SM-32 ACCEPTING A PLEA OF GUILTY

Scope

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The inquiry suggested here is intended to illustrate a complete plea acceptance procedure, fully implementing the personal inquiry required by § 971.08 and Wisconsin case law.

SM-32 has been repeatedly cited with approval by the Wisconsin Supreme Court, in decisions urging that it be used by the trial courts. In a 2006 decision, the court "strongly encouraged" trial courts to follow the procedures prescribed in SM-32. State v. Brown, 2006 WI 100, ¶23, footnote 11, 293 Wis.2d 594, 716 N.W.2d 906. Also see, State v. Hampton, 2004 WI 107, ¶44, 274 Wis.2d 379, 683 N.W.2d 14; State v. Bangert, 131 Wis.2d 246, 272, 389 N.W.2d 12 (1986); State v. Minniecheske, 127 Wis.2d 234, 245-46, 378 N.W.2d 283 (1983); and, State v. Bartelt, 112 Wis.2d 467, 483-84, 334 N.W.2d 91 (1983).

The use of written plea acceptance forms has been expressly approved. State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987); State v. Brandt, 226 Wis.2d 610, 594 N.W.2d 759 (1999). But a personal inquiry of the defendant is still required, ". . . making a record that the defendant had sufficient time prior to the hearing to review the form, had an opportunity to discuss the form with counsel, had read each paragraph, and had understood each one." 141 Wis.2d 823, 827. The Judicial Conference has adopted CR-227, a form titled, "Plea Questionnaire/Waiver of Rights." Section 971.025(1) provides: "In all criminal actions and proceedings . . . the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18 . . ."

SM-32 is divided into ten sections, each identified by a Roman numeral. The section headings are intended only to clearly identify the different parts of the plea acceptance inquiry. Directions to the judge are in all capital letters.

The suggested questions and statements to be addressed to the defendant (and, in a few instances, to defense counsel) are found in quotation marks and are numbered from 1 to 30. Their form is merely suggested by this Special Material; judges will undoubtedly want to tailor them to the case at hand and develop others of their own.

THE FOLLOWING ASSUMES THE DEFENDANT IS REPRESENTED BY COUNSEL. IF THE DEFENDANT IS NOT REPRESENTED, A VALID WAIVER OF COUNSEL MUST BE OBTAINED BEFORE ACCEPTING THE PLEA.[1]

I. Determining Compliance With Victims' Rights Legislation

THE COURT SHOULD INQUIRE OF THE PROSECUTOR:

"Have you complied with the victim notice and consultation law – § 971.095(2)?"[2]

II. Reading the Charging Document; Guilty Plea Tendered

ASSURE THAT THE DEFENDANT HAS A COPY OF THE COMPLAINT OR THE INFORMATION; IDENTIFY THE CHARGE, THE MAXIMUM TERM OF IMPRISONMENT AND THE MAXIMUM FINE,[3] APPLICABLE REPEATER STATUTES, PENALTY ENHANCERS, AND MANDATORY MINIMUM SENTENCES.[4]

THE INFORMATION OR COMPLAINT SHOULD BE READ, UNLESS THE READING IS WAIVED.[5]

THE COURT SHOULD INQUIRE PERSONALLY[6] OF THE DEFENDANT:

1. "How do you plead?"

IF THE DEFENDANT ANSWERS "NO CONTEST" OR "ALFORD," THE COURT SHOULD ADDRESS THE DEFENDANT AND DEFENSE COUNSEL AS FOLLOWS.[7]

["A plea of no contest means that you do not contest the state's ability to prove

the facts necessary to constitute the crime."]

["An Alford plea is a guilty plea accompanied by a claim of innocence."]

["Do you understand that for the purposes of this proceeding, (a plea of no contest) (an Alford plea) will have the same effect as a plea of guilty? And that, if accepted, it will result in a conviction that carries the same character and force as a conviction resulting from a plea of guilty?"]

["Counsel, have you discussed the consequences of the plea with the defendant and do you believe the defendant understands them?"]

CONTINUE WITH THE FOLLOWING IN ALL CASES.

2. "Before your plea is entered and accepted by the court, the court will ask you certain questions to determine whether or not your plea should be entered and accepted. If you have any trouble understanding the questions, take all the time you need to confer with your attorney."

3. **"If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."[8]**

ADD THE FOLLOWING IN ALL FELONY CASES.

4. "If you are convicted of a felony, you will not be allowed to possess a firearm. Section 941.29 makes it a crime punishable by imprisonment for up to ten years or a fine of up to $25,000, or both, for a person convicted of a felony to possess a

firearm."[9]

5. "If you are convicted of a felony, you may not vote in any election until your civil rights are restored."[10]

CONTINUE WITH THE FOLLOWING IN ALL CASES.

6. "If you are convicted, you may be required to make full or partial restitution to any victim of the crime."[11]

III. Determining the Defendant's Ability to Understand the Proceedings

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE PROCEEDINGS BEFORE ACCEPTING THE PLEA. THE COURT SHOULD MAKE PERSONAL INQUIRY OF THE DEFENDANT INTO AREAS SUCH AS EDUCATION, WORK EXPERIENCE, HISTORY OF MENTAL ILLNESS, RECENT DRUG OR ALCOHOL USE, ETC. THE FOLLOWING ARE EXAMPLES OF QUESTIONS[12] THAT SHOULD BE ASKED. ANSWERS INDICATING THE NEED FOR MORE INFORMATION SHOULD BE PURSUED.

7. "How old are you?"

8. "How far did you go in school?"

9. "Do you have a job?"

IF THE ANSWER IS YES:

"Where do you work?"

"How long have you worked there?"

IF THE ANSWER IS NO:

"When were you last employed?"

"What are you trained to do?"

10. "Have you received treatment for mental or emotional problems?"

11. "Have you had any alcohol or other intoxicants today?"

"Have you taken any medication or drugs today?"

12. "Are you having any difficulty understanding the court?"

"Are you having any difficulty understanding your attorney?"

13. "Is there anything you do not understand about what has happened in this case so far?"

IV. Establishing the Voluntariness of the Plea

ESTABLISHING VOLUNTARINESS INVOLVES TWO AREAS OF INQUIRY:

1. PLEA AGREEMENT; AND

2. THREATS OR COERCION OR PROMISES OUTSIDE OF A PLEA AGREEMENT.

14. "Is there a plea agreement in this case?"

IF THERE IS A PLEA AGREEMENT,[13] PUT IT ON THE RECORD AND ESTABLISH THE DEFENDANT'S UNDERSTANDING OF THE AGREEMENT.

15. "Do you understand the plea agreement?"

16. "Do you understand that the court is not bound by a sentencing recommendation or other terms of the plea agreement?"[14]

17. "Do you understand that upon your plea of guilty, the court may impose the maximum penalty, in spite of any agreement?"[15]

IF THE PLEA AGREEMENT INVOLVES READ-INS, ADD THE FOLLOWING:[16]

18. Do you understand that if any charges are read-in as part of a plea agreement they have the following effects:

- Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.
- Restitution – you may be required to pay restitution on any read-in charges.
- Future prosecution – the State may not prosecute you for any read-in charges.

