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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP731-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN L. NASH,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE RALPH M. RAMIREZ, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant Kevin L. Nash carry his burden to establish that the circuit court record contained an insufficient factual basis for his *Alford*[1] plea, thus establishing a manifest injustice?

The circuit court answered: No.

The court of appeals answered: No.

This Court should answer: No.

2. To establish the strong factual basis necessary before a circuit court may accept a defendant's *Alford* plea, is the State required to present evidence in the form of live witness testimony, recorded oral statements, witness affidavits, and other documentary evidence?

By finding a sufficient factual basis without the presentation of those forms of evidence, the circuit court answered: No.

By holding that the amended criminal complaint and prosecutor's verbal representations "easily describe 'strong evidence of guilt,'" the court of appeals answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

INTRODUCTION

Attempting to retroactively render his *Alford* plea a manifest injustice, Nash invites this Court to exercise its superintending authority to adopt an ambiguous, unnecessary rule employed by no jurisdiction in the country. Specifically, Nash asks this Court to require circuit courts to convene an abridged bench trial, complete with witness testimony, oral statements, witness affidavits, and other documentary evidence in some (but apparently not all) cases where an *Alford* plea is entered.

This Court should reject that invitation because Nash's rule would only serve to drain precious circuit court resources and harm defendants like Nash by discouraging circuit courts and prosecutors from entertaining a defendant's request to enter an *Alford* plea.

Here, Nash held an absolute constitutional right to have the State prove any contested sexual assault charges at a jury trial, or, with the circuit court's approval, to maintain his innocence while accepting a plea offer that offered numerous benefits. He chose the latter, and after reviewing the charging documents and discovery materials with his attorney, Nash agreed four times that the State's evidence was enough to prove him guilty. Even more important than Nash's view of the evidence, the circuit court was satisfied that there was a sufficient factual basis to accept Nash's *Alford* plea. Nash's proposed rule, applied in his case, would have done nothing but force his victims to relive traumatic experiences by testifying to the same information already in the record.

Nash established no manifest injustice meriting plea withdrawal, and this Court should therefore affirm.

STATEMENT OF THE CASE AND FACTS

The charges and plea agreement

In February 2016, the State charged Nash with one count of first-degree sexual assault of a child under the age of 12, C.L.W., contrary to Wis. Stat. § 948.02(1)(b), and one count of repeated sexual assault of a child, A.T.N., contrary to Wis. Stat. § 948.025(1)(b). (R. 1:3–4.) Nash later entered into an agreement with the State where he would plead no-contest to an amended charge of sexual assault of a child under 16 years of age as an act of domestic abuse, contrary to Wis. Stat. §§ 948.02(2), 973.055(1), as alleged in an amended information.[2] (R. 31:1; 32; 89:3–4.)

Because this appeal concerns whether there was sufficient information in the record to show strong proof of guilt for the crime of which Nash was convicted, the State summarizes the information contained in the record at the time of his ensuing plea.

The amended criminal complaint and other-acts motion

The State filed an amended criminal complaint that alleged that in October 2015, Nash's three younger sisters disclosed that he had sexually assaulted each of them.[3] (R. 8:2.) C.L.W. made the first report, telling a teacher that Nash assaulted her several years earlier. (R. 8:2.) Waukesha police opened an investigation and determined that Nash had

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[2] The State omitted Nash's original charges from the amended information, alleging only the single amended count to which Nash ultimately pled. (*See* R. 31:1.)

[3] The original criminal complaint and amended criminal complaint set forth a nearly identical factual basis. (*See* R. 1:4–5; 8:1–3.) The only observed difference between the two documents involved the State correcting a typographical error and removing a sentence enhancer that was originally alleged in error. (*See* R. 1:3–4; 8:1.)

assaulted both C.L.W. and A.T.N. in the family's Pewaukee home between November 2011 and November 2012. (R. 8:1.) At that time, Nash was approximately 14 to 15 years old. (*See* R. 8:1.) A.T.N. was approximately 8 to 9 years old, and C.L.W. was 4 to 5 years old. (*See* R. 8:1.) The third sister, M.K.N., was 11 to 12 years old; she reported that Nash assaulted her in Milwaukee, before the family moved to Pewaukee. (*See* R. 8:1–2.)

All three girls were forensically interviewed. (R. 8:2.) During her interview, C.L.W. described how Nash once approached her while she was sitting on a couch in the basement of their Pewaukee home. (R. 8:2.) He exposed his penis and forced it into her mouth. (R. 8:2.) C.L.W. said she pushed him away and ran upstairs. (R. 8:2.)

A.T.N. recounted how Nash assaulted her almost daily in the same Pewaukee basement. (R. 8:2.) She stated that Nash would lay on top of her on a futon, pin her down with his body weight, and cover her mouth with his hand. (R. 8:2.) A.T.N. described how Nash's "private part" then made contact with her "private part," often painfully. (R. 8:2.) At least once, according to A.T.N., Nash tried to pry her mouth open and insert his penis. (R. 8:2.)

In addition to the Pewaukee assaults of C.L.W. and A.T.N., the amended complaint indicated that assaults occurred in Milwaukee and at a grandmother's home in Georgia. (R. 8:2.) After a hearing, the circuit court granted the State's motion to admit evidence of those prior bad acts. (R. 14:1; 91:18.) Among that evidence were C.L.W.'s and A.T.N.'s accounts of Nash having penis-to-vagina sexual contact and intercourse with them while the family was living in Milwaukee. (R. 91:5; 14:6.) And M.K.N. divulged having sexual contact with Nash, also in the basement of the Milwaukee home. (R. 91:5–6; 14:7.)

As for the Georgia assault, A.T.N. had recounted an incident in her grandmother's garage during which Nash forced her to lie down, put his hand over her mouth, and then "touched her private part with his private part." (R. 91:7; 14:6.) Their uncle, according to A.T.N., interrupted that assault. (R. 91:7; 14:6.)

