STATE OF WISCONSIN

IN SUPREME COURT

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

To determine whether there is "strong proof of guilt" to establish a factual basis for a guilty plea under *Alford v. North Carolina*, a circuit court must hear witness testimony or oral statements or review witness affidavits or other documentary evidence.

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

The state acknowledges that this court may exercise its superintending power to mandate methods for circuit courts to use when determining whether there is a sufficient factual basis to support an *Alford* plea. (State's brief at 20-21). The state argues this court should not exercise that power in this case. This court should reject the state's arguments and instead adopt Kevin Nash's proposal.

Before addressing the state's arguments, Nash must first restate the points established in his opening brief (at 11-29).

When accepting a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), a circuit court must determine whether the state's evidence constitutes "strong proof of guilt" that the defendant committed the crime to which the defendant is pleading. *State v.*

Smith, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996) (*citing Alford*, 400 U.S. at 37-38); *State v. Garcia*, 192 Wis. 2d 845, 859-60, 532 N.W.2d 111 (1995); *State v. Johnson*, 105 Wis. 2d 657, 663, 314 N.W.2d 897 (Ct. App. 1981). As *Johnson* elaborated, there must be a "sufficient factual basis … established at the plea proceeding to substantially negate [the] defendant's claim of innocence." 105 Wis. 2d at 664. While strong proof of guilt is not 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.

Our strong proof of guilt standard is rooted in *Alford*. In explaining why Alford's guilty plea was voluntary despite his claims of innocence, the Court said "the record before the judge contains strong evidence of actual guilt." 400 U.S. at 37. The strength of the state's case was important because it meant that, regardless of whether Alford believed he was guilty or innocent, he pleaded guilty "because in his view he had absolutely nothing to gain by a trial and much to gain by pleading." *Id*. Thus, "[w]hen [Alford's] 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 (citation and footnote omitted).

The connection between the strength of the state's case and the validity of Alford's plea is grounded on two related Supreme Court decisions. The first is *Brady v. United States*, where the defendant argued his guilty plea was involuntary because he was prosecuted under a statute that permitted the death penalty if he chose to have a jury trial but not if he pleaded guilty. 397 U.S. 742, 743, 746 (1970). While *Brady* held that fear of a greater penalty after a trial does not necessarily make a plea involuntary, it did so based on an expectation that innocent defendants would not "falsely condemn" themselves because judges would make sure "there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged." *Id*. at 758.

Alford was prosecuted under a statute similar to the one in *Brady*, so his claim of innocence expressly questioned the reliability of his guilty plea and raised a voluntariness issue. While the Court held that the constitution allows an innocent person to plead guilty, the validity of the plea, as already noted, depended on the judge having evidence that "substantially negated [the defendant's] claim of innocence" and "provided a means by which the judge could test whether the plea was being intelligently entered…." *Alford*, 400 U.S. at 37-38.

The reference to evidence to "test" Alford's plea cites *McCarthy v. United States*, 394 U.S. 459 (1969), the second related decision. *McCarthy* emphasized

that the court's obligation to find a factual basis for a guilty plea assures the voluntariness plea by assuring the defendant understands the law in relation to the facts, and in particular that the facts the defendant is admitting constitute the crime to which he or she is pleading. *Id.* at 466-67. In addition to citing *McCarthy*, the *Alford* Court repeated the concern from *Brady* about innocent defendants: "[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." 400 U.S. at 38 n.10.

Together, *Brady*, *McCarthy*, and *Alford* require a factual basis of strong evidence of guilt for a plea of guilty entered by a defendant claiming to be innocent. This ensures the plea is a knowing, voluntary, intelligent choice among alternative courses of action, for the strength of the state's case is a predominant factor in the defendant's decision-making regarding plea bargains. *Brady*, 397 U.S. at 756. Requiring a court taking an *Alford* plea to assess independently the strength of the state's evidence is a check against coercion of a defendant who, fearing a greater penalty, is giving up a trial based on an inaccurate assessment of the evidence.

As Nash explained (brief-in-chief at 17-18), we know from the exoneration of people who have pleaded guilty that the specter raised by *Alford*

pleas—that the innocent will falsely condemn themselves—does happen. And we know one reason why it happens—the fear of a trial penalty, a factor obviously present in this case. Nash's trial counsel told the circuit court that, while Nash denied he committed the charged offenses, "he wanted to accept the plea bargain because the original charges were carrying 120 years of exposure…." (89:13; A-Ap. 131). Nash is not demonizing plea bargaining or arguing that all pleas are coerced, as the state claims (brief at 26). But understanding the reasons for plea bargaining, and especially the reasons for *Alford* pleas and innocent people pleading guilty, is critical to understanding why *Alford*'s strong proof of guilt standard must be given real effect.