IF THE PLEA AGREEMENT CALLS FOR PROBATION, ADD THE FOLLOWING:[17]

19. "Do you understand that if you are placed on probation and if you later violate a condition of probation, that your probation may be revoked and you may be required to serve a sentence in jail or prison?"

CONTINUE WITH THE FOLLOWING IN ALL CASES:

20. "Has anyone else made any promise or threat to you[18] (aside from the plea agreement) to get you to plead guilty to this charge?"

V. Determining the Defendant's Understanding of the Crime Charged

21. "By pleading guilty, you are admitting that you committed all the elements of the crime of _____, which are as follows:"

THE COURT MUST BE SATISFIED THAT THE DEFENDANT UNDERSTANDS THE CHARGE TO WHICH THE GUILTY PLEA IS BEING ENTERED. ONE WAY TO ACHIEVE THIS IS TO SUMMARIZE THE ELEMENTS OF THE CRIME CHARGED, RELATING THEM TO THE FACTS OF THE CASE.[19] REFERRING TO THE UNIFORM INSTRUCTION FOR THE OFFENSE WILL BE HELPFUL IN IDENTIFYING THE ELEMENTS. ATTACHING A COPY OF THE APPLICABLE INSTRUCTION

TO THE PLEA QUESTIONNAIRE IS RECOMMENDED. THE COURT SHOULD INQUIRE OF DEFENSE COUNSEL REGARDING ANY SPECIAL ISSUES[20] OR PROBLEMS THAT SHOULD BE EXPLAINED TO THE DEFENDANT.

22. "Do you understand that you are admitting that you committed each of these elements?"[21]

FOR NO CONTEST PLEAS, SUBSTITUTE THE FOLLOWING.[22]

["Do you understand that your plea does not contest that the state can prove each of these elements?"]

FOR ALFORD PLEAS, SUBSTITUTE THE FOLLOWING.

["Do you understand that these are the elements the state would have to prove if you went to trial?

"And do you understand that despite your claim of innocence, if your plea is accepted the court will find you guilty, because strong evidence of guilt will have been established?"]

VI. Waiver of Constitutional Rights[23]

23. "By pleading (guilty you admit that you committed the crime) (no contest you do not contest that you committed the crime) and, thus, you relieve the state of proving at a trial that you committed that crime, and you also waive – that is, you give up – important constitutional rights.

IF AN ALFORD PLEA IS INVOLVED, SEE SM-32A NO CONTEST AND ALFORD PLEAS.[24]

"You give up your right to have the state prove that you committed each element of the crime. The state must convince each member of the jury beyond a reasonable doubt that you committed the crime. Do you understand that?

"You give up your right not to incriminate yourself, which means, you have a right not to admit to a crime, not to say anything that will subject you to a criminal penalty. If the court accepts your plea, you will be convicted, and the court can impose sentence against you. Do you understand that?

"You give up the right to confront your accusers, which means you have the right to face the witnesses against you, to hear their sworn testimony against you, and to cross-examine them by asking them questions to test the truth and accuracy of their testimony. If the court accepts your plea, you give up your right to confront your accusers. Do you understand that?

"You give up the right to present evidence in your own behalf and to require witnesses to come to court and testify for you. Do you understand that?

"Knowing that if the court accepts your plea, you give up your constitutional right to a trial by jury, your constitutional right not to incriminate yourself, and your constitutional right to confront the witnesses against you and to subpoena witnesses, do you still wish to plead (guilty) (no contest)?"

VII. Inquiry of Counsel and Defendant

THE FOLLOWING QUESTIONS SHOULD BE DIRECTED TO DEFENSE COUNSEL.

24. "Have you had sufficient opportunity to thoroughly discuss this case and the plea decision with the defendant?"

25. "Are you fully satisfied that the defendant is making (his) (her) plea of guilty freely, voluntarily, and intelligently?"

26. "Are you satisfied that the defendant understands the nature of the charge(s), the elements thereof, and the effects of (his) (her) plea?"

27. "And, are you satisfied the defendant is knowingly and intelligently waiving (his) (her) constitutional rights?"

ADD THE FOLLOWING IF A REPEATER ALLEGATION IS INVOLVED.

[28. "And, are you satisfied that the defendant understands the enhanced penalty that can be imposed if the court accepts the plea(s) of guilty as a repeater?"]

THE FOLLOWING QUESTIONS SHOULD BE DIRECTED TO DEFENDANT.

29. "Have you thoroughly discussed this case and the plea decision with your lawyer?"

30. "Are you satisfied with the representation you have received from your lawyer?"

VIII. Entering the Plea

IF, BASED ON THE ABOVE INQUIRY, THE COURT IS SATISFIED THAT THE PLEA SHOULD BE ENTERED, THE COURT SHOULD STATE:[25]

"The clerk is directed to enter the plea in the record. The court does not thereby accept the plea, but the court defers acceptance of the plea and will now hear facts to determine whether the court should accept the plea of guilty."

IX. Establishing a Factual Basis for the Plea

IT IS REQUIRED THAT THE COURT MAKE A RECORD SHOWING THAT THERE IS A FACTUAL BASIS FOR THE DEFENDANT'S PLEA.[26] THE TRIAL JUDGE MUST DETERMINE THAT A FACTUAL BASIS FOR THE PLEA EXISTS BY MAKING "SUCH AN INQUIRY AS SATISFIES [THE COURT] THAT THE DEFENDANT IN FACT COMMITTED THE CRIME CHARGED." WIS. STAT. § 971.08(1)(b).[27]

IF THE CASE INVOLVES AN ALFORD PLEA, THE COURT MUST MAKE A FINDING THAT THERE IS "STRONG EVIDENCE OF GUILT."[28]

THE PRECISE METHOD BY WHICH THIS DUTY IS MET HAS BEEN LEFT TO THE DISCRETION OF THE TRIAL COURTS.[29] IT IS NOT REQUIRED THAT THE EVIDENCE SUBMITTED AS A BASIS FOR THE PLEA BE ADMISSIBLE AT A TRIAL OR THAT IT BE SUFFICIENT TO CONVICT BEYOND A REASONABLE DOUBT.[30]

THE REQUIRED INFORMATION MAY BE ESTABLISHED IN A VARIETY OF WAYS, AND THE TRIAL COURT MAY ADOPT DIFFERENT PROCEDURES, DEPENDING ON THE SERIOUSNESS OF THE CHARGE. IT IS COMMON PRACTICE TO ASK THE PROSECUTOR TO ESTABLISH THE FACTUAL BASIS FOR THE PLEA. ACCEPTED METHODS INCLUDE:

(1) REFERRING TO THE CRIMINAL COMPLAINT;

(2) CONSIDERING TRANSCRIPTS OF THE PRELIMINARY EXAMINATION[31] OR HEARINGS ON PRETRIAL MOTIONS;

(3) ALLOWING THE PROSECUTOR TO DESCRIBE THE FACTS;

(4) REFERRING TO POLICE REPORTS[32] OR STATEMENTS OF THE DEFENDANT;

(5) RECEIVING TESTIMONY FROM POLICE OFFICERS,[33] VICTIMS, OR OTHER WITNESSES;[34] AND

(6) TAKING JUDICIAL NOTICE OF COURT RECORDS IN OTHER CASES (e.g., TRIAL OF A CODEFENDANT).

