash petitioned for review by this court under Rule 809.62, which this court granted.

ARGUMENT

To determine whether there is the "strong proof of guilt" necessary to establish a factual basis for a guilty plea under *Alford v. North Carolina*, a circuit court may not rely solely on information in the criminal complaint, as happened in Nash's case, but must hear witness testimony or oral statements or review witness affidavits or other documentary evidence.

A. Summary of Argument; Standard of Review.

Wisconsin circuit courts have the discretion to accept the kind of plea recognized in *North Carolina v. Alford*, 400 U.S. 25 (1970), which involves a defendant pleading guilty while simultaneously protesting his or her innocence. *State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995); *State v. Johnson*, 105 Wis. 2d 657, 661-63, 314 N.W.2d 897 (Ct. App. 1981). This case presents the question of what circuit courts must do to establish and assess the unique factual basis required for an *Alford* plea—"strong proof of guilt." *Garcia*, 192 Wis. 2d at 857-58; *Johnson*, 105 Wis. 2d at 663. *Cf. Alford*, 400 U.S. at 37-38 (referring to "strong evidence of actual guilty," a "strong case," and a "strong factual basis for the plea").

For the reasons set forth below, this court should exercise its superintending authority under Article VII, Section 3(1), of the Wisconsin Constitution, to require that determining whether an *Alford* plea is supported by "strong proof of guilt" requires assessment by the circuit court of live testimony or recorded oral statements of relevant witnesses or other documentary evidence of the evidence the state would introduce at a trial. This method of establishing strong proof of guilt is necessary to assure that an *Alford* plea is knowing, voluntary, and intelligent and, therefore, constitutionally valid. And it is a method that was used in prior Wisconsin cases and was apparently used in *Alford* itself. Because the method used to establish the factual basis for Kevin Nash's *Alford* plea did not employ any of these types of evidence but consisted of a restatement of the allegations in the criminal complaint, there was no showing of strong proof of guilt and Nash should be allowed to withdraw his plea.

A defendant who seeks to withdraw a guilty plea after being sentenced must prove by clear and convincing evidence that refusing to allow plea withdrawal would result in a manifest injustice. *State v. Finley*, 2016 WI 63, ¶58, 370 Wis. 2d 402, 882 N.W.2d 761. One type of manifest injustice is the failure of the trial court to establish a sufficient factual basis that the defendant committed the offense to which he or she pleads. *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). When the defendant is entering an *Alford* plea, establishing the

factual basis requires the evidence show strong proof of guilt that the defendant committed the crime to which the defendant pleads. *Alford*, 400 U.S. at 37-38 (1970); *Garcia*, 192 Wis. 2d at 857-58.

The determination of whether there is a sufficient factual basis for a plea is a matter within the circuit court's discretion and will not be overturned unless it is clearly erroneous. *Smith*, 202 Wis. 2d at 25. At the same time, however, the issue for review in this case—whether a circuit court must follow specific procedures or use particular methods to establish strong proof of guilt for an *Alford* plea—involves a matter for this court's superintending authority under Article VII, Section 3(1), of the Wisconsin Constitution. That is a question this court alone decides.

B. "A system of pleas, not trials" and the benefits and dangers of such a system.

About 97% percent of federal convictions are the result of guilty pleas. *See* Mark Motivans, U.S. Dept. of Justice, Bureau of Justice Statistics, *Federal Justice Statistics* 2015-16 (NCJ251770, Jan. 2019) at 9 & Table 6; Brian Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent'g Rptr. 256, 257, Figure 1 (2019). There is variation of the plea rate across states, but in the vast majority of states for which there is data over 90% of criminal cases are resolved with a plea. *See* National Center for State

Courts, Court Statistics Project—Criminal, 2018 General Jurisdiction Criminal Jury Trials and Rates and Bench Trial and Rates.[5] *See also Missouri v. Frye*, 566 U.S. 134, 143 (2012) (recognizing pleas account for nearly 95% of all criminal convictions). This shows the reality that plea bargains, whether for concessions on charges or on sentencing consequences, have become so central to the administration of the criminal justice system that it is "for the most part a system of pleas, not a system of trials…." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

But "[t]o note the prevalence of plea bargaining is not to criticize it." *Frye*, 566 U.S. at 144. Since the earliest cases accepting that plea bargaining is "inherent in the criminal law and its administration" and holding it is "not constitutionally forbidden," *Brady v. United States*, 397 U.S. 742, 751-52 (1970), courts and commentators have recognized the benefits—the "mutuality of advantage"—of the practice:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed

[5] These tables are in a database available at http://popup.ncsc.org/CSP/CSP_Intro.aspx (under the tab "Criminal").

> punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id. at 752. *Cf. Frye*, 566 U.S. at 144 ("[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.").

