SM-28 INQUIRY REGARDING THE DECISION WHETHER TO TESTIFY

THE FOLLOWING IS REQUIRED WHEN THE DEFENDANT SEEKS TO WAIVE THE RIGHT TO TESTIFY. IT IS RECOMMENDED WHEN THE DEFENDANT HAS DECIDED TO TESTIFY

DIRECT THE FOLLOWING QUESTIONS TO THE DEFENDANT:

"Do you understand that you have a constitutional right to testify?"

"And do you understand that you have a constitutional right not to testify?"

"Do you understand that the decision whether to testify is for you to make?"

"Has anyone made any threats or promises to you to influence your decision?"

"Have you discussed your decision whether or not to testify with your lawyer?"

"Have you made a decision?"

"What is that decision?"

DIRECT THE FOLLOWING QUESTIONS TO DEFENSE COUNSEL:

"Have you had sufficient opportunity to thoroughly discuss this case and the decision whether to testify with the defendant?"

"Are you satisfied that the defendant is making the decision knowingly, intelligently, and voluntarily?"

THE COURT SHOULD STATE THE APPROPRIATE FINDING ON THE RECORD.

COMMENT

SM-28 was originally published in 2004. The Comment was updated in 2005 and 2009. This revision was approved by the Committee in July 2011 to address State v. Denson, 2011 WI 70, 335 Wis.2d 681, 799 N.W.2d 831.

This Special Material is intended to provide a framework for implementing the requirement established in State v. Weed, 2003 WI 85, 263 Wis.2d 434, 666 N.W.2d 485:

> . . . in order to determine whether a criminal defendant is waiving his or her right to testify, a circuit court should conduct an on-the-record colloquy with the defendant outside the presence of the jury. The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel. ¶43.

Weed requires the colloquy only when a defendant seeks to waive the right to testify. The Committee concluded that a similar inquiry should be conducted when the defendant decides to testify, because a constitutional right is involved regardless of the decision that is made. In State v. Jaramillo, 2009 WI App 39, ¶17, 316 Wis.2d 538, 765 N.W.2d 855, the Wisconsin Court of Appeals noted that while it lacked the authority to require a colloquy where a defendant decides to testify, "we do recommend it as good practice," citing this Comment.

In State v. Denson, 2011 WI 70, 335 Wis.2d 681, 799 N.W.2d 831, the Wisconsin Supreme Court addressed the question whether a colloquy is required when the defendant has decided to testify. The court concluded that while a fundamental constitutional right is involved, an on-the-record inquiry is not required. However, after noting there are some potential dangers in having the judge conduct a colloquy, the court recommended that an inquiry like that suggested in SM-28 be conducted. Relevant portions of the Denson decision follow.

> ¶8 A criminal defendant's constitutional right not to testify is a fundamental right that must be waived knowingly, voluntarily, and intelligently. However, we conclude that circuit courts are not required to conduct an on-the-record colloquy to determine whether a defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify. While we recommend such a colloquy as the better practice, we decline to extend the mandate pronounced in Weed. In any case, once a defendant properly raises in a postconviction motion the issue of an invalid waiver of the right not to testify, an evidentiary hearing is an appropriate remedy to ensure that the defendant knowingly, voluntarily, and intelligently waived his or her right not to testify.
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> ¶64 As the Weed court recognized, we are in the small minority of jurisdictions that impose an affirmative duty upon circuit courts to conduct an on-the-record colloquy to ensure that a criminal defendant is knowingly, intelligently, and voluntarily waiving his or her right to testify. 263 Wis. 2d 434, ¶41. The vast majority of jurisdictions do not impose such a duty upon circuit courts, and in fact, many jurisdictions advise against it. Their reasons for not mandating an on-the-record colloquy are many. [Citations omitted.] The most notable include that by advising the defendant of his or her right to testify, the circuit court might inadvertently influence the defendant to waive his or her right not to testify, might improperly intrude upon the attorney-client relationship or interfere with defense strategy, or might lead the defendant into believing that his or her defense counsel is somehow deficient.