(7) ALLOCUTION BY THE DEFENDANT.

IN ADDITION TO THE ABOVE-DESCRIBED METHODS, SOME COURTS ADVOCATE THE USE OF A FULLY DESCRIPTIVE STIPULATION, OFTEN IN CONNECTION WITH A WRITTEN GUILTY PLEA FORM, WHICH IS SIGNED BY THE DEFENDANT, DEFENSE COUNSEL, AND THE PROSECUTOR AND DISCLOSES THE CHARGE, ITS CONSEQUENCES, THE RIGHTS WAIVED BY A GUILTY PLEA, THE FACTS SUPPORTING THE PLEA, AND ANY PLEA BARGAIN THAT HAS BEEN NEGOTIATED.[35]

THE CASE MAY BE ADJOURNED BY THE COURT FOR THE PURPOSE OF PREPARING FOR ANY OF THE METHODS OF ESTABLISHING THE FACTUAL BASIS FOR THE PLEA.

IF THE PLEA IS BEING ENTERED TO A REPEATER ALLEGATION, ADD THE FOLLOWING QUESTION.[36]

31. "Were you convicted of (name offense) on (date)?"

FOLLOWING THE OFFERING OF THE FACTUAL BASIS, DEFENSE COUNSEL SHOULD BE ASKED:

32. "From your own investigation, are you satisfied that there is a factual basis for the plea?"

X. Accepting the Plea and Pronouncing Judgment

IF THE COURT IS SATISFIED FROM THE SHOWING PRESENTED BY THE STATE THAT A FACTUAL BASIS EXISTS FOR THE DEFENDANT'S PLEA TO THE OFFENSE TO WHICH THE DEFENDANT PLEADS (OR TO A MORE SERIOUS OFFENSE),[37] THE COURT SHOULD MAKE FINDINGS OF FACT, ON THE RECORD, SUBSTANTIALLY AS FOLLOWS:[38]

"The court finds that the defendant understands the proceedings and that the plea of guilty is freely, voluntarily, and intelligently made. The court finds that the defendant understands the constitutional rights that are waived by a guilty plea and that the defendant freely and voluntarily waives those rights."

"The court finds from the record that a factual basis exists for the plea and that the

defendant has committed the crime charged."

SUBSTITUTE THE FOLLOWING IF THE CASE INVOLVES AN ALFORD PLEA.

["The court finds from the record that a factual basis exists for the plea, that there is strong evidence of guilt, and that the defendant has committed the crime charged."]

CONTINUE WITH THE FOLLOWING IN ALL CASES.[39]

"The court accepts the plea and finds the defendant guilty."

THE COURT SHOULD NOW STATE UPON THE RECORD:

"Upon the court's finding of guilty, it is adjudged that the defendant is convicted of the crime of _____ in violation of § _____, Wisconsin Criminal Code."

THE COURT SHOULD NOW DECIDE WHETHER A PRESENTENCE INVESTIGATION SHOULD BE ORDERED AND A DATE SHOULD BE SET FOR SENTENCING.

COMMENT

SM-32 was originally published in 1966 as "SM-30." It was revised and renumbered "SM-32" in 1974 and revised again in 1980, 1985, 1992, 1994, 1995, 2007 and 2019. The 2007 revision involved the addition of Section I., revision of question 15, and extensive updating of the Comment. This revision was approved by the Committee in February 2021; it updated the Comment and footnotes.

The inquiry suggested here is intended to illustrate a complete plea acceptance procedure, fully implementing the personal inquiry required by § 971.08 and Wisconsin case law. It is expected that individual judges will use it only as a general guide, choosing those parts that seem helpful and modifying others as appropriate to local practice and the case at hand.

The 1980 version of SM-32 was cited with approval by the Wisconsin Supreme Court in State v. Bartelt, 112 Wis.2d 467, 334 N.W.2d 91 (1983). The court "strongly advise[d] trial judges to give substantial heed to the explicit directions contained therein when accepting a plea of guilty or no contest." 112 Wis.2d 467, 484 n.3. The 1985 version was cited with approval in State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986). See discussion below. The 1995 version was cited with approval and its use urged in State v. Hampton, 2004 WI 107, ¶44, 274 Wis.2d 379, 683 N.W.2d 14 and State v. Brown, 2006 WI 100, ¶23, note 11, 293 Wis.2d 594, 716 N.W.2d 906.

Court-Required Plea Acceptance Procedures

The first Wisconsin decision to identify significant requirements for guilty plea acceptance was Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969). Ernst held that the then-existing procedures of Rule 11 of the Federal Rules of Criminal Procedure were required in state courts as a matter of federal constitutional law under the decision in Boykin v. Alabama, 395 U.S. 238 (1969). It is now clear that Rule 11 procedures are not constitutionally required in state practice. State v. Bangert, supra, at 259-60. Even though application of Federal Rule 11is not required and though it has been extensively changed since 1969, its extensive commentary and the federal cases interpreting it may be helpful when questions about Wisconsin guilty plea practice arise.

State v. Bangert, supra, reaffirmed the requirement that a full personal inquiry be conducted in accepting a plea, including an inquiry into the defendant's understanding of the elements and their relation to the facts of the case. The rule of State v. Cecchini, 124 Wis.2d 200, 368 N.W.2d 830 (1985), that a plea can automatically be withdrawn if there is a defect in the acceptance colloquy, was overruled. In its place, Bangert created a new procedure to replace automatic withdrawal of a plea where the record of plea acceptance is defective:

> (1) the defendant must make a prima facie showing that required plea acceptance procedures were not complied with and must allege that the plea was not understandingly made;
>
> (2) if that showing is made, the burden shifts to the State to show that the plea was knowingly, voluntarily and intelligently entered. The state may go outside the record of the plea colloquy and use any evidence relevant to the issue.