It is generally recognized that, due to increases in caseloads, criminal laws, and the complexity in criminal trials, the criminal justice system would seize up without guilty pleas and plea bargaining due to a lack of resources to have a trial in every case, or even in most cases. Lucian Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 Utah L. Rev. 51, 60, 81, 566 U.S. at 186 (Scalia, J., dissenting) ("…we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt."). Thus, guilty pleas assure not only that the criminal justice continues to function, but that it does so more efficiently by allowing allocation of resources away from trials of clear-cut cases. Efficiency in turn assures quicker resolution of more cases, which brings quicker resolution for both the defendant and

victim, allowing for both swifter imposition of punishment and earlier entry into rehabilitative programs.

Plea bargaining also helps prosecutors obtain cooperation in complex cases—for instance, in organized crime prosecutions or drug delivery conspiracy cases. It spares witnesses the time and potential trauma of testifying and provides victims with closure more quickly than trials do with the frequent added benefit of securing forthright admissions of guilt. And it recognizes the personal autonomy of defendants and allows them to exercise some control over the resolution of their case. *See* J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 Vand. Law Rev. 1099, 1138-45 (2014); Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?*, 47 Emory L. J. 753, 765-67 (1998).

Despite these benefits, plea bargaining also raises a host of well-known concerns. One is that it conflicts with the criminal justice system's search for truth. Even if a defendant is guilty of some crime, plea bargaining may lead to incomplete investigations of the case, inadequate disclosure of and limited adversarial testing of evidence. Further, inducements of leniency can lead defendants to plead guilty to crimes different from the ones they committed. That may produce sentences that are disproportionately lenient in some cases and disproportionately harsh in others. Wilkinson, *In Defense*, 67 Vand. L. Rev. at 1105-06; Guidorizzi,

"Ban" Plea Bargaining?, 47 Emory L. J. at 767-71. *See also* John Blume & Rebecca Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 166-69 (2014).

The most serious concern, and the one salient to this case, is the possibility that plea bargaining coerces innocent defendants into pleading guilty for fear of greater consequences if they exercise their fundamental constitutional right to a trial. This is especially problematic in serious cases, where maximum penalties are high or mandatory minimum sentences may apply. Wilkinson, *In Defense*, 67 Vand. L. Rev. at 1104-05; Guidorizzi, *"Ban" Plea Bargaining?*, 47 Emory L. J. at 771-72. But it is not limited to the most serious cases. With the proliferation of criminal offenses and broad prosecutorial discretion, a defendant may face multiple counts and enhanced penalty that, absent a plea agreement and guilty plea, will mean significantly higher consequences of getting convicted at trial rather than entering a plea. Dervan, *Bargained Justice*, 2012 Utah L. Rev. at 61-64; Blume & Helm, *The Unexonerated*, 100 Cornell L. Rev. at 169-70, 173-75. *Cf. Lafler*, 566 U.S. at 186 (Scalia, J., dissenting) (plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense"). This "trial penalty" (or, conversely, "plea discount") has been documented. Johnson, *Plea-Trial Differences in Federal Punishment*, 31 Fed. Sent'g Rptr. at 256-58, 259-60; Dervan, *Bargained Justice*,

2012 Utah L. Rev. at 84-86. It is clear that trial penalties lead some innocent people to plead guilty. According to the statistics of the National Registry of Exonerations, as of 2019 roughly 20% of recorded exonerations in the Registry (533 out of 2,631) were the product of guilty pleas.[6]

The concern about coercion and conviction of the innocent due to trial penalties is particularly acute when a defendant takes the route allowed under *Alford* of pleading guilty while continuing to maintain his or her innocence. A defendant may want to do that for the same reasons guilty defendants want to plea bargain—a reduced sentence, avoiding the stress and expense of pretrial detention and trial—though there may be other considerations. A defendant may wish to plead guilty yet publicly maintain innocence to avoid ridicule or embarrassment, such as where the charge is sexual assault of children. Or, the defendant might think the jury will not believe a claim of self-defense or accident. *Garcia*, 192 Wis. 2d at 857. Moreover, the simple fact *Alford* pleas are available may tempt innocent defendants to plead, as they get the benefits of a plea bargain while maintaining innocence.

Despite the evident reasons for resolving a case this way, an *Alford* plea is "a curious legal construct."

[6]. The National Registry of Exonerations is available on the website of the University of Michigan Law School at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited June 24, 2020).

Blume & Helm, *The Unexonerated*, 100 Cornell L. Rev. at 172. "One would think that if defendant says he did not commit the crime, the criminal justice system would insist on a trial to resolve the question." *Id.* As curious a construct as it is, *Alford* held the constitution does not preclude a defendant who maintains innocence from entering a guilty plea:

> …[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Alford, 400 U.S. at 37. Though *Alford* did not use the phrase "trial penalty," the decision arose out of just that phenomenon, as did *Brady*, which held that plea bargaining does not automatically invalidate a guilty plea. Understanding this context of *Brady* and *Alford* throws light on what a court must do to assure itself that an *Alford* plea is constitutionally valid.