In short, the purpose of the heightened factual basis standard for an *Alford* plea is to assure that the plea is knowing, voluntary, and intelligent, for it requires the court to conclude that 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 state fails to grasp this purpose, and its failure undermines its substantive arguments, to which Nash now turns.

The state begins by asserting Nash's proposal is a "radical rule," for three reasons. The first is that no other jurisdiction uses Nash's proposed approach. (State's brief at 21-22). Nash noted this himself. (brief-in-chief at 39-40). Nonetheless, as Nash argued (*id.* at 36-37), as a matter of logic a judge cannot

meaningfully employ the strong proof of guilt standard with only second- or third-hand recitations of the evidence; instead, the judge needs to do some direct review of the evidence itself.

Next, the state argues Nash's proposal does not serve the interest of assuring a knowing and voluntary plea. (State's brief at 22-23). Here we see the state's failure to grasp the purpose of the factual basis requirement for an *Alford* plea, for it focuses solely on whether the methods Nash proposes will prevent the "naïve defendant" from entering a guilty plea without understanding that his conduct does not satisfy the elements of the crime. (*Id*. at 23). An *Alford* plea does not present this problem—or at least Nash's *Alford* plea does not. No doubt, as the state says, the nature of the offenses charged here is simple to understand. (*Id.* at 16). But the issue is not that Nash misunderstands whether the alleged conduct constitutes child sexual assault; it is that he insists the conduct did not happen. It is not only naïveté about the nature of the crime that the *Alford* factual basis must address; it is primarily the prospect that the defendant is pleading to avoid a trial penalty when the state's evidence is not strong, making the judgment about the advisability of the plea mistaken.

The state also argues that if Nash's lawyer's explanation of the evidence did not convince him to admit his criminal conduct, neither will the additional evidence provided in a thorough-going factual basis inquiry. (State's brief at 23, 27). Here

again the state misses the purpose of the *Alford* factual basis standard, which is not about convincing Nash to admit the offense. He denies the conduct and is entering an *Alford* plea, and therefore it falls to the judge to ascertain whether there is strong proof of guilt despite the defendant's denial. The methods are for the benefit of the *judge*, who has to assess the strength of the evidence.

The last reason the state gives (brief at 24) for Nash's proposal being "radical" is that it is inconsistent with *State v. Annina*, 2006 WI App 202, 296 Wis. 2d 599, 723 N.W.2d 708. Not so. *Annina* is an example of an *Alford* plea where the defendant contested the factual basis for a specific element. *Id.*, ¶10. The element was supported by evidence she did not contest, including a police report read by the prosecutor at an evidentiary hearing, and on that basis the court found strong proof of guilt. *Id.*, ¶¶4-7, 11, 14-17. As Nash made clear (brief-in-chief at 35), what will be necessary to establish a factual basis will depend on the particular case, and *Annina* illustrates that point.

This takes us to the state's arguments that Nash's proposal would destroy plea proceedings and harm defendants. (State's brief at 25-29). One of the arguments is that mandating specific methods to establish an *Alford* plea factual basis will micromanage circuit courts. (*Id.* at 28). As just noted, Nash acknowledges the appropriate method is based on the particular case. In a case like this, where the question of guilt or innocence at a trial would come

down to the credibility of the accusers versus the accused, the circuit court must be presented with evidence sufficient to assess credibility. Thus, witness statements—live or recorded—would be in order. In other cases (*e.g.*, *Annina*) that will not be necessary.

The state also asserts (brief at 26-27) that mandating specific methods will "disincentivize" *Alford* pleas by taking more time for "needless" evidentiary procedures and making victims and witnesses appear at the plea hearing. Nash said the requirements will require more time for the plea hearing. (Brief-in-chief at 37-38). And again, while witnesses are the preferred method, they are not required to establish every factual basis; where witnesses are required, not every witness will be needed, and testimony will be for the limited purpose of establishing the factual basis, not to try the case. In the cases in which recorded witness statements or documentary evidence suffice, the court and parties can review them in advance and even stipulate to their admission to provide the factual basis rather than review them at the hearing. Finally, even a longer plea hearing with some witness testimony saves time and inconvenience compared to a bench trial or jury trial.

Furthermore, the systemic factors driving plea bargaining are more significant than some extra time involved in taking care to establish the factual basis. Both the state and defendants have reasons to avoid trials; in virtually every case this mutuality of advantage will loom larger in importance than the

need to take extra steps to assure an *Alford* plea is accepted—especially when those extra steps give the state and circuit court confidence the plea will withstand postconviction attack on factual basis grounds. And the extra steps Nash proposes is not for *all* guilty or no contest pleas, but only for *Alford* pleas, which historically constitute 6 to 8 percent of pleas. (Brief-in-chief at 13-14).