The State's evidentiary notices

Before the plea hearing, the State filed notice of its intent to offer into evidence at trial the sisters' video-recorded interviews. (R. 17.) Copies were provided to the defense. (R. 22.) The State also filed a witness list, notice of its intent to call the forensic interviewer as an expert witness, and a summary of her anticipated testimony. (R. 16; 28.)

Finally, the State disclosed its intent to use in its case-in-chief a Mirandized statement Nash gave while in custody and to call the detective who took the statement as a trial witness. (R. 24.) The State filed a video recording of the statement prior to the plea hearing and a police-prepared transcript of the statement before sentencing. (R. 30; 35.) In that statement, Nash admitted to having a sexual encounter with A.T.N. where he touched and kissed her nipples before his mother interrupted him. (R. 35:1, 3–6.)

The plea hearings

Nash appeared at a plea hearing that the court continued over two days. (R. 89:1; 90:1.)

On the first day, the State filed an amended information containing a single count of sexual assault of a child under 16 years of age. (R. 32.) Nash submitted a plea questionnaire and waiver of rights form indicating that he would plead no contest to the amended sexual assault charge. (R. 31:1; 89:3.) On that document, he initialed each of the elements of the crime to which he was pleading, indicating

that he understood the elements of that crime. (R. 31:1, 3; 89:3.)

Defense counsel explained to the court that Nash was "not going to contest that the State could present witnesses or other evidence that if believed by a jury would be sufficient to convict [Nash] of the amended charge in the complaint [sic]." (R. 89:3.) Defense counsel also clarified, "[Nash] is not saying that he committed the offense outright and in a way it could be 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 [sic] and the State has no objection." (R. 89:3.)

The court confirmed that Nash understood the nature of the charge to which he was pleading and what the State would have to prove to support a guilty verdict. (R. 89:6.) Defense counsel confirmed that he provided the discovery materials to Nash and "met him at the jail on numerous occasions to go over the documents." (R. 89:6.) Nash agreed that was true.[4] (R. 89:6.) The court asked Nash if he understood the charge to which he was pleading and what the State would have to prove before he could be found guilty. (R. 89:6.) Nash answered, "Yes, sir." (R. 89:6.)

Nash also confirmed that he was voluntarily relinquishing certain constitutional rights. (R. 89:6–9.) After Nash hesitated while answering some of the court's questions, the court reminded him that he could discuss any concerns with his lawyer before proceeding. (R. 89:9.) Defense counsel clarified that Nash "didn't really have questions about the rights. He was asking about the PSI." (R. 89:9.)

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[4] Nash affirmed during the first and second plea hearings that he could read, (R. 89:6; 90:5), and he also indicated in the plea questionnaire form that he understood the English language, (R. 31:1).

The court also reviewed the amended information with Nash. (R. 89:10.) The court described the general timeframe and location of the crime and explained that the State alleged that Nash had sexual intercourse with a child under the age of 16, C.L.W. (R. 89:10.) When asked how he would plead, Nash answered, "No-contest." (R. 89:10.) The court then asked the State for an offer of proof. (R. 89:10.)

The prosecutor stated how Nash's three sisters had reported being assaulted, and that Nash "had engaged in sexual intercourse" with two of them while the family was living in Pewaukee. (R. 89:10–11.) The prosecution added that although the State had alleged only one act of sexual intercourse involving C.L.W., "there were multiple acts of sexual intercourse, penis to vagina, at" the Pewaukee address. (R. 89:11.) All three sisters were under 16 at the time of these incidents. (R. 89:11.)

Immediately after the prosecutor finished the offer of proof, the court asked Nash if he understood what the State would need to prove if his case went to trial, and Nash answered, "Yeah, I do." (R. 89:11.) Nash once again expressed his desire to enter a no-contest plea. (R. 89:11.)

In the context of entering a no-contest plea, the court asked Nash if he acknowledged that the State had enough evidence to prove the charge, and Nash answered, "No." (R. 89:12.) Nash asserted his belief that he was not guilty of the charge. (R. 89:12.) The court then asked defense counsel to explain his discussions with Nash concerning his plea, and defense counsel stated that he met with Nash three times in the last week to discuss the evidence that the State would present at trial, specifically testimony from the sisters, the forensic interviewers, and the investigating officers:

> *I relayed to him that the sisters, 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 I went over with him what a no-contest plea meant as far as the standard no-contest plea. Where you say you are not challenging it. You are saying that the State could produce this evidence and that it is believed a jury would convict him.
>
> He denied to me that he actually committed the offense but he wanted to accept the plea bargain because the original charges were carrying 120 years of exposure and the State was willing to reduce this to one charge and that they also reduced their sentence recommendation to basically leaving it up to the Court. *We went over this on three separate occasions and he indicated to me that he understood what that meant.*

(R. 89:13 (emphasis added.)

When questioned again about whether there was enough evidence for the State to prove the amended charge, Nash launched into a lengthy criticism of what he considered a "hearsay case" pursued by the State. (R. 89:14–15.) He commented on how "the DNA came back," how he kept hearing "he said she said stuff," and how he was not going to proceed to trial because he would "lose" in that county. (R. 89:14–15.) The court decided to continue the plea hearing to the following day after Nash expressed "several concerns" about how he wanted to proceed to trial but simultaneously did not want a trial, how he purportedly "protect[ed] [his] sisters from all evil," and how the allegations were "all this hearsay." (R. 89:15–16.)

The next day, defense counsel explained that he had met with Nash twice since the last hearing, reviewed the pleading procedure once again, and confirmed that Nash did not want to proceed to trial and instead wanted to enter a plea. (R. 90:2–3.) Defense counsel also clarified, "He is not

admitting that he did this offense *but he is admitting that the State could present evidence that a jury could believe and convict him*." (R. 90:3 (emphasis added).) When asked if that was true, Nash answered, "Yes, sir." (R. 90:3.)