> ¶65 We believe that these risks apply with even greater force to a circuit court's inquiry into a criminal defendant's decision to testify. Defense counsel has the primary responsibility for advising the defendant of his or her corollary rights to testify and not to testify and for explaining the tactical implications of both. . . . In that sense, we believe it "unlikely that a competent defense counsel would allow a defendant to take the stand without a full explanation of the right to remain silent and the possible consequences of waiving that right." Once a defendant, counseled by his or her attorney, makes the decision to testify, a circuit court's inquiry into whether the defendant is aware of his or her corollary right not to testify runs a real risk of interfering with defense strategy and inadvertently suggesting to the defendant that the court disapproves of his or her decision to testify. . . .
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> ¶66 Therefore, different from our conclusion in Weed, see 263 Wis. 2d 434, ¶¶41-42, we conclude that the risk that a circuit court's inquiry into a criminal defendant's decision to testify will influence the defendant to waive his or her right to testify or will improperly interfere with defense strategy outweighs the benefit of mandating an on-the-record colloquy to ensure that the defendant is knowingly, voluntarily, and intelligently waiving his or her right not to testify.
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> ¶67 At the same time, as a practical matter, we recognize that conducting an on-the-record colloquy "is the clearest and most efficient means" of ensuring that the defendant has validly waived his or her right not to testify "and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions." See Klessig, 211 Wis.2d at 206; see also Anderson, 249 Wis. 2d 586, ¶23. Here, for instance, we are mindful of the fact that had the circuit court engaged Denson in an on-the-record colloquy regarding his right not to testify, this case likely would not be before us. Accordingly, we recommend an on-the-record colloquy as the better practice. In fact, the Special Materials prepared by the Wisconsin Criminal Jury Instructions Committee already direct circuit courts to inquire into a criminal defendant's understanding of both the right to testify and the right not to testify. See Wis JI-Criminal SM-28.

The Committee recommends conducting this inquiry at the time the defense case is presented, as opposed to doing so at an earlier time. The decision should be made in context, when the consequences of testifying or waiving the right to do so will be more clear.

The questions provided here are just suggestions. If the defendant's replies indicate a possible lack of understanding, follow-up questions or allowing additional consultation between the defendant and defense counsel may be advisable.

For a case finding a waiver colloquy sufficient in light of the Weed requirements, see State v. Arredondo, 2004 WI App 7, 269 Wis.2d 369, 674 N.W.2d 647. Arredondo also addressed the standards to be applied if, after executing a valid waiver, a defendant seeks to reopen the testimony to allow him testify.

In State v. McDowell, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500, the Wisconsin Supreme Court imposed an additional obligation on the trial court in cases where defense counsel seeks to use the narrative approach in eliciting the defendant's testimony because of concern that the defendant may testify falsely. The court first concluded that "defense counsel may not substitute narrative questioning for the traditional question and answer format unless counsel knows the client intends to testify falsely. Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission

of intent to testify untruthfully." ¶3. If this standard is met, "the attorney's first duty shall be to attempt to dissuade the client from the unlawful course of conduct." ¶45. If counsel believes this advice will not be followed, "an attorney should seriously consider moving to withdraw from the case." ¶46. If the motion is denied, "counsel should proceed with the narrative form, advising the defendant beforehand of what that would entail." ¶47. Defense counsel also must advise the prosecutor and the court before using the narrative form. Upon being so advised, the court must proceed as follows:

Courts, in turn, shall be required to examine both counsel and the defendant and make a record of the following: (1) the basis for counsel's conclusion that the defendant intends to testify falsely; (2) the defendant's understanding of the right to testify, notwithstanding the intent to testify falsely; and (3) the defendant's, and counsel's, understanding of the nature and limitations of the narrative questioning that will result. ¶48.