C. The legal and factual context of *Alford* shows that its concern with strong evidence of guilt is central to insuring an *Alford* plea is knowing, voluntary, and intelligent.

The context relevant to *Alford* begins with *Brady*. In addressing the validity of a guilty plea entered as part of a plea agreement that will result in

some sort of leniency, the Supreme Court in *Brady* reiterated the general principle that a guilty plea must be voluntary and intelligent:

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady, 397 U.S. at 748 (footnote omitted). Wisconsin law is, of course, the same. *State v. Bangert*, 131 Wis. 2d 246, 257-58, 265-66, 389 N.W.2d 12 (1986) (the Due Process clause requires that the waivers of constitutional rights made by a guilty plea be voluntary and knowing).

Brady claimed his guilty plea was not voluntary because he entered it out of fear of the death penalty. He had been charged under a federal statute that allowed the death penalty to be imposed

only if a jury recommended doing so; thus, waiving a jury trial avoided the death penalty. Brady's judge was unwilling to try the case without a jury, so Brady pleaded guilty. 397 U.S. at 743. The Supreme Court later declared the statute's death penalty provision unconstitutional because it imposed an impermissible burden on a defendant's exercise of the constitutional right to a jury trial. *United States v. Jackson*, 390 U.S. 570, 572 (1968). Relying on *Jackson*, Brady argued the impermissible burden placed on the exercise of his right to trial was inherently coercive and made his plea involuntary. 397 U.S. at 746.

The Supreme Court disagreed, holding that the fact a defendant decided to plead guilty in order to avoid the death penalty did not necessarily mean the decision was coerced. 397 U.S. at 746-47. It said *Jackson* did not establish a new test for determining the validity of a guilty plea; instead, the standard remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Id.* at 747-49 If a defendant facing an extraordinary trial penalty takes that potential penalty into account along with all the other circumstances of his case and makes a voluntary and intelligent choice to plead guilty rather than pursue an alternative course of action, the plea is knowing and voluntary. *Id.*

But, the Court continued, "[t]his is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily

valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury." *Id.* at 757-58. Thus, courts need to "take great precautions against unsound results"—that is, inaccurate or unreliable results—whether in guilty pleas or trials. *Id.* at 758. And:

> We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is *based on our expectations that courts will satisfy themselves* that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and *that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged*.

Id. (emphasis added).

Like the defendant in *Brady*, Henry Alford had entered a guilty plea to avoid the death penalty under a state statute with a provision similar to the one invalidated by *Jackson*. Spurred by *Jackson*, Alford also sought plea withdrawal, arguing that because the statute made the death penalty the potential price of a trial, his decision to plead was involuntary. A federal circuit court of appeals agreed in a decision issued before *Brady* was decided. *Alford*, 400 U.S. at 29-30.

The Supreme Court accepted review of the court of appeals decision in Alford's case and, in light of *Brady*, rejected the Fourth Circuit's conclusion. But that left the question of whether, due to Alford's assertions of innocence, his plea was invalid because, as *Brady* had said, an admission of guilt "is normally '[c]entral to the plea and the foundation for entering judgment against the defendant….'" *Alford*, 400 U.S. at 32, *quoting Brady*, 397 U.S. at 748. As we know, the Court held that while "an admission of guilt" by the defendant may be the norm in guilty plea cases, it "is not a constitutional requisite to the imposition of criminal penalty." *Alford*, 400 U.S. at 37.

The Court acknowledged the rationales for and against requiring an admission of guilt. On one hand is the general principle that the law only authorizes a conviction where guilt is shown. On the other hand is the concern that courts should not "force any defense on a defendant in a criminal case, particularly when advancement of the defense might "end in disaster," and that "guilt, or the degree of guilt, is at times uncertain and elusive," so that a defendant, "though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty…." Because there are "reasons other than the fact that he is guilty [that] may induce a defendant to so plead,… [h]e must be permitted to judge for himself in this respect." *Id.* at 33-34 (quoted sources omitted; punctuation modified).

So far this is a recapitulation of *Brady*. But in explaining why the record in *Alford* showed a basis for a voluntary guilty plea despite the defendant's claims of innocence, the Court noted that "the record before the judge contains strong evidence of actual guilt." 400 U.S. at 37. This was important because the strength of the state's case meant that, regardless of whether he believed he was guilty or innocent, Alford "insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading." *Id.* The record made clear that:

> Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of *the evidence against him*, which substantially negated his claim of innocence and which further *provided a means by which the judge could test whether the plea was being intelligently entered*,... its validity cannot be seriously questioned.

Id. at 37-38 (emphasis added; citation and footnote deleted).

The reference to evidence to "test" Alford's plea cites *McCarthy v. United States*, 394 U.S. 459 (1969), the final case that establishes the context for the factual basis requirement in *Alford*. In *McCarthy* the Court discussed the relationship between voluntariness and the factual basis determination, emphasizing the protective function performed by the

factual basis requirement. *Id.* at 466-67. *McCarthy* says the voluntariness and factual basis requirements are inextricably linked, for a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466.