The Bangert court also stated:

> Henceforth, we will also require as a function of our supervisory powers that state courts at the plea hearing follow the provisions set forth in Wis JI-Criminal SM-32 (1985), Part V, Waiver of Constitutional Rights . . .
>
> Although Bangert questions only the adequacy of the nature of the charge and constitutional waiver colloquy of the plea hearing, we urge trial courts to closely follow all of the procedures for the taking of a guilty or no contest plea as set forth at Wis JI-Criminal SM-32 (1985). We have previously expressed this recommendation, and believe that careful adherence to SM-32 will satisfy the constitutional standard of a voluntary and knowing plea, as well as the Ernst requirements, the procedure of Section 971.08, Stats., and the other mandatory procedures described herein.
> 131 Wis.2d 246, 22.
>
> . . . .
>
> We reiterate that the duty to comply with the plea hearing procedures falls squarely on the trial judge. We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude." Such solicitude will serve to forestall postconviction motions, which have an even more detrimental effect on a trial court's time limitations than do properly conducted plea hearings. Intentional failure to follow such mandate could be grounds for judicial discipline.
> 131 Wis.2d 246, 278-79.

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court restated the list of duties a court has at a plea acceptance proceeding:

> ¶23 This court has recognized that circuit courts have a number of duties at a plea hearing to ensure that a defendant's guilty or no contest plea is knowing, intelligent, and voluntary, which include conducting a colloquy to:
>
> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

SM-32 covers all of the above, although not in the same order.

Addressing The Defendant Personally

Requirements at several stages of the plea acceptance procedure refer to the trial court "personally" providing advice or making inquiry. In State v. Hampton, supra, the court discussed what "personally" requires in the context of determining the defendant's understanding that the judge is not bound by sentencing recommendations in the plea agreement. The court held that the judge's duty "does not require that the court all the essential information personally, although personal explanation by the court strikes us as the most logical, consistent, and efficient way of delivering the information." 2004 WI 107, ¶43 (emphasis in original). See note 5, below.

Relying On A Plea Questionnaire/Waiver Of Rights Form

In State v. Hoppe, 2009 WI 41, 317Wis.2d 161,765 N.W.2d 794, the court held that the plea colloquy was insufficient but that other evidence showed the plea was voluntarily and understandingly made. The primary issue was the permissible extent of reliance on a signed "Plea Questionnaire/Waiver of Rights" form:

> ¶ 30. A circuit court may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties. . . .
>
> ¶ 31. A circuit court may not, however, rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy. . . [T]he plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in [State v.] Brown. . . .
>
> ¶ 32. . . . A complete Form can therefore be a very useful instrument to help ensure a knowing, intelligent, and voluntary plea. The plea colloquy cannot, however, be reduced to determining whether the defendant has read and filled out the Form. Although we do not require a circuit court to follow inflexible guidelines when conducting a plea hearing, the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant.

In State v. Pegeese, 2019 WI 60, — Wis.2d —, 928 N.W.2d 590, the Wisconsin Supreme Court reaffirmed the holding in Hoppe:

> ¶36 A plea questionnaire is indeed a useful tool to supplement a plea colloquy, but it alone does not replace a plea colloquy during which the circuit court must determine whether a plea is being made knowingly, intelligently, and voluntarily.
> . . . . .
> ¶39 We therefore reaffirm that the circuit court may utilize a waiver of rights form such as Form CR-227, but the use of that form does not otherwise eliminate the circuit court's plea colloquy duties. While the circuit court must exercise great care when conducting a plea colloquy so as to best ensure that a defendant is knowingly, intelligently, and voluntarily entering a plea, a formalistic recitation of the constitutional rights being waived is not required.

The Defendant's Right To Be Present

". . . § 971.04(1)(g) provides a criminal defendant the statutory right to be in the same courtroom as the presiding judge when a plea hearing is held, if the court accepts the plea and pronounces judgment. However, we also conclude that this statutory right may be waived ..." State v. Soto, 2012 WI 93, 343Wis.2d 43, ¶2, 817 N.W.2d 848. The court also described the type of inquiry that should accompany the use of videoconferencing for a hearing at which "presence" is required. 343Wis.2d 43, ¶46. See SM-18 Defendant's Consent To Proceed By Videoconference B Waiver Of Right To Be Present Under § 971.04.

Joining A Guilty Plea With A Plea Of Not Guilty By Reason Of Mental Disease Or Defect

The Committee recommends that the full guilty plea acceptance procedure should be followed in cases where a defendant joins a plea of guilty with a plea of not guilty by reason of mental disease or defect [NGI]. The cases should be treated as involving two pleas. First, there is a plea of guilty to the offense(s) charged, with the full plea acceptance procedures used. This is consistent with State v. Shegrud, 131 Wis.2d 133, 389 N.W.2d 7 (1986) – holding that an NGI plea is like a no contest plea and that Bangert and § 971.08 procedures should be followed – and State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986). Also see, State v. Vander Linden, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987), where the recommended procedure was referred to with apparent approval. Second, there is the plea of "not guilty by reason of mental disease or defect." The Committee recommends that the colloquy reflect that defendants understand the nature of this plea, including the maximum term of commitment to which they are exposed. See § 971.17(1).

In State v. Fugere, 2019 WI 33, 386 Wis.2d 76, 924 N.W.2d 469, the Wisconsin Supreme Court held that trial courts are not required to advise defendants of the maximum term of commitment if they are found not guilty by reason of mental disease or defect and declined to exercise its supervisory authority to require courts to do so.

> ¶2. We conclude that a circuit court is not required to inform an NGI defendant of the maximum possible term of civil commitment at the guilt phase: (1) because a defendant who prevails at the responsibility phase of the NGI proceeding has proven an affirmative defense in a civil proceeding, avoiding incarceration, and is not waiving any constitutional rights by so proceeding in that defense; and (2) because an NGI commitment is not punishment, but rather a collateral consequence to one who successfully mounts an NGI defense to criminal charges. We therefore decline to exercise our superintending and administrative authority to require circuit courts to advise NGI defendants of the maximum period of civil commitment.

In State v. Francis, 2005 WI App 161, 285 Wis.2d 451, 701 N.W.2d 632, the court of appeals held that when accepting a guilty plea from a defendant who had originally entered an insanity plea, the court was not required to address the defendant personally with respect to the withdrawal of the insanity plea. However, the court noted:

> . . . we believe it nonetheless advisable for the trial court to engage in personal colloquy for a least two reasons: First, it helps satisfy the court that the defendant is aware and alert as to what is going on. Second, the record is protected from later ineffective assistance of counsel claims where a convicted defendant might assert that counsel never discussed the NGI withdrawal. 285 Wis.2d 451, 467, footnote 5.

The Wisconsin Supreme Court has reaffirmed that it is good practice for a plea colloquy to address NGI plea withdrawal. State v. Burton, 2013 WI 61, 349 Wis.2d 1, 832 N.W.2d 611.

1. SM 30 Waiver And Forfeiture Of Counsel, etc., provides a suggested inquiry and findings for the waiver of the right to counsel.

2. **Consultation with victims**. This question is intended to comply with the requirements of § 971.08(1)(d), which reads as follows: "(d) Inquire of the district attorney whether he or she has complied with s. 971.095(2)."