Shortly thereafter, the court personally addressed Nash and confirmed for a second time that Nash believed, based on his review of the evidence, that the State had evidence that could result in his conviction. (R. 90:5.) Nash agreed that he read the documents and paperwork in his case, understood the charge to which he was pleading, and reviewed with his attorney the elements of the offense that the State would have to prove before he could be found guilty. (R. 90:6.) Later, the court advised Nash,

> What I have been told and I want to reiterate this, it is your position you didn't do these things, however, *you believe that the State has a sufficient amount of proof or information such that we could have a jury trial and they could meet their burden of proof*. You could be found guilty at a jury trial of the two charges on the original document, the information, but you wish to take advantage of this amended information and enter your plea of no-contest. Is that true?

(R. 90:10–11 (emphasis added).) Again, Nash answered, "Yes, sir." (R. 90:11.)

The court proceeded to explain to Nash the concept of an *Alford* plea, summarizing, from Nash's perspective, "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?" (R. 90:11.) For a fourth time that hearing, Nash agreed. (R. 90:11.)

At a subsequent hearing, the circuit court later imposed a prison sentence comprised of three years' initial confinement and five years' extended supervision, but stayed that sentence, placing Nash on probation for a period of five

years. (R. 81:1; 92:27.) Nash's probation has since been revoked, and he is now serving the eight-year aggregate sentence. (R. 63.)

Postconviction proceedings

Nash moved to withdraw his plea on two alternative grounds. (R. 69:4; 99:3–4.) Relevant on appeal is Nash's request to withdraw his *Alford* plea on manifest injustice grounds because the circuit court had neglected to find, and the record did not reflect, strong proof of guilt as required under *North Carolina v. Alford*, 400 U.S. 25 (1970).[5] (R. 69:5–9; 99:3–4, 7.)

At the motion hearing, postconviction counsel acknowledged that the court did not need to use the phrase "strong proof of actual guilt" when it made its factual basis finding. (R. 99:19–20.) Counsel noted, however, that it was not clear during the plea proceeding whether everyone was "operating under the heightened standard" for *Alford* pleas. (R. 99:19–20.)

The State countered that no manifest injustice had occurred. (R. 99:3.) The State underscored that the court did not rely solely on the complaint in establishing the factual basis, but also asked for an offer of proof. (R. 99:14.) After reviewing that evidence for the postconviction court, the State concluded that it had "absolutely and positively satisfied this Alford requirement of strong evidence of guilt." (R. 99:14–17.)

The court denied Nash's motion. (R. 77; 99:26.) It agreed with the prosecution that there was "a strong proof of guilt set

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[5] Alternatively, Nash argued that the circuit court did not confirm his understanding of the elements of the domestic abuse modifier to which he also pled. (R. 69:9–14.) The postconviction court agreed with Nash on this point and removed the domestic abuse modifier from the judgment of conviction. (R. 99:10–11.)

out on the record" between the information in the complaint and the offer of proof:

> 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. We are not able to be definite about it. 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.

(R. 99:25–26.) The circuit court concluded that Nash was not entitled to any relief. (R. 99:26.)

The court of appeals affirmed

Nash appealed, renewing only his claim that he was entitled to withdraw his *Alford* plea on the ground of manifest injustice, insisting that the circuit court "erred in finding a sufficient factual basis to accept" his plea. *State v. Nash*, No. 2018AP731-CR, 2019 WL 1940698 (Wis. Ct. App. May 2, 2019) (unpublished) (per curiam). The court of appeals disagreed, concluding "that the amended complaint and the representations of the prosecutor *easily describe* 'strong evidence of guilt' on each of the two elements of the offense: sexual intercourse and age of the victim." *Id.* ¶ 21 (emphasis added).

The court went on to examine how the "strong evidence of guilt" standard was met, recognizing, "The penis-to-mouth contact that C.W. is quoted reporting in the amended complaint qualifies as sexual intercourse." *Id.* The court also

recognized that "[t]he prosecutor represented that three witnesses would all testify that Nash committed sexual assaults in a particular place during a particular time period, including the specific sexual assault that is the subject of the amended information." *Id.* Finally, the court opined that the State's case was only strengthened by the proposed other-acts evidence that would be admitted at trial, where the jury would have heard that Nash engaged in sexual intercourse with C.L.W. as well as A.T.N. *Id.*

Nash petitioned for review, which this Court granted.

STANDARDS OF REVIEW

"The circuit court has discretion to determine whether a plea should be withdrawn." *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482. Whether a sufficient factual basis exists to support an *Alford* plea is a determination that also "lies within the discretion of the trial court and will not be overturned unless it is clearly erroneous." *State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996).

Nash proposes that this Court exercise its superintending authority to impose a rule governing which forms of evidence a circuit court must receive before it may find a sufficient factual basis to accept a defendant's *Alford* plea. This Court alone is tasked with that decision. Wis. Const. art. VII, § 3.

ARGUMENT

By granting Nash's petition for review, this Court has signaled that it will decide whether to exercise its superintending authority to establish a new procedure governing the acceptance of *Alford* pleas. At its core, however, this appeal boils down to whether Nash carried his burden to prove that a manifest injustice would result if he were not

permitted to withdraw his *Alford* plea. He failed to do so, and this should be apparent because the only way Nash can now prevail is by first convincing this Court to impose upon circuit courts an ambiguous new rule employed by no jurisdiction in the country and then showing how the new rule was not followed in his case.

The State will first explain how the information contained in the record was sufficient for the circuit court to accept Nash's *Alford* plea. Thereafter, the State will describe how Nash's proposed rule is (1) not used by any jurisdiction that accepts *Alford* pleas, (2) divorced from the rationale behind the rule requiring circuit courts to establish a factual basis for a defendant's plea, (3) unsupported by Wisconsin and Supreme Court authority, (4) detrimental both to the administration of justice and to the interests of defendants in Nash's position who wish to enter an *Alford* plea, and (5) unnecessary, as criminal defendants already have many avenues to compel the State to present evidence of their guilt.