Along with the reference to *McCarthy* the Court repeated the concern it voiced in *Brady* about innocence. In referring to the plea being validly entered, the Court said that "[b]ecause of the importance of protecting the innocent and of insuring that guilty pleas are the product of free and intelligent choice," pleas coupled with a claim of innocence need a factual basis and the judge taking the plea must "inquire[] into and [seek] to resolve the conflict between the waiver of trial and the claim of innocence." *Alford*, 400 U.S. at 38 n.10.

Read together, then, *Brady*, *McCarthy*, and *Alford* require a factual basis of strong evidence of guilt for a plea of guilty entered by a defendant who protests his or her innocence, for that is a necessary step in ascertaining that the plea is a knowing, voluntary, and intelligent choice among the defendant's alternative courses of action. This makes practical as well as legal sense, for the strength of the state's case—or perceived strength, as there may be various barriers to the accurate perception of the strength of the evidence—is a predominant factor in how defendants (and their lawyers) make decisions about plea bargains. *Brady*, 397 U.S. at 756; Allison Redlich, *et al.*, *The Psychology of Defendant*

Plea Decision Making, 72 Am. Psychol. 339, 342-44 (2017). Requiring a court that is accepting an *Alford* plea to assess the state's evidence and its strength independently is a check against coercion of a defendant who, fearing a greater penalty, is giving up a trial based on an assessment of the evidence that is incomplete or inaccurate or irrational.

As noted above, Wisconsin has long required that an *Alford* plea be supported by a factual basis showing "strong proof of guilt." *Johnson*, 105 Wis. 2d at 663; *Garcia*, 192 Wis. 2d at 859-60. The cases adopting that standard did not do so based on *Alford*'s context and connection with *Brady* and *McCarthy*, but for the following reasons it is clear our adoption of this requirement is consistent with the conclusion that the strong proof of guilt factual basis requirement is necessary to assure the constitutional validity of *Alford* pleas.

In Wisconsin the requirement that a court accepting a plea establish a factual basis is set forth in Wis. Stat. § 971.08(1)(b). That statute provides that, before a circuit court accepts a guilty or no contest plea, it must "make such inquiry as satisfies it that the defendant in fact committed the crime charged." Establishing a sufficient factual basis requires a showing that "the conduct which the defendant admits constitutes the offense charged...." *State v. Lackershire*, 2007 WI 74, ¶33, 301 Wis. 2d 418, 734 N.W.2d 23 (quoted sources omitted). The requirement that a court establish a factual basis is one among other duties prescribed in § 971.08, but all

of the duties are imposed because they are "designed to ensure that a defendant's plea is knowing, intelligent, and voluntary." *Id.*, ¶34; *State v. Brown*, 2006 WI 100, ¶23, 293 Wis. 2d 594, 716 N.W.2d 906. *Cf. State v. Kelty*, 2006 WI 101, ¶44, 294 Wis. 2d 62, 716 N.W.2d 886 (a plea may not be knowing, intelligent, and voluntary if the plea colloquy was defective in discussing the elements of the crime or the factual basis).

The factual basis requirement is part of the process of assuring a valid plea because it "protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Lackershire*, 301 Wis. 2d 418, ¶35 (quoted source omitted). A defendant's failure to realize that the conduct to which she pleads guilty does not fall within the offense charged is incompatible with the plea being knowing and intelligent. *Id.*

In fact, *Lackershire* offers an instructive comparison to the factual basis issue in *Alford* plea cases, where the defendant is asserting innocence. The defendant was a young woman charged with child sexual assault for having sexual contact with a boy. 301 Wis. 2d 418, ¶6. She maintained the boy had nonconsensual sexual contact with her, however. *Id.*, ¶9. The circuit court's factual basis inquiry was insufficient because it did not resolve the substantial question of whether the facts that formed the basis of Lackershire's plea constituted the offense charged,

for it failed to demonstrate that Lackershire realized that if the underlying conduct was a sexual assault upon her, that conduct could not constitute the offense charged. *Id.*, ¶38. Thus, she was potentially pleading guilty without realizing that her conduct did not constitute the offense charged and that she could not be convicted. *Id.*, ¶46.

Though *Alford* pleas are not mentioned in Wis. Stat. § 971.08, this court has explicitly made the procedural safeguards of that statute applicable to *Alford* pleas. *Garcia*, 192 Wis. 2d at 860; *State v. Smith*, 202 Wis. 2d 21, 26, 549 N.W.2d 232 (1996). At the same time, however, "*Alford* pleas are treated differently from guilty pleas in regard to the factual basis requirement because *Alford* pleas allow a defendant to be convicted of a crime even though the defendant continues to assert his innocence." *Smith*, 202 Wis. 2d at 27. The defendant's assertion of innocence poses a "difficulty … in relation to the factual basis requirement…." *Smith*, 202 Wis. 2d at 27, *citing Johnson*, 105 Wis. 2d at 663.