Section 971.095 is titled: "Consultation with and notices to victim." Subsection (2) imposes a duty on the district attorney to offer all victims who have requested it "an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations."

The Committee concluded that this inquiry should be made at the beginning of the plea acceptance hearing. If the prosecutor has not complied with § 971.095(2), that fact should be disclosed as early as possible. If the prosecutor has complied as required, establishing that fact at the beginning of the proceeding should satisfy not only the obligation set forth in § 971.08(1)(d) but also the obligation in § 971.315 to make the same inquiry if the plea agreement calls for dismissal of charges:

> **971.315 Inquiry upon dismissal**. Before a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s.

971.095(2).

See footnote 15 regarding plea agreements calling for dismissal of charges.

3. **Identifying the maximum penalty**. The maximum penalty must be explained at the time the plea is accepted, even if it has been explained at earlier stages of the proceedings. State v. Bartelt, 112 Wis.2d 467, 334 N.W.2d 91 (1983). A complete description of the charge and the penalty may be done in the following manner:

> "Do you understand that you are charged with burglary?"
> "And do you understand that the maximum penalty for burglary is 12 ½ years of imprisonment, composed of 7 ½ years of initial confinement and 5 years extended supervision, and a fine of $25,000?"

In State v. Sutton, 2006 WI App 118, 294 Wis.2d 330, 718 N.W.2d 146, the court held that advice is not required about the maximum term of initial confinement on a bifurcated sentence; advice on the maximum term of imprisonment is sufficient.

In State v. Douglas, 2018 WI App 12, 380 Wis.2d 389, 908 N.W.2d 466, plea withdrawal was ordered because the trial court and counsel provided erroneous information on the maximum sentence.

When the defendant entered his guilty plea in State v. Finley, 2016 WI 63, 370 Wis.2d 402, 882 N.W.2d 761, he was erroneously informed (both by the circuit court and in the plea questionnaire/waiver of rights form) that his maximum exposure was nineteen and one half years. Finley was sentenced to the actual maximum of twenty-three and one half years imprisonment, and he later sought to withdraw his plea. The court of appeals sent the case back and the trial court reduced the sentence to nineteen and one half years. Finley went back to the court of appeals; the court ordered that he be allowed to withdraw his plea. The Supreme Court affirmed:

> ¶ 95 . . . Finley is entitled to withdraw his plea: The circuit court misinformed Finley of the potential punishment he faced if convicted, information the circuit court was required to give the defendant; and the State failed to prove that when Finley entered his plea he knew the potential punishment he faced if convicted.

The decision included a "Glossary" of sentencing terms apparently intended to encourage uniformity in conducting the plea colloquy. Section 971.08 requires advising on the "potential punishment," which according to the Glossary, is the same as the maximum statutory penalty [including any penalty enhancements].

When the defendant entered his guilty plea in State v. Cross, 2010 WI 70, 326 Wis.2d 492, 786 N.W.2d 464, he, his lawyer, and the trial court all thought that the applicable maximum imprisonment he faced was 40 years. In fact, the correct maximum was 30 years imprisonment – 20 confinement and 10 ES. He was originally sentenced to 25 years confinement with 15 years ES. He moved to withdraw his plea. The trial court denied the motion but reduced the sentence to 20 years confinement and 10 years ES. The Wisconsin Supreme Court affirmed:

> ¶ 4 We hold that where a defendant is told that he faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law, the circuit court has not violated the plea colloquy requirements outlined in Wis. Stat. § 971.08 and our Bangert line of

cases. In other words, where a defendant pleads guilty with the understanding that he faces a higher, but not substantially higher, sentence than the law allows, the circuit court has still fulfilled its duty to inform the defendant of the range of punishments. Therefore, the defendant is not entitled to an evidentiary hearing, and plea withdrawal remains in the discretion of the circuit court and will not be disturbed unless the defendant shows that it is necessary to correct a manifest injustice.

The decision overrules State v. Harden, 2005 WI App 252, 287 Wis.2d 871, 707 N.W.2d 173 and withdraws language in State v. Quiroz, 2002 WI App 52, ¶16, 251 Wis.2d 245, 641 N.W.2d 715, which held the defendant was not required to show he would have pled differently if he had known the correct maximum.

All applicable penalty enhancers should be included in the description of the maximum penalty, such as repeater allegations under § 939.62, the increased penalty for committing a crime while armed under § 939.63, etc. The previous versions of this Special Material recommended that if conviction would require that a consecutive sentence be imposed, that fact should also be disclosed. 2001 Wisconsin Act 109 repealed all mandatory consecutive sentence provisions except one: § 946.43(2m)(b) relating to assaults by prisoners.

A trial court in accepting a guilty plea is not required to specifically inform the defendant that the crime is a felony or misdemeanor because this is not part of the "nature of the charge." The court noted that one way to describe "the nature of the charge" is to read from the appropriate jury instructions, which typically do not include the word "felony" or "misdemeanor." State v. Robles, 2013 WI App 76, 348 Wis.2d 325, 833 N.W.2d 184.

"Direct" and "Collateral" Consequences

The general rule is that advice on "direct" but not "collateral" consequences of conviction is required at the time a plea is accepted. A "direct consequence" is "one that has a definite, immediate, and largely automatic effect on the range of defendant's punishment." State v. Bollig, 2000 WI 6, ¶16, 232 Wis.2d 561, 605 N.W.2d 199. "Collateral consequences are indirect and do not flow from the conviction." State v. Byrge, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. The following have been found to be "collateral consequences":

- mandatory DNA surcharge; applying the "intents/effects" test, the surcharge was not enacted with punitive intent and did not have a punitive effect. State v. Williams, 2018 WI 59, 381 Wis.2d 61, 912 N.W. 2d 373. Also see, State v. Frieboth, 2018 WI App 46, 383 Wis.2d 733, 916 N.W. 2d 643.

- requirement to register as a sex offender. Bollig, supra. [However, the court found that lack of knowledge of the registration requirement was a fair and just reason for a motion to withdraw a plea prior to sentencing.] Also see, State v. [Charles] Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543, where plea withdrawal was allowed because misinformation regarding sex offender registration went to the heart of the agreement.

- the possible revocation of probation for a sex offender who entered an Alford plea and therefore may not make the admission of guilt required for participation in treatment programs. State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 579 N.W.2d 698 (1998).

- potential commitment as a "sexually violent person" under Chapter 980. State v. Myers, 199 Wis.2d 391, 544 N.W.2d 609. [But see, State v. Nelson, 2005 WI App 113, 282 Wis.2d 502, 701 N.W.2d 32: the defendant's lack of knowledge of the possible Chapter 980 commitment was a fair and just reason for a motion to withdraw a plea prior to sentencing. Also see, State v. [Charles] Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543, where plea withdrawal was allowed because misinformation regarding a possible Chapter 980 commitment went to the heart of the agreement.]