In the end, the State will respectfully request that this Court affirm the court of appeals' opinion and reject Nash's request to enact an ambiguous, unnecessary rule that will undoubtedly do more harm than good.

I. Nash failed to carry his burden to prove that a manifest injustice would result if he were not permitted to withdraw his *Alford* plea.

A. Foundational principles

1. The history of *Alford* pleas

A half-century ago, Henry Alford faced a capital murder charge with little evidence supporting his innocence claim. *Alford*, 400 U.S. at 26–27. Witnesses provided statements tending to implicate Alford in the murder. *Id.* at 27. Confronted with this strong inculpatory evidence yet still

maintaining his innocence, Alford pleaded guilty to a reduced murder charge to spare his own life. *Id.* at 27–29.

Concluding that Alford's plea was constitutionally valid, the Supreme Court recognized, "[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." *Id.* at 37. The Court explicitly held, "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." *Id.*

Acceptance of what has become known as an *Alford* plea is not automatic. There is an important safeguard built into its practice: before the court may accept such a plea, the trial court record must contain "strong evidence of actual guilt," also characterized by the Supreme Court as a "strong factual basis." *Id.* at 37–38. Particularly relevant to Nash's claim, the Supreme Court did not prescribe a particular method to meet this threshold, nor did it mandate that any type of witness testimony be presented at Alford's own plea hearing. *See id.* at 28, 32–33, 38.

Since the Supreme Court's decision, *Alford* pleas have gained acceptance in Wisconsin, first by the court of appeals in *State v. Johnson*, 105 Wis. 2d 657, 314 N.W.2d 897 (Ct. App. 1981), and later by this Court in *State v. Garcia*, 192 Wis. 2d 845, 532 N.W.2d 111 (1995). Like the Supreme Court, however, neither this Court in *Garcia* nor the court of appeals in *Johnson* mandated a specific method to establish the strong factual basis necessary before a circuit court may accept an *Alford* plea. Nor have any of the other state courts that have adopted the *Alford* procedure.

2. Before accepting an *Alford* plea, the circuit court must be satisfied that strong proof of guilt exists as to each element of the crime charged.

Before accepting any guilty, no-contest, or *Alford* plea, circuit courts are instructed to satisfy certain requirements. Wis. Stat. § 971.08(1).[6] Among those duties, a circuit court is directed to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b). This requirement 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." *State v. Thomas*, 2000 WI 13, ¶ 14, 232 Wis. 2d 714, 605 N.W.2d 836 (quoting *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978)).

As introduced above, in the *Alford* context, the judge must determine whether "the evidence the state would offer at trial is strong proof of guilt." *Johnson*, 105 Wis. 2d at 663; *see also Alford*, 400 U.S. at 37 (no constitutional error where "the record before the judge contains strong evidence of actual guilt"). Strong proof is required "as to each element of the crime" charged. *Smith*, 202 Wis. 2d at 28. But the proof required is not equivalent to proof beyond a reasonable doubt; rather, the factual basis must be sufficient "to substantially negate [the] defendant's [protestations] of innocence." *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 645, 579 N.W.2d 698 (1998) (quoting *Johnson*, 105 Wis. 2d at 664).

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[6] Although the statute does not mention *Alford* pleas, its procedural safeguards apply nonetheless. *State v. Smith*, 202 Wis. 2d 21, 25–26, 549 N.W.2d 232 (1996).

3. To withdraw his plea after he had been sentenced, Nash was required to establish a manifest injustice.

Nash was entitled to withdraw his *Alford* plea after sentencing only if he proved by clear and convincing evidence that a manifest injustice would otherwise result. *See Johnson*, 105 Wis. 2d at 666. This heavy burden "reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists." *State v. Cross*, 2010 WI 70, ¶ 42, 326 Wis. 2d 492, 786 N.W.2d 64.

A court's failure to establish a sufficient factual basis "is one type of manifest injustice that justifies plea withdrawal." *State v. Scott*, 2017 WI App 40, ¶ 30, 376 Wis. 2d 430, 899 N.W.2d 728; *accord State v. Higgs*, 230 Wis. 2d 1, 10, 601 N.W.2d 653 (Ct. App. 1999). When applying the manifest injustice test, the reviewing court is not limited to the plea record but can consider the "totality of the circumstances," including the sentencing record, defense counsel's statements, and other portions of the record. *State v. Cain*, 2012 WI 68, ¶ 31, 342 Wis. 2d 1, 816 N.W.2d 177; *Scott*, 376 Wis. 2d 430, ¶ 30.

B. Nash established no manifest injustice because his *Alford* plea was supported by a strong factual basis.

During his plea hearings, Nash insisted that he understood the nature of the charged crime and what the State would need to prove to support a guilty verdict. (R. 89:6.) These admissions are not surprising. After all, the amended sexual assault crime charged was not complicated; the State needed to prove only that (1) Nash had sexual intercourse or contact with a person, and (2) that person was under the age of 16 years at the time Nash had sexual intercourse or contact with her. (*See* R. 31:3.)

In *Garcia*, this Court noted that a defendant charged with sexually assaulting children "may wish to plead guilty yet publicly maintain his innocence to avoid ridicule or embarrassment." 192 Wis. 2d at 857. For such a defendant, an *Alford* plea may be attractive. Here, Nash may not have wanted to admit the heinous acts he committed against his young sisters. But the criminal complaint and amended criminal complaint informed the circuit court of detailed victim accounts of how Nash forced his penis into C.L.W.'s mouth as she was lying on a basement couch, repeatedly pinned A.T.N. down on the same couch while painfully putting his "private part" against her "private part," and tried to pry A.T.N.'s mouth open to insert his penis. (R. 8:2.) His *Alford* plea allowed him to both acknowledge the strength of the case against him and continue his protestations of innocence.