To assure the knowing and voluntary nature of the plea in light of this "difficulty," the factual basis requirement for an *Alford* plea can only be fulfilled if there is a showing of "strong proof of guilt" by the state that the defendant committed the crime to which he or she is pleading guilty. *Smith*, 202 Wis. 2d at 27, *citing Johnson*, 105 Wis. 2d at 663, *and Garcia*, 192 Wis. 2d at 857-58. This more stringent level of factual basis evidence in *Alford* pleas is necessitated by the fact that the evidence has to be strong enough

to overcome a defendant's "protestations" of innocence. Although strong proof of guilt is less than proof beyond a reasonable doubt, *State v. Spears*, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988), it is clearly greater than what is needed to meet the factual basis requirement under a guilty plea.

In short, based on *Alford* and its factual and legal context, as well as on our precedent applying § 971.08(1)(b) to require a heightened factual basis for *Alford* pleas, it is clear that establishing a factual basis, while not itself a constitutionally mandated requirement for a valid plea, is a method to assure a result that is constitutionally mandated—that a plea is knowing, voluntary, and intelligent. In the context of an *Alford* plea and a defendant's assertion of innocence, making the method effective demands that the factual basis be strong enough for a court to assure itself that entering the defendant's decision to enter the plea despite his or her assertion of innocence is "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31. The next section addresses what a court accepting an *Alford* plea must do to establish the strong proof of guilt required.

D. This court should mandate specific methods for establishing "strong proof of guilt" to support an *Alford* plea.

As explained above, this court has been clear that it takes more to establish a factual basis for an *Alford* plea than for an ordinary guilty plea, and that more is required in order to assure a defendant who claims to be innocent is knowingly, voluntarily, and intelligently entering the plea. But it is also the case, as Nash conceded below and the court of appeals noted (slip op. ¶25; App. 111), that this court has never mandated any specific method for a circuit court to use in determining whether that standard has been met. For the following reasons, this court should now require the circuit court to use sworn witness testimony or oral statements or review witness affidavits or other documentary evidence when establishing the factual basis for an *Alford* plea.

Before explaining why the court should adopt these methods, Nash first acknowledges again that while establishing a sufficient factual basis for an *Alford* plea is a necessary part of assuring the plea is voluntary, the constitutional requirement that a plea be voluntary does not by itself impose any specific method for assessing the factual basis. Nor does § 971.08(1)(b) or any other statute require a particular method, as establishing a factual basis is usually a matter for the trial court's discretion.

Smith, 202 Wis. 2d at 25. But because the strong proof of guilt requirement is a means to assure that an *Alford* plea is constitutionally valid, he asks this court to mandate these specific procedures as an exercise its superintending authority, pursuant to Article VII, Section 3(1) of the Wisconsin Constitution.

This court's superintending authority endows it "with a power that is indefinite in character ... and limited only by the necessities of justice." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996). It is in the interest of justice that a circuit court take particular care to determine that an *Alford* plea is supported by strong proof of guilt, for this will ensure that the plea is being entered knowingly, intelligently, and voluntarily. Second, by assuring the validity and thus finality of the plea, it helps preserve the resources of the criminal justice system. Furthermore, in cases involving a victim, it promotes closure and finality for the victim.

The justifications for the use of the court's superintending authority in this case overlap to a great degree with the justifications invoked in *Bangert* to prescribe methods for determining the defendant's understanding of the nature of a charge. The court noted that no particular procedure is constitutionally mandated for a circuit court's acceptance of a no contest or guilty plea. Instead, invoking its superintending and administrative authority over the circuit courts, the court made it mandatory for a circuit court to undertake a personal

colloquy with the defendant in order to assist the circuit court in making the constitutionally required determination that a defendant's plea is voluntary. 131 Wis. 2d at 267-72. *See also State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (using superintending and administrative authority to mandate the use of a colloquy in cases involving a defendant's waiver of the right to counsel in order to serve "the dual purposes of ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding our scarce judicial resources"). A specific procedure designed to establish the strong proof of guilt needed to support an *Alford* plea will help ensure a defendant is entering a constitutionally valid plea and avoid post-plea litigation. Therefore, establishing such a procedure is an appropriate use of this court's superintending authority.

Turning to the method, Nash first notes that while this court has adopted the "strong proof of guilt" standard for assessing the factual basis for a plea and has offered some elaboration on what the standard means, there have been only a few decisions addressing whether that standard was satisfied in a particular case. Those decisions, however, show the way to what method a circuit court should use to assess whether the state has strong proof of guilt.