- lifetime GPS monitoring is not "punishment," and, therefore, not a direct consequence that Muldrow had to be informed of prior to his plea. State v. Muldrow, 2018 WI 52, 381 Wis.2d 492, 912 N.W.2d 74.

- possible transfer to an out-of-state prison. State v. Parker, 2001 WI App 111, 244 Wis.2d 145, 629 N.W.2d 77.

- ineligibility for federal health care benefits under 42 USC 1320. State v. Merten, 2003 WI App 171, 266 Wis.2d 588, 668 N.W.2d 750.

- federal firearms restriction for those convicted of misdemeanor offenses involving domestic violence. State v. Kosina, 226 Wis.2d 482, 595 N.W.2d 464 (1999).

- deportation issues based on the defendant's own misunderstanding of his status [where the court gave the required advice]. State v. Rodriguez, 221Wis.2d 487, 585 N.W.2d 701 (1998).

- unavailability of parole and good time under Truth In Sentencing. State v. Plank, 2005 WI App 109, 282 Wis.2d 520, 699 N.W.2d 235.

Even though advice on matters in the list above is not directly required, the Committee recommends that obvious and serious collateral consequences of the guilty plea should be disclosed. The most common is probably the possible revocation of probation, parole, or extended supervision. Also see footnote 9, below, regarding the required advice on the prohibition on possession of a firearm by a convicted felon.

Care should be taken to assure that the defendant understands what the maximum statutory penalty is, as distinguished from the sentence likely to be imposed, the date of parole eligibility, the likely date of parole release, or the mandatory release date on the sentence. Confusion about parole eligibility, for example, is sometimes claimed as a basis for withdrawing a plea, usually without success. See State v. Birts, 68 Wis.2d 389, 228 N.W.2d 351 (1975), which held that trial courts should not attempt to describe parole consequences as a part of the plea acceptance procedures.

In State v. Byrge, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477, the court recognized a different rule where a court exercises its authority to determine parole eligibility for life sentences under s. 973.014 under the pre-Truth In Sentencing system. "In this circumstance, parole eligibility is a direct consequence of the plea." 2000 WI 101, ¶4. Thus, "in the narrow circumstance in which a circuit court has statutory authority under s. 973.014(2) to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting the plea." 2000 WI 101, ¶4.

4. Repeater statutes; penalty enhancers; mandatory minimums

Repeater statutes, penalty enhancers, and related provisions were reduced in number by 2001 Wisconsin Act 109. The following remain in force:

- § 939.615 Lifetime supervision of serious sex offenders. [See Wis JI Criminal 980.]

- § 939.616 Mandatory minimum sentence for certain child sex offenses. [First created as § 939.617 by 2005 Wisconsin Act 430; changed to § 939.616 by the Revisor when 2005 Wisconsin Act 433 created another § 939.617.] Requires a mandatory minimum sentence for certain violations of § 948.02(1) and § 948.025(1).

- § 939.617 Minimum sentence for certain child sex offenses: creates presumptive minimum sentences for violation of certain child sex offenses that are not sexual assaults: § 948.05, § 948.075, and § 948.12. Created by 2005 Wisconsin Act 433.

- § 939.618 Mandatory minimum sentence for repeat serious sex crimes: provides increased penalties for persons with prior convictions under § 940.225(1) or (2). If the prior and the current conviction are for violating § 940.225(1) the maximum term of imprisonment is life without parole or extended supervision. In other situations covered by the statute, there is a mandatory minimum sentence of 3 years and 6 months for the second violation. [This is former § 939.623, renumbered, retitled, and revised by 2005 Wisconsin Act 433.]

- § 939.619 Mandatory minimum sentence for repeat serious violent crimes: provides a mandatory minimum sentence of 3 years and 6 months for violation of §§ 940.03 or 940.05 if there is a prior conviction for those crimes or a crime punishable by life imprisonment. [This is former § 939.624, renumbered and retitled by 2005 Wisconsin Act 433.]

- § 939.6195 Mandatory minimum sentence for repeat firearm crimes: requires that the term of confinement for a bifurcated sentence be at least 4 years.

- § 939.62 Increased penalty for habitual criminality: the regular "repeater" provisions are in subs. (1) and (2).

- § 939.62(2m): mandatory sentence of life without parole for a "persistent repeater." This applies to "serious child sex offenses" ("Two Strikes") and to "serious felonies" ("Three Strikes").

- § 939.621 Increased penalty for certain domestic abuse offenses: provides a penalty increase of up to 2 years for certain domestic abuse offenses. [See Wis JI Criminal 983 and 984].

- § 939.63 Penalties; use of a dangerous weapon: provides for increases in the maximum sentence if a person commits a crime while possessing, using, or threatening to use a dangerous weapon. [See Wis JI-Criminal 990].

- § 939.632 Penalties; violent crime in a school zone: provides a 5 year penalty increase for certain "violent crimes" that are felonies and a 3 month penalty increase for certain "violent crimes" that are misdemeanors. [See Wis JI Criminal 992.]

- § 939.635 Increased penalty for certain crimes against children committed by a child care

provider: provides for a 5-year increase in the maximum penalty for specified crimes against a child. [See Wis JI-Criminal 2115].

- § 939.645 Penalties; crimes committed against certain people or property: this is the so-called Hate Crimes Law. It provides a 5 year penalty increase for felonies; it increases the maximum sentence to two years for Class A misdemeanors; and, it increases the maximum sentence to one year in jail for misdemeanors other than a Class A misdemeanor. [See Wis JI-Criminal 996 and 996A].

Also note that Chapter 961 has its own repeater provision for controlled substance offenses [see § 961.48] and several penalty enhancer provisions [see §§ 961.46, 961.49, and 961.495].

Finally, Chapter 980, Sexually Violent Persons, allows commitment after the completion of a prison sentence for persons found to be "sexually violent persons." See Wis JI-Criminal 2501 - 2503. This has been labeled a "collateral consequence." See the list in footnote 3.

The Committee does not believe that the trial judge is required to explain all of these provisions to the defendant during the plea acceptance procedure. However, when a penalty enhancer is charged, the maximum penalty is affected and should be disclosed on the record. Advice on the mandatory minimum sentence under § 939.616 Mandatory minimum sentence for certain child sex offenses, is required. State v. Thompson, 2012 WI 90, 342 Wis.2d 674, 818 N.W.2d 904.

Section 971.08(1)(c) requires advice on deportation consequences. See footnote 8, below.

5. If the reading of the charging document is waived, assure that the waiver appears in the record.

6. **Personal Inquiry**. It is a personal inquiry of the defendant that is required. The court must assure that the defendant's own responses appear on the record.