In anticipation of that plea, Nash's attorney spent nearly four hours with him in the weeks leading up to the plea hearing to ensure he understood the plea procedure, the criminal elements, and other information. (R. 90:14–15.) Nash repeatedly admitted, in writing and verbally during both plea hearings, that he understood these elements and what the State would need to prove if his case proceeded to trial. (R. 31:3; 89:6, 11, 12; 90:6.) With his firm understanding of the crime's two elements, Nash could easily grasp how the above-referenced facts presented in his charging documents would prove that he committed the crime if he went to trial.

If the facts alleged in the complaint and amended complaint were inadequate to gauge the strength of the State's case, however, there was damning other-acts evidence the court had previously decided to admit at Nash's impending jury trial. (R. 91:2–9, 18.) During the pretrial hearing on the State's other-acts motion, the circuit court listened to the prosecutor describe the victims' forensic

interviews, the facts surrounding the charges brought in the present case, the details of the uncharged sexual assaults that Nash committed in Milwaukee and Georgia, and an announcement of which witnesses would testify to those facts. (R. 91:2–9.) The court also received a video recording and recording transcript, both revealing that Nash had confessed to police that he once kissed one of his sister's nipples before his mother intervened. (R. 30; 35.)

If even that information fell short of establishing a requisite strong factual basis, the court heard from Nash's trial counsel and the prosecutor at Nash's first plea hearing. (R. 89:10–11, 13.) Nash's attorney explained that the State would call, among other witnesses, Nash's three sisters who "were going to say that [Nash] had sexual contact with them and/or sexual intercourse." (R. 89:13.) During that same hearing, the circuit court heard the prosecutor provide a summary explaining how Nash engaged in "multiple acts of sexual intercourse, penis to vagina," with his young sisters, all of whom were under the age of 16 at the time. (R. 89:10–11.)

If even that information were not enough, before formally accepting Nash's plea, the court heard from Nash himself who acknowledged four times during his continued plea hearing that the State could present the evidence summarized above to a jury to convict him. (R. 90:3, 5, 11.) Even if he had not admitted that the State's evidence was sufficient, it is important to remember that the factual basis supporting Nash's plea did not need to constitute proof beyond a reasonable doubt; it just had to be sufficient to "substantially negate" Nash's protestations of innocence. *See Schwarz*, 219 Wis. 2d at 645.

Here, Nash's declarations of innocence were weak, at best. When Nash contested the factual basis at his first plea hearing, he launched into a rambling speech about hearsay

evidence and being on suicide watch, a prediction that he would "lose in [that] county right here because it's always about the DA and the jury," a comment about how everyone was "looking at [him] the wrong way," and a claim that he "did none of this." (R. 89:14–16.) Simply put, other than a blanket denial that he committed the crime, Nash gave no reason for the court to question the supplied factual basis, e.g., a motive for the victims to lie, an alibi, or any exculpatory evidence.

Nash's plea hearing comments never undercut the State's case. But they did reveal his true objection to the factual basis, which had nothing to do with a failure to understand how the facts fit the crime: Nash evidently felt that, absent DNA evidence, he should not be convicted based on a victim's statement, or what he labeled "hearsay." (*See* R. 89:14–16.) It should probably go without saying that presenting his victims to testify at an evidentiary hearing, just so Nash and the circuit court could hear their same accounts already detailed in police reports, charging documents, and recordings, would not have pacified Nash's dispute with the State's evidence, because there would still be no DNA evidence.

In sum, the court of appeals correctly concluded that the information supplied to the circuit court "easily describe[d] 'strong evidence of guilt'" for the offense to which Nash was pleading. *See Nash*, 2019 WL 1940698, ¶ 21. After reviewing the record and the strong factual basis accompanying Nash's plea, this Court, too, should hold that Nash failed to carry his burden to prove by clear and convincing evidence that his plea resulted in a manifest injustice.

II. This Court should decline Nash's invitation to impose an ambiguous, unnecessary rule that would unduly constrain circuit courts from accepting *Alford* pleas.

Nash proposes that this Court use its superintending authority to require circuit courts, before accepting an *Alford* plea, to determine the "strong proof" of the defendant's guilt on the basis of "live testimony or recorded oral statements of relevant witnesses or other documentary evidence of the evidence the state would introduce at a trial." (Nash's Br. 12.) He contends that only with such a record can a circuit court determine whether the defendant's plea is knowing, voluntary, and intelligent. (Nash's Br. 12.)

This Court should reject Nash's proposal. As the State will explain, Nash's rule is not only unfounded in the entire country, it also defies past Wisconsin precedent, is divorced from the protective purpose behind the factual basis requirement, and would only serve to discourage the acceptance of *Alford* pleas in an already overburdened legal system. The alleged necessity of Nash's rule is entirely undermined by the many practical alternatives already available to a circuit court to secure a sufficient factual basis. The available alternatives demonstrate that this Court need not exercise its superintending authority to force an unnecessarily burdensome rule on circuit courts.

In the end, Nash had to choose between a trial and accepting the State's plea offer. He regrets his decision after being sentenced. No proposed rule will change that.

A. Exercise of this Court's superintending authority

This Court maintains "superintending and administrative authority over all courts." Wis. Const. art. VII, § 3. And this power is "as broad and as flexible as necessary

to insure the due administration of justice in the courts of this state." *Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878 (quoting *In re Kading*, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975)).

But this Court's supervisory authority is not to be employed lightly. *Id.* ¶ 12. "This court will not exercise its superintending power where there is another adequate remedy . . . or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996) (quoting *McEwen v. Pierce Cty.*, 90 Wis. 2d 256, 269–70, 279 N.W.2d 469 (1979)). Whether the Court chooses to exercise its supervisory authority in a given situation is a matter of judicial policy rather than one relating to the power of this Court. *Evers,* 382 Wis. 2d 666, ¶ 12.

B. Nash's proposed rule is radical: it has not been adopted in any jurisdiction; it is divorced from the protective rationale underlying the factual basis requirement; and it is inconsistent with Wisconsin case law.