The state next claims that the court should not exercise its superintending authority to mandate specific methods because there are other options for the defendant to solicit the evidence. (State's brief at 29-31). The first option, the state says, is to have a trial. That, of course, is absurd. A trial is not a method of creating a factual basis for a plea; it takes the place of a plea. As for preliminary hearings, Nash himself noted (brief-in-chief at 35) that testimony at other pretrial hearings could provide the necessary testimony (though preliminary hearings are frequently waived, as happened here (10; 96:2-5)).

Last, the state suggests (brief at 30-31) that the defendant could explain what element of the offense he or she is denying, and the circuit court could focus on the evidence regarding that element. That will be appropriate in some cases (*Annina* is an example). But that is not possible in a case like this, where the defendant denies the crime occurred. The state might be frustrated by such "imprecise, blanket denial[s]" (brief at 30), but those, too, are covered by *Alford* (not to mention that a person may be accused of a crime that never occurred).

Last, the state argues Nash's "true motivation" is to benefit from the plea agreement while compelling the state to prove his guilt. (State's brief at 31-32). Setting aside the fact this is essentially what happened in *Alford*, 400 U.S. at 31-33, Nash's motivation is a method consonant with the heightened factual basis standard for *Alford* pleas. He acknowledges that strong proof of guilt is not proof beyond a reasonable doubt, but the point of the method is to provide the judge with the evidence he or she needs to assess the strength of the state's case. "[T]he circuit court is in the best position to decide whether the State's evidence is sufficiently convincing" to show strong proof of guilt. (State's brief at 31). Precisely. That is why the judge must be provided with the evidence, not a simulacrum of it.

B. The factual basis in this case was insufficient.

The state also argues that there is strong proof of guilt in this case. (State's brief at 16-19). Nash addressed most of this argument in his brief-in-chief (at 40-43), but three points merit a reply here.

First, the state cites Nash's statement to a Georgia detective that was filed with the court. (State's brief at 18 (*citing* 30; 35)). Assuming the circuit court reviewed it, this statement adds little to the evidence. Nash admitted a single incident of sexual contact with A.T.N., for which he was "whooped," leading him to desist in more conduct. (35:3-4, 5, 12-13). Despite persistent questioning a

police interrogator, Nash firmly denied any other allegations of sexual conduct. (35:4-5, 9-11, 14-15, 16-17, 18, 19, 20, 22).

Next, the state cites Nash's acknowledgements during the plea hearing that he understood what evidence the state would introduce and that the evidence could result in him being convicted. (State's brief at 18 (*citing* 90:3, 5, 11; A-Ap. 139, 141, 147)). A defendant's realization there might be sufficient evidence to convict is not enough; it is still up to the judge to determine whether the state's evidence amounts to strong proof of guilt. The summaries of the evidence offered at Nash's plea hearings did not allow the judge to make that assessment.

Finally, the state says Nash's "rambling" blanket denial gave no reason to doubt the allegations summarized by the prosecutor. (State's brief at 18-19). When a case turns on the credibility of the accuser as against the accused, a blanket denial may be all the defendant can provide. And to the extent a denial is made by the defendant in person, giving the judge the opportunity to assess demeanor and credibility, then the accusations should be subject to the same in-person assessment of credibility and demeanor in order for the court to determine whether they offer strong proof of guilt.

C. Remand is the appropriate remedy.

Citing *State v. Loop*, 65 Wis. 2d 499, 222 N.W.2d 694 (1974), the state argues that, if this court

adopts methods a circuit court must use to assess the factual basis for an *Alford* plea, it should remand the case to give the state the opportunity to make a factual basis showing using those methods. (State's brief at 33).

The circuit court in *Loop* erred by failing to meet the factual basis requirement when accepting the defendant's plea. 65 Wis. 2d at 500. At a hearing on the defendant's postconviction motion to withdraw his plea, the state presented evidence to support a factual basis, though the defendant disputed the evidence. *Id.* at 501, 503. This court held the evidence introduced at the postconviction hearing provided a factual basis and the defendant was not entitled to plea withdrawal. *Id.* at 503.

While *Loop* is not an *Alford* plea case, the defendant disputed the factual basis, so to that extent the situation was analogous to an *Alford* plea. Accordingly, based on *Loop*, Nash agrees that upon adopting his proposal for how circuit courts should establish factual basis in *Alford* plea cases, the court should remand the case for the chance to establish strong evidence of guilt under the court's ruling.

CONCLUSION

For the reasons given above and in Nash's brief-in-chief, 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. The court should then remand this case for further proceedings in light of the methods the court adopts.

Dated and filed by U.S. Mail this 25th day of August, 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 2,955 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 25th day of August, 2020.

Signed:

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