Personal inquiry is required even though the defendant is represented by competent counsel. The personal inquiry requirement is one of the major emphases of the cases that have required the formal plea procedures. In State v. Ernst, 43 Wis.2d 661, 170 N.W.2d 713 (1969), the Wisconsin Supreme Court specifically recognized that "under Boykin v. Alabama, Wisconsin courts can no longer indulge in the presumption" that counsel has fulfilled his or her duty of proper representation. 43 Wis.2d 661, 674. Whether or not one agrees with the conclusion or its assumptions about counsel's role, it is clear that the burden of assuring that a defendant understands the nature and effect of the plea has been unequivocally imposed on the trial judge. This was reaffirmed in State v. Brown, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, where the court recognized that the U.S. Constitution can be satisfied by reliance on counsel's representations [see, Bradshaw v. Stumpf, 545 U.S. 175 (2005)]. The court noted, that "[s]ince Bangert, however, we have interpreted Wis. Stat. § 971.08 to require a court to obtain more direct confirmation of a defendant's understanding before accepting a plea." 2006 WI 100, ¶56, footnote 26.

If the plea is tendered by counsel, it is important that the defendant personally acknowledge that the plea is the defendant's own decision. The same practice should be followed at any other time during the plea acceptance procedure when counsel answers a question that has been directed to the defendant.

In State v. Burns, 226 Wis.2d 762, 594 N.W.2d 799 (1999), the court affirmed a conviction where the defendant was never directly asked "How do you plead?" and did not state his plea on the record. However, the court "urges circuit courts to follow the usual and strongly preferred practice of asking defendants

directly and personally in open court and on the record how they plead to the charged offenses and of entering the pleas on the record." 226 Wis.2d 762, 765. SM 32, and question no. 1 in particular, was cited with approval.

If the defendant refuses to answer the questions that constitute the plea acceptance colloquy, the plea should not be accepted. See, State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

With respect to misdemeanor cases, § 971.04(2) provides that defendants may authorize their attorney in writing to act on their behalf in any manner and may "be excused from attendance at any or all proceedings." This conflicts with § 971.08(1)(a) which requires that the court must address the defendant personally before accepting a plea of guilty or no contest, and makes no exception for misdemeanors. The court of appeals dealt with the conflict in State v. Krause, 161 Wis.2d 919, 927, 469 N.W.2d 241 (Ct. App. 1991), holding that both statutes should be given effect:

> While a misdemeanant need not be present at a plea hearing, we conclude that the remaining requirements of 971.08, Stats., are equally applicable in the case of misdemeanors as in felonies.

Apparently, the court must conduct an inquiry of counsel to determine if the defendant personally is making a voluntary and understanding plea.

7. **No Contest and Alford Pleas**. If the defendant pleads "no contest" or "Alford," the court should make it clear to the defendant that, for the purposes of the criminal proceeding, the plea will have the same effect as an unequivocal plea of guilty. State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 632, 579 N.W.2d 698 (1998). The full plea acceptance procedures should be followed for no contest pleas, which may be entered only "subject to the approval of the court." § 971.06(1)(c). An Alford plea is a guilty plea accompanied by a claim of innocence, which the court may reject if it concludes that the plea is contrary to the public interest or the interest of justice. State v. Garcia, 192 Wis.2d 845, 859, 532 N.W.2d 111 (1995). In State v. Williams, 2000 WI App 123, 237 Wis.2d 591, 614 N.W.2d 11, the court of appeals implied that a judge's flat refusal to accept an Alford plea because "I have just made a policy that I will not accept one" would be error. However, the alleged error was considered waived in that case.

The acceptance and effects of no contest and Alford pleas are discussed in SM 32A, No Contest and Alford Pleas. [Garcia, supra, cited SM 32A with approval.]

The material in brackets provides a definition of the no contest and Alford pleas and attempts to assure that the defendant understands that those pleas result in an unequivocal judgment of guilty. The Committee was prompted to add the material by the decision in State v. Garcia, supra, where the Wisconsin Supreme Court reaffirmed that "the circuit courts of Wisconsin may, in their discretion, accept Alford pleas." The court cited SM 32A with approval with respect to its recommendation that:

> judges . . . ask defense counsel on the record whether counsel has discussed the consequences of the plea with the defendant and if so, whether the defendant has expressed his understanding of those consequences.
> 192 Wis.2d 845, 858 59.

Further, the court added the following in a footnote:

> Although not required to make the plea acceptable, including a definition of an Alford plea on the guilty plea questionnaire may help to further document the defendant's understanding of the

> plea. We invite the Wisconsin Jury Instruction Committee to consider making such a change on the form.
> 192 Wis.2d 845, 860, at footnote 6.

The additions to the text of SM 32 are intended to address these concerns.

8. **Deportation, exclusion from admission, denial of naturalization**. This advice is in bold because it is expressly required by § 971.08(1)(c), which provides that before the court accepts a plea of guilty or no contest, it shall:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Section 971.06(3) prohibits any inquiry into the citizenship status of the defendant: "At the time a defendant enters a plea, the court may not require the defendant to disclose his or her citizenship status."

The required warning must be given at the time the plea colloquy is conducted. Giving the warning at the arraignment is not a substitute for what the statute clearly requires. State v. Vang, 2010 WI App 118, 328 Wis.2d 251, 789 N.W.2d 115.

There has been extensive litigation regarding whether plea withdrawal is required where the advice on immigration consequences was not given or not given precisely as required by the statute. The advice for the judge accepting a plea, however, should be clear: give the warning in the words of the statute. Motions to withdraw guilty pleas are also frequently based on ineffective assistance of counsel. See cases collected at the end of this footnote. In Padilla v. Kentucky, 559 U.S. 356 (2010), the court held that the right to effective assistance of counsel extends to advise on deportation consequences.

In State v. Reyes Fuerte, 2017 WI 104, 378 Wis.2d 504, 904 N.W.2d 773, the Wisconsin Supreme Court found that the advice given by the trial judge on immigration consequences fell short of what § 971.08(1)(c) requires in two ways: it referred to "resident" instead of "citizen" and failed to mention "denial of naturalization." The court held, however, that harmless error analysis applies to this situation and concluded that the error was harmless:

> ¶41 We hold that, under the circumstances of this case, the circuit court's errors in giving the plea advisement required by Wis. Stat. § 971.08(1)(c) are harmless. Reyes Fuerte knew of the potential immigration consequences because his counsel went over the plea waiver form, which contains a substantially similar advisement, with him in Spanish. The failure to bring any ineffective assistance claim under Padilla further indicates that counsel did inform Reyes Fuerte of the potential immigration consequences of his plea. Finally, the two immigration consequences relevant to Reyes Fuerte were raised by the circuit court, such that he had knowledge of those potential consequences. To allow him to withdraw his plea now would be to allow him to "manipulate [Wisconsin's] criminal justice system in order to circumvent the immigration laws;" we cannot accept that the legislature intended to, or actually did, write § 971.08(2) to have such a result. State v. Issa, 186 Wis. 2d 199, 212, 519 N.W.2d 741 (Ct. App. 1994) (Fine, J., concurring).