That this Court's adoption of Nash's proposed rule would effect a sea change in our jurisprudence is an understatement. The radical nature of the proposal is evident for three reasons. First, it has not been adopted or even considered in any other jurisdiction. Second, it is divorced from the protective rationale that underlies the factual basis requirement for all guilty, no-contest, and *Alford* pleas, and provides no extra protection to defendants. Third, it is in direct conflict with prior published authority of the court of appeals.

As noted, no other jurisdiction has adopted or even considered a rule like the one Nash proposes. Nash acknowledges this fact and resorts instead to two law review

articles from 1977 (whose analysis has never been judicially adopted after nearly half a century). (Nash's Br. 39–40.)

Conversely, other jurisdictions generally follow an approach similar to Wisconsin's, and will find a strong factual basis supporting an *Alford* plea without employing Nash's proposed rule. *See*, *e.g.*, *Scarborough v. State*, 363 S.W.3d 401 (Mo. Ct. App. 2012) (finding sufficient factual basis from prosecutor's factual recitation at plea hearing); *Amerson v. State*, 812 P.2d 301, 303 (Idaho Ct. App. 1991) (recognizing that reading facts surrounding a crime into the record was sufficient and that an *Alford* plea does not require a "mini-trial"). Even the foreign authorities Nash cites to show that some courts require more than a charging document do not require the evidentiary procedure he suggests. (*See* Nash's Br. 38 and cases cited therein.)

Not only is the proposed rule unprecedented, it does nothing to advance the protective rationale of the factual-basis requirement. To understand the flaws in Nash's proposed rule, it is important to recall why circuit courts are required to establish a factual basis for a defendant's plea in the first place.

Nash points to the Supreme Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969), for the principle that, in the plea context, "the voluntariness and factual basis requirements are inextricably linked." (Nash's Br. 25.) Like the Supreme Court in *McCarthy*, this Court has recognized that the factual basis requirement protects a defendant who (1) wishes to enter a guilty plea and (2) understands the nature of the charge he faces, but (3) fails to realize that his conduct does not actually meet all the elements of the charged crime. *See Thomas*, 232 Wis. 2d 714, ¶ 14; *see also McCarthy*, 394 U.S. at 467.

The State acknowledges the important interest served in protecting a defendant in such a situation; a circuit court should not accept a guilty plea from a naïve defendant whose conduct clearly fails to satisfy the elements of the crime charged. But the rationale for the factual basis requirement is the same whether a defendant pleading guilty is willing to admit his guilt or prefers to maintain his innocence. Either way, requiring the presentation of testimony, oral statements, affidavits, and other documentary evidence is overkill.

Simply put, the type of evidence Nash demands is unnecessary to prevent a naïve defendant from entering a plea where the facts don't fit the crime because the simpler record typically before the court will contain many, if not all, of the facts the State would present under Nash's proposed rule. As long as the record contains a strong factual basis to show the defendant is guilty of the crime to which he intends to plead, the protection afforded by the factual basis requirement is complete.

And if we were to apply Nash's proposed rule to his case—assuming the combined contents of the amended criminal complaint, discovery materials, the State's other-acts motion and argument, the prosecutor's comments at the plea hearings, and defense counsel's explanation at the plea hearings were insufficient to show how Nash's actions satisfied the elements of the crime—it is difficult to understand how the presentation of "witness testimony, oral statements, and other documentary evidence" echoing those same facts would have changed anything. It is unlikely that any amount of evidence—not even that presented at a comprehensive jury trial—would persuade an ashamed brother to admit to the repulsive crimes Nash committed against his three sisters.

The third indication of the radical nature of Nash's proposal is that it conflicts with Wisconsin precedent, a fact

Nash does not acknowledge. The issue presented in this appeal concerns the threshold that would allow a circuit court to find strong evidence of guilt necessary for an *Alford* plea. A published court of appeals decision issued after *Garcia* and *Johnson* refutes Nash's position that witness testimony, oral statements, affidavits, and other documentary evidence are necessary to establish the requisite factual basis.

Specifically, in *State v. Annina*, the court of appeals addressed whether a circuit court improperly denied a defendant's motion to withdraw her *Alford* plea on the premise that it lacked a factual basis to support a charge of resisting an officer. 2006 WI App 202, 296 Wis. 2d 599, 723 N.W.2d 708. For the factual basis, the circuit court reviewed Annina's criminal complaint and asked the prosecutor to describe the conduct that justified an underlying disorderly conduct arrest that led to Annina's resistive behavior. *Id.* ¶ 16. In response, the prosecutor did not present testimony but merely read a police report excerpt aloud. *See id.* In a published opinion, the court of appeals held that the record before the circuit court supported its finding of a sufficient factual basis and that the court "properly exercised its discretion when it found a factual basis for the crime." *Id.* ¶ 17.

Listening to the prosecutor read aloud from the police report, the circuit court in *Annina* certainly could not have judged the "demeanor and credibility and power of the witnesses' testimony"—something Nash suggests is necessary before a circuit court could find a sufficient factual basis in his case. (*See* Nash's Br. 36.) Thus, if *Annina* was correctly decided, Nash must be wrong that "live testimony or recorded oral statements of relevant witnesses or other documentary evidence . . . is *necessary* to assure that an *Alford* plea is knowing, voluntary, and intelligent and, therefore, constitutionally valid." (*See* Nash's Br. 12 (emphasis added).)

Still, to support his rule, Nash offers just over two pages of cases where courts from Wisconsin and other jurisdictions have held that the factual basis for an *Alford* plea was sufficiently supported by the State's presentation of witness testimony. (Nash's Br. 32–35.) Nash evidently confuses sufficiency with necessity, which are two different concepts. Just because the State *could* establish a strong factual basis by calling most, or all, of its expected trial witnesses to testify at Nash's plea hearing does not mean that is *required*.