This court addressed whether there was "strong proof of guilt" in two cases.[7] The first, *Smith*,

[7] This court's decision in *Garcia* did not involve a factual basis issue; instead, the defendant challenged the use of *Alford*

offers little assistance here, for it involved indisputable facts showing it was legally impossible for the defendant to have committed the crime. *Smith*, 202 Wis. 2d at 23-24 (defendant charged with second degree sexual assault of a 16-year-old, but entered an *Alford* plea to an amended charge of child enticement, one of the elements of which is that the victim is *less* than 16 years old). Though *Smith* affirms that there must be strong proof of guilt of each element of the crime to which the defendant is pleading guilty, *id.* at 28, the court had no occasion in that case to address the more common factual situations presented in *Alford* plea cases, where the facts are disputed.

This court was faced with that scenario in *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998), and it held the record did show strong proof of guilt. *Id.* at 646-47. The factual basis for the plea in *Warren* was not grounded solely on the allegations of the criminal complaint or the prosecutor's summary of that information. Instead, it was based on the detailed preliminary hearing testimony of the victim and the investigating officer, who interviewed the victim as part of the police investigation. *Id.* at 622-24, 646-47.

The court of appeals decisions addressing the sufficiency of a factual basis for an *Alford* plea

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pleas generally, and in the alternative claimed his plea was invalid because he was not aware of the consequences of his plea. 192 Wis. 2d at 851, 861.

likewise involve the circuit court's reliance on more than the allegations in the criminal complaint. In *Johnson*, the defendant entered an *Alford* plea to a charge after a trial on the charge ended in a hung jury. The circuit court found strong proof of guilt based on the record of that trial. 105 Wis. 2d at 659-60, 664-65.

Similarly, in *Spears* the state called witnesses to testify at the plea hearing and summarized the expected testimony of other witnesses. 147 Wis. 2d at 438-40. And in *State v. Annina*, 2006 WI App 202, ¶¶7, 14-17, 296 Wis. 2d 599, 723 N.W.2d 708, at a pretrial hearing on the exclusion of evidence the prosecutor read from a police report that gave the police officer's specific narrative of the criminal conduct that led to the resisting an officer charge to which the defendant was entering an *Alford* plea.

Last but not least, before the trial court accepted the defendant's plea in *Alford* a police officer testified under oath and summarized the state's evidence. 400 U.S. at 28. The court also heard from two additional witnesses who indicated that the defendant had taken his gun, stated that he was going to kill the victim, and then returned stating that he had murdered the victim. *Id.* at 28-29. The defendant also provided sworn testimony before the court accepted his plea. *Id.* at 28. This sworn testimony certainly fits what the Court had in mind when it advised that a guilty plea from a defendant asserting innocence should not be accepted "until the judge taking the plea has inquired into and sought to

resolve the conflict between the waiver of trial and the claim of innocence." *Id.* at 38 n.10.

While sworn testimony at the plea hearing is the surest and should be the preferred method for allowing the judge to assess whether the state has strong proof of guilt, Nash acknowledges that what will be necessary in a particular case could depend on the charges to which the defendant is pleading. Thus, is some cases, reference to a transcript of sworn testimony from an earlier evidentiary hearing in the case—for instance, a preliminary hearing, an evidentiary hearing on a motion-in-limine, or a suppression hearing—could also be an alternative (or additional) way to establish strong proof of guilt.

Further, in cases like this one, where a child witness has given a videotaped forensic interview (16; 17) that the state has sought to admit under Wis. Stat. § 908.08, the judge could review (or rely on a previous review of) the statement. It is also the case that police make audio recordings of their interviews of witnesses. Those, too, could be reviewed at or before the plea hearing.

Finally, while less satisfactory than any of the previously listed methods, a thorough, organized presentation or recital of witness statements or other exculpatory evidence the state would present at a trial could support a finding of strong proof of guilt, if it is sufficiently detailed and offers multiple bases on which a judge could find strong proof of guilt.

Requiring these specific procedures makes sense given the quantum of evidence needed to establish strong proof of guilt. In explaining the "strong proof of guilt" requirement, this court has made it clear that "[a]lthough strong proof of guilt is *less* than proof beyond a reasonable doubt, … it is *clearly greater* than what is needed to meet the factual basis requirement under a guilty plea." *Smith*, 202 Wis. 2d at 27 (emphasis added), *citing Spears*, 147 Wis. 2d at 435. "The requirement of a higher level of proof in *Alford* pleas is necessitated by the fact that the evidence has to be strong enough to overcome a defendant's 'protestations' of innocence." *Smith*, 202 Wis. 2d at 27. *Cf. Johnson*, 105 Wis. 2d at 664 (there must be a "sufficient factual basis … established at the plea proceeding to substantially negate [the] defendant's claim of innocence"). This cannot be done with a second- or third-hand recitation of the minimal information in the probable cause section of the criminal complaint.

Indeed, resolving the conflict between a guilty plea and an assertion of innocence requires a sense of the demeanor and credibility and power of the witnesses' testimony that will virtually never be found in a charging document or a prosecutor's recitation from or summary of it. The best way to get that sense of the evidence is to use sworn witness testimony. This would best be done at the plea hearing itself, where the judge can focus on the specific question of whether there is strong proof of guilt. Because the testimony relates to the factual basis and need not amount to proof beyond a

reasonable doubt, the testimony would be limited to the core allegations of the defendant's criminal conduct. Similarly, because the plea hearing is not a trial and the testimony is offered only as to factual basis for the plea he or she has agreed to enter, defendants would have only limited, if any, incentive to cross-examine or otherwise refute the witnesses.