Reaching this conclusion required the overruling of State v. Douangmala, 2002 WI 62, 253 Wis. 2d

173, 646 N.W.2d 1:

> ¶36 In light of the foregoing, we hold that Douangmala was objectively wrong because it failed to consider the mandatory language in Wis. Stat. §§ 971.26 and 805.18 and thus overrule it. Additionally, we reinstate Chavez, Issa, Lopez, and Garcia as valid law and binding precedent.

The court still encouraged reading the statutory script verbatim:

> ¶19 Before we begin our analysis, we take a moment to remind circuit court judges that simply reading the language of the advisement from Wis. Stat. § 971.08(1)(c) is by far the best option. The use of quotation marks (such as those in § 971.08(1)(c)) is "an unusual and significant legislative signal" that should be given effect by circuit courts. State v. Garcia, 2000 WI App 81, ¶16, 234 Wis. 2d 304, 610 N.W.2d 180. In this instance, those quotation marks are best given effect by reading the advisement as written in the statute. See id. Though, as a result of this opinion, harmless error now applies as a "safety net" for circuit courts, the best practice remains reading the exact language of the statute. Id.

State v. Douangmala, 2002 WI 62, 253 Wis.2d 173, 644 N.W.2d 891, was overruled by Reyes Fuerte. In it, the court answered "yes" to the following question: "If a circuit court fails to give the deportation warning required by § 971.08(1)(c) when accepting a guilty or no-contest plea, is a defendant entitled to withdraw the plea later upon a showing that the plea is likely to result in the defendant's deportation, regardless of whether the defendant was aware of the deportation consequences of the plea at the time the defendant entered the plea?" The court said that the result is compelled by the specific terms of § 971.08(2).

Reyes Fuerte reinstated the following cases as "valid law and binding precedent": State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Ct. App. 1993); State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994); State v. Lopez, 196 Wis.2d 725, 539 N.W.2d 700 (Ct. App. 1995); and, State v. Garcia, 2000 WI App 81, 234 Wis.2d 304, 610 N.W.2d 180.

In State v. Garcia, 2000 WI App 81, ¶1, 234 Wis.2d 304, 610 N.W.2d 180, the court held that "a trial court is required to personally address the defendant in the express words of the statute," referring to s. 971.08(1)(c). Question 3 uses the express words of § 971.08(1)(c).

Also see State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Ct. App. 1994), ordering withdrawal of a plea where the trial judge relied on a written plea acceptance form instead of personally addressing the defendant to assure understanding of deportation consequences.

In State v. Rodriguez, 221 Wis.2d 487, 585 N.W.2d 701 (Ct. App. 1998), the trial court addressed the defendant as required by § 971.08(1). The defendant later sought to withdraw the plea, claiming his misunderstanding of his citizenship status meant that his plea was not voluntarily and intelligently made. The court of appeals held that in this context the deportation consequences were "collateral" and the defendant's own mistake about them did not require withdrawal of the plea.

In State v. Mursal, 2013 WI App 125, ¶16, 351 Wis.2d 180, 839 N.W.2d 173, the court applied the "substantial compliance" doctrine: an immigration advisement substantially complied with § 971.08 if it explained all the elements of the statute; minor linguistic differences that don't change the meaning of the advice do not require plea withdrawal.

In State v. Valadez, 2016 WI 4, 316 Wis.2d 332, 874 N.W.2d 514, when the trial court accepted the

defendant's pleas [in 2004 and 2005] it did not include advice on immigration consequences. In 2013, she moved to withdraw her pleas under § 971.08(2). Valadez was a lawful permanent resident and there were no plans to deport her. However, if she left the country and sought to reenter, she would be denied readmission. The court held that she had shown exclusion from admission was likely, satisfying the requirements of § 971.08(2), and was entitled to withdraw her plea. The decision did not resolve the question whether any time limits apply to motions under § 971.08(2).

In State v. Ortiz-Mondragon, 2015 WI 73, 364 Wis.2d 1, 866 N.W.2d 717, the defendant sought to withdraw a no contest plea, alleging ineffective assistance of counsel – specifically, the failure to advise that deportation would be mandatory rather than "a possibility." The supreme court concluded that counsel did not perform deficiently. Because federal immigration law is not "succinct, clear, and explicit" in providing that Ortiz Mondragon's substantial battery offense constituted a crime involving moral turpitude, his attorney "need[ed] [to] do no more than advise [him] that pending criminal charges may carry a risk of adverse immigration consequences." ¶5.

In State v. Shata, 2015 WI 74, 364 Wis.2d 1, 866 N.W.2d 717, the defendant made a similar claim, specifically, that counsel was ineffective for failing to advise that deportation would be mandatory rather than "a strong chance." The trial court denied withdrawal but the court of appeals reversed. The supreme court concluded plea withdrawal was not warranted:

. . . Shata is not entitled to withdraw his guilty plea because he did not receive ineffective assistance of counsel. Specifically, Shata's attorney did not perform deficiently. Shata's attorney was required to "give correct advice" to Shata about the possible immigration consequences of his conviction. Padilla, 559 U.S. at 369. Shata's attorney satisfied that requirement by correctly advising Shata that his guilty plea carried a "strong chance" of deportation. Shata's attorney was not required to tell him that his guilty plea would absolutely result in deportation. In fact, Shata's deportation was not an absolute certainty. Executive action, including the United States Department of Homeland Security's exercise of prosecutorial discretion, can block the deportation of deportable aliens. ¶5.

In State v. Villegas, 2018 WI App 9, 380 Wis.2d 246, 908 N.W.2d 198, a motion to withdraw a guilty plea was denied: counsel was not ineffective in failing to inform the defendant that his plea would render him inadmissible to the United States and ineligible for Deferred Action for Childhood Arrivals (DACA). [The trial court did give the advice required by § 971.08.]

9. **Possession of a firearm**. Section 973.176(1) requires providing this information at the time of sentencing. The Committee concluded that it is a good practice, though not required, to include it at the time the plea is accepted as well.

Section 973.176(1) was created by 1989 Wisconsin Act 142 (effective date: March 31, 1990) and reads as follows:

FIREARM POSSESSION Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court shall inform the defendant of the requirements and penalties under § 941.29.

Section 941.29 makes it a Class G felony for a convicted felon to possess a firearm. The maximum term of imprisonment for a Class G felony is ten years: an initial term of confinement of 5 years and 5 years extended supervision. [2001 Wisconsin Act 109 repealed the former penalty structure, which increased the penalty for a second offense.]

Caution should be exercised where a plea agreement purports to avoid the ban on firearm possession. In Koll v. DOJ, 2009 WI App 74, 317 Wis.2d 753, 769 N.W.2d 69, the court held that the Wisconsin Department of Justice was correct in refusing to issue a gun permit to a person convicted of disorderly conduct in a domestic context, even though the plea agreement in the case was specifically tailored to characterize the offense as "non-domestic disorderly conduct" to avoid the collateral consequence of the federal ban on gun possession. However