In other words, what appellate courts have deemed *sufficient* to establish the requisite factual basis in past *Alford* plea cases does not necessarily set the bar for what is minimally *necessary* to establish the requisite factual basis in all *Alford* plea cases. We can safely say that if the short excerpt recited by the prosecutor in *Annina* was sufficient, then the more detailed contents of Nash's amended criminal complaint, the State's other-acts motion and argument, the prosecutor's plea hearing comments, and defense counsel's plea hearing comments—together—must be adequate in Nash's case. This holds true regardless of whether courts have found that the presentation of *more* forms of evidence was also sufficient to constitute a strong factual basis *in other cases*.

In sum, Nash's proposed rule should be rejected because it has not been adopted by any jurisdiction, it is unnecessary to protect a defendant from entering a plea to a crime he did not commit, and it defies Wisconsin law. That said, the State would be remiss if it did not take the opportunity to also explain the damage Nash's rule would cause, if adopted.

C. Nash's proposed rule would be destructive to plea proceedings in this state and harmful to defendants in Nash's position.

Nash recognizes, "[D]ue 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." (Nash's Br. 15.) He also acknowledges that resolving cases through plea deals benefits not only the State and circuit courts but defendants just like him. (Nash's Br. 16.) The Supreme Court endorsed this same sentiment when it explained,

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. 257, 260 (1971).

But to convince this Court that it should impose his new rule upon circuit courts, Nash pays lip service to the importance of plea agreements while demonizing their use. (*See* Nash's Br. 13–19.) Nash spends considerable time portraying plea bargains as a source of coercion that compels "innocent defendants into pleading guilty for fear of greater consequences if they exercise their fundamental constitutional right to a trial." (Nash's Br. 16–19.) In doing so, Nash advances the same sort of argument that the Supreme Court rejected fifty years ago in *Brady v. United States*, 397 U.S. 742, 757–58 (1970) (rejecting defendant's argument that his guilty plea was involuntary because of his fear that the death penalty was possible if his case were tried to a jury).

The State respectfully asks this Court not to exercise its considerable power to disincentivize the acceptance of *Alford* pleas by unnecessarily bogging circuit courts down with additional evidentiary hearings and subjecting crime victims to needless harassment. Contrary to Nash's flippant

dismissal of these considerations as "minimal when considered against the benefits of a requirement for a more specific procedure," (Nash's Br. 37), the non-existent benefits of mandating needless evidentiary procedures do not begin to outweigh the problems his rule will cause.

In fact, adopting Nash's rule would not only frustrate the administration of circuit court proceedings, it would also hinder defendants like Nash from ever entering an *Alford* plea in the future. What incentive would a prosecutor have to make a more favorable plea offer if she nevertheless needs to present testimony from a child sexual assault victim—like Nash's three young sisters—unavoidably retraumatizing the victim in the process? And even if the prosecutor would oblige, what incentive does a circuit court have to entertain a defendant's *Alford* plea if doing so will require it to convene a lengthy evidentiary hearing, take testimony from multiple witnesses, listen to recorded statements, and review other evidence? How is that any more efficient than just holding a bench trial?

Nash is grasping at straws by suggesting that his proposed rule would "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." (Nash's Br. 37–38.) As explained earlier, a defendant who refuses to admit to facts describing atrocious sexual abuse in a criminal complaint is not going to miraculously admit those same facts once his victim testifies. *See supra* p. 23. If Nash or another defendant wants relief from his conviction or sentence, he is going to challenge the factual basis supporting his *Alford* plea regardless of whether the facts came from a charging document or live testimony.

Nash's proposed rule will do nothing to cut down on needless postconviction litigation, and it is absurd that Nash would suggest that his proposed rule "promotes closure and finality for the victim." (*See* Nash's Br. 31.) Compelling three brave young women to take the witness stand to testify to their brother's heinous sexual abuse would hardly "promote closure and finality" when their statements are already presented to the court in other formats. Nash's rule would serve only to annoy and revictimize his sisters, plain and simple.

These resource considerations aside, employing Nash's rule would also trample on the circuit court's ability to independently assess whether there is a sufficiently strong factual basis to support a defendant's plea. We currently defer to a circuit court's determination of whether a factual basis exists to support an *Alford* plea unless that decision is clearly erroneous. *Smith*, 202 Wis. 2d at 25. That discretion goes out the window if this Court decides to micromanage circuit courts by employing Nash's rule, thereby signaling a lack of confidence in the lower courts' ability to independently examine the nature of the charges, review the record before it, and decide whether a strong factual basis exists for a defendant's *Alford* plea.

One thing is certain: Nash's proposed rule will do more harm than good. Using Nash's own supplied statistics, if between 90 and 95 percent of criminal cases are resolved by a plea agreement, and between 6 and 8 percent of those cases involve an *Alford* plea, that is a substantial number of evidentiary hearings that circuit courts will need to hold to satisfy Nash's proposed rule. (Nash's Br. 13–14, 37.) That is no easy burden for the court system to bear, and it's a burden the court system should not need to bear given that those evidentiary procedures will do no more than require the

presentation of the same information already contained in the charging document or court record. *See supra* pp. 20–22.

If this Court stays true to its past practice of exercising its superintending powers only where another adequate remedy is unavailable or where a trial court's conduct threatens to impose a significant hardship upon a citizen, *Jezwinski*, 206 Wis. 2d at 226, it should probably go without saying that this Court will not adopt a rule causing more harm than good where neither consideration is present. When there are many feasible options, as there are already for circuit courts wishing to establish a factual basis for a defendant's *Alford* plea, this Court does not lightly exercise its superintending authority to impose unnecessary, burdensome rules. *See id.* As the State will now explain, there are already existing alternatives that could be used to ensure a sufficiently strong factual basis to support a defendant's *Alford* plea.

D. Nash's proposed rule is also unnecessary because a defendant has plenty of opportunities to solicit the evidence he seeks.

Although his proposed rule is detrimental to the administration of our justice system, if Nash were unsatisfied with his charging document and discovery materials and insisted on hearing some additional forms of evidence to establish his guilt, there were various suitable alternatives that he could have utilized short of requiring the court to convene his requested mini-trial. Those alternatives further highlight why this Court should not exercise its superintending authority to adopt his proposed rule.