And, of course, mandating a specific procedure over and above what is needed for a non-*Alford* guilty plea advances the fundamental value of assuring that a defendant's plea is knowing, voluntary, and intelligent. In particular, it helps courts assure that defendants do not plead guilty out of fear of a trial penalty when the state's case does not, in fact, present strong proof of guilt.

While use of one or more of these methods would make an *Alford* plea proceeding more involved and time-consuming than an ordinary guilty plea, those costs are minimal when considered against the benefits of a requirement for a more specific procedure. First, studies show that *Alford* pleas make up about 6% to 8% of all pleas. Allison Redlich & Asil Ozdogru, *Alford Pleas in the Age of Innocence*, 27 Behav. Sci. & L. 467, 483 (2009). Thus, they are not so numerous that it would impose a significant burden on trial courts. Indeed, it would not pose more of a burden than the two plea proceedings that had to be conducted in this case to address the concerns raised by Nash's plea. Moreover, mandating a uniform procedure for establishing the strong proof of guilt needed for an *Alford* plea may add little

additional time across the legal system, for it advances the interest of finality and provides a guard against time-consuming postconviction proceedings and the prospect that the plea will be invalidated, and the prosecution restarted.

Finally, Nash has found no other jurisdiction that mandates the kind of specific procedure for sworn testimony that he is advocating. Some states do, however, recognize the need to have something more than a charging document or a summary statement from the state that the defendant contradicts for the court to determine whether the state has a strong enough case to satisfy *Alford*. For instance, these states will look to any part of the record to supply the factual basis, including affidavits of witnesses or in support of warrants, presentence reports, preliminary hearing transcripts, police reports, uncontradicted statements of the prosecutor, and the defendant's own admissions. *See, e.g., State v. Salinas*, 887 P.2d 985, 987 (Ariz. 1994); *State v. Ortiz*, 789 N.W.2d 761, 768 (Iowa 2010); *State v. Scroggins*, 276 So.3d 131 (La. 2019); *State v. Stilling*, 856 P.2d 666, 674-76 (Utah Ct. App. 1993). Others mandate little more than caution and "thorough inquiry." *State v. Malo*, 577 A.2d 332, 334 (Me. 1990). Finally, at least one court has expressly said that an *Alford* plea factual basis determination does not require a "mini-trial" of the case. *Amerson v. State*, 812 P.2d 301, 303 (Idaho Ct. App. 1991).

In addition, not too long after *Alford* was decided two commentators addressing plea-taking

methods offered suggestions relevant to establishing a factual basis for an *Alford* plea. The first expressly addressed *Alford*, noting that a court taking an *Alford* plea probably "must undertake a broader, more searching inquiry de novo, and find facts more persuasive of true guilt than the mere minimum necessary to support the charge. Examining prior minutes and hearing the prosecutor describe the evidence he hopes to adduce can hardly be enough…." H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 L. & Contemp. Problems 102, 126 (1977). Instead:

> At least as to the disputed aspects of the case, one would think that a process more nearly approaching the *Alford* mini-trial is required. Without live evidence, it is extremely difficult for the court to resolve issues of credibility between the prosecution witnesses and the defendant. If, as the Court indicates in *Alford*, the trial judge must, in effect, "find" guilt by resolving factual issues, he must go beyond asking the prosecutor to justify his charging decision, and beyond perceiving evidence in written statements or testimony which contradicts the defendant's averrals.

Id.

The second addressed factual basis ("accuracy") inquiries generally, not *Alford* pleas specifically, but he sensibly advocated generally for "the most reliable method available." John Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 125 U. Penn. L. Rev.

88, 132 (1977). Noting that while it is time-consuming, testimony from witnesses is the method "characterized by a high degree of reliability." *Id.* at 136. And a high degree of reliability is what is required before a defendant claiming to be innocent is allowed to enter a guilty plea.

E. The record in this case does not establish strong proof of guilt, so Nash's *Alford* plea is not supported by a sufficient factual basis.

The procedures Nash advocates for in the previous section, not to mention those used to establish strong evidence of guilt in previous Wisconsin *Alford* plea cases, stand in sharp contrast to the process used in this case. In particular, there was no testimony from any witness at the plea hearing, whether a complaining witness or investigating officer; no review of any audio or visual recording; and no detailed, documented description of the investigation and allegations. Accordingly, this court should hold that, contrary to the conclusion of the court of appeals, the circuit court failed to establish strong evidence of guilt to support Nash's *Alford* plea.

At Nash's initial plea hearing, the circuit court asked the state for an "offer of proof," and in response the state summarized the allegations contained in the complaint. (89:10-11; App. 128-29). At the second plea hearing the court confirmed with the state that it intended to rely on its prior offer of proof as well as

the complaint and amended complaint for a factual basis. (90:9-10; App. 145-46). And that is what the court did finally rely on. (90:15-16; App. 151-52).

The complaint would certainly be sufficient to establish a factual basis for a mine-run guilty plea. The complaint describes the genesis of the investigation into Nash; gives the dates and locations of the alleged offenses; and summarizes the pertinent content of the statements C.L.W. and A.T.N. gave during their forensic interview—namely, that C.L.W. alleged Nash forced her mouth to have contact with his penis and that A.T.N. alleged Nash had sexual intercourse with her on multiple occasions and attempted to put his penis in her mouth on one occasion. (1:4-5; App. 114-15). But as noted above, this court has been clear that it takes more to establish a factual basis for an *Alford* plea than for an ordinary guilty plea. *Smith*, 202 Wis. 2d at 27.

In addition, as to the prosecutor's "offer of proof," that is a misnomer, for it is simply a summary of the information in the complaint. (89:10-11; App. 128-29). While it "highlighted key allegations" (slip op. ¶25; App. 111), it offered *no* additional details or substance regarding the allegations. It did not subtract from the factual basis provided in the complaint, but it did not add to it, either.

In addition to the complaint and the state's "offer of proof," the circuit court had ruled that the state could admit certain other-act evidence at trial (14:5-7; 91:16-18), and the court of appeals concluded

this evidence added strength of the state's case. (Slip op. ¶21; App. 109). But this evidence added nothing to the equation. The other acts were already set out in the complaint (1:5; App. 115), and the state's other-acts motion added almost no details about the alleged acts (14:6, 7). Further, there was no testimony or evidence presented at the other-acts motion hearing that added any details or fleshed out any of the accusations. (91). Repeating the same basic information from the complaint does not serve to show the allegations are strong.

Furthermore, the other-acts allegations here present the same issues as the allegations underlying the criminal charges, as they involve conduct that was supposed to have occurred three or four years earlier, when C.L.W. was as young as 4 or 5, A.T.N. was 8 to 9, and M.K.N. was 11 to 12. (1:4-5; App. 114-15). This is yet more delayed reporting of conduct by young witnesses purporting to recall something that happened when they were even younger. Nash also consistently denied the other-acts allegations, just as he did the allegations for which he was charged. (89:16; App. 134). Thus, the multiple allegations of the same kind of conduct are not so corroborative or credible that they show strong proof of guilt.

Next, the court of appeals' citation to and gloss on *Warren* seemingly implies that the fact the complaining witnesses made allegations of sexual assault is enough by itself to show "strong proof of guilt." (Slip op. ¶21; App. 109). But *Warren* found strong proof of guilt based on the sworn preliminary

hearing testimony of the child victim and a police officer. 219 Wis. 2d at 622-24, 646. Nash waived a preliminary hearing (10; 96:2-5) and there was no other proceeding where similar sworn testimony was presented. In addition, it cannot be the case that child victims' statements are always sufficient alone to establish strong proof of guilt. Children no less than adults may fail to remember accurately, or misperceive events, or fabricate allegations, and a defendant entering an *Alford* plea is asserting that there is just that kind of problem with the complaining witness's evidence.

Finally, citing *Smith*, the court of appeals said that because Nash's plea was negotiated the factual basis assessment could be relaxed. (Slip op. ¶23; App. 110). In reality, *Smith* says the opposite. While *Smith* cites the rule that a factual basis inquiry need not go to the same length when there is a negotiated plea, 202 Wis. 2d at 25, citing *Broadie v. State*, 68 Wis. 2d 420, 423-24, 228 N.W.2d 687 (1975), *Smith* goes on to hold that rule is *not* applicable to *Alford* pleas. Noting that *Broadie* involved a guilty plea, this court said "[t]his case, instead, involves an *Alford* plea, *and therefore is controlled by Garcia*'s requirement of strong proof of guilt." 202 Wis. 2d at 28 (emphasis in original).

In short, the factual basis for Nash's *Alford* plea was ultimately supported by nothing beyond the information in the criminal complaint. Because the plea was not taken using a method that assures a proper assessment of strong proof of guilt, this court

should reverse the court of appeals' decision and remand the case with directions that Nash be allowed to withdraw his plea.

CONCLUSION

For the reasons given above, this court should mandate specific methods for a circuit court to use in establishing the strong proof of guilt necessary to support an *Alford* plea. It should also find that the record in this case is insufficient to establish strong proof of guilt, and therefore Kevin Nash should be allowed to withdraw his plea.

Dated and filed by U.S. Mail this 26th day of June, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 10,319 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 and filed by U.S. Mail this 26th day of June, 2020.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender

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.

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.

Dated and filed by U.S. Mail this 26th day of June, 2020.

Signed:

_____

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Assistant State Public Defender

APPENDIX

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TO
APPENDIX