The State recognizes that a charging document may not always contain enough facts constituting a strong factual basis necessary for a court to accept a defendant's *Alford* plea.

If the criminal complaint in Nash's case indicated only that one complaining child victim came forward to police and simply said, "When Kevin was babysitting me a few years ago, he made me sad when he touched my private area," that barebones disclosure would likely not constitute the strong proof of guilt necessary for the court to accept Nash's *Alford* plea. But there are many feasible alternatives to Nash's proposed rule that would ensure that an *Alford* plea is not based on such a paltry record. And Nash could have pursued any of these if he wanted to compel the State to present more satisfactory evidence of his guilt.

On one end of the spectrum, Nash could have exercised his constitutional right to have the State present evidence necessary to convince a jury beyond a reasonable doubt that he committed the crimes charged at a trial. *See State v. Warbelton*, 2009 WI 6, ¶ 56, 315 Wis. 2d 253, 759 N.W.2d 557. But Nash explicitly waived his rights to a trial and to confront his accusers; nobody forced him to give up those rights. (R. 90:7–8.)

Even if he did not want to go to that extreme, Nash could have exercised his statutory right to have the State present testimony and other evidence at his preliminary hearing. *See* Wis. Stat. § 970.03. The circuit court explicitly advised Nash of that right, along with his right to have his attorney cross-examine the State's witnesses, yet Nash still decided to forego that opportunity. (R. 96:3–5.)

And if Nash wanted something even less elaborate than a full trial or a preliminary hearing, he could have at least explained to the court which element went unmet by the proffered factual basis, instead of asserting an imprecise, blanket denial of the alleged criminal offense. Doing so would have allowed the circuit court to focus on that element when assessing the strength of the supplied factual basis and

potentially compel the prosecutor to supplement the record if it were lacking in some respect, like in *Annina*.

At the end of the day, there are many avenues that one could employ to ensure that a sufficient factual basis is presented to support a defendant's plea. Even Nash himself acknowledges that, in the context of determining whether a sufficient factual basis exists for an *Alford* plea, "what will be necessary in a particular case could depend on the charges to which the defendant is pleading." (Nash's Br. 35.)

Indeed, when reviewing the record before it, the circuit court is in the best position to decide whether the State's evidence is sufficiently convincing before accepting a defendant's plea, and if the court finds the information lacking to support any element of the crime charged, it can do as the circuit court did in *Annina* and ask the prosecutor to supplement the record with more facts. 296 Wis. 2d 599, ¶¶ 16–17. Undoubtedly, *Annina* teaches us that viable options already exist to ensure the existence of a sufficient factual basis without forcing a blanket rule upon circuit courts.

E. Nash's true motivation behind his proposed rule is letting a defendant benefit from a plea agreement while compelling the State to prove his guilt.

In support of his proposed rule, Nash asserts that "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." (Nash's Br. 36.) In the same breath, however, Nash declares, "[B]ecause 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." (Nash's Br. 36–37.)

Nash's wavering position is confusing. If a defendant insists that a charging document contains insufficient facts to show strong proof of guilt, why would he sit back and make no efforts to undermine a witness's testimony describing the same facts contained in that charging document? And if a defendant truly were limited in cross-examining a testifying witness under Nash's proposed rule, what is the point of requiring witness testimony that will mirror facts already contained in the charging document?

Nash's strange, counterintuitive argument reveals his true motivation behind his proposed rule: he wanted to have his cake and eat it, too. On the one hand, Nash wanted to take advantage of a plea offer that resulted in a conviction to a reduced sexual assault charge, a lesser maximum sentence, and a commitment by the State to make no sentence recommendation. Despite these valuable benefits, Nash still wanted to hold the State to its burden to prove him guilty, effectively requiring the prosecutor to present much, if not all, of the same evidence it would have introduced had Nash proceeded to trial.

But Nash had a decision to make, and requiring that he choose between a jury trial or a plea deal to greatly reduce his potential penalties did not render his plea involuntary. *See Brady*, 397 U.S. at 757–58. Nash gave up his right to confront his accusers and test their credibility when he entered his *Alford* plea, and he was not entitled to a quasi-bench trial to require the State to prove that his plea should be accepted.

F. If this Court adopts a new rule governing *Alford* pleas, the State should have an opportunity to satisfy it before Nash is permitted to withdraw his plea.

Where an insufficient factual basis was furnished at a defendant's original plea hearing, this Court has held that supplementing that factual basis after his conviction is "enough to correct the initial error" and, under those circumstances, avoids a manifest injustice from occurring. *Loop v. State*, 65 Wis. 2d 499, 503, 222 N.W.2d 694 (1974).

Under this logic, should this Court decide that the circuit court erred by failing to employ an evidentiary procedure unrecognized in any jurisdiction in the country at the time of Nash's plea hearing, there is no reason that allowing the State to meet a newly designed rule thereafter would not similarly avoid a manifest injustice from occurring.

Therefore, if this Court determines to exercise its superintending authority to construct a new rule governing how the State must establish a strong factual basis for a defendant's *Alford* plea, it should not automatically order the circuit court to allow Nash to withdraw his plea. Instead, it should remand the case to allow the State an opportunity to meet this Court's new rule, thereby ensuring once again that there is a strong factual basis for Nash's plea and guaranteeing that no manifest injustice occurs.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 7th day of August 2020.

Respectfully submitted,

JOSHUA L. KAUL
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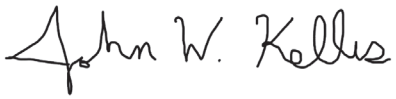

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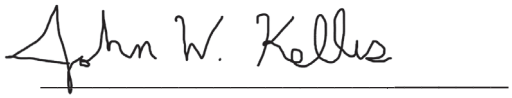
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9465 words.

Dated this 7th day of August 2020.



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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 7th day of August 2020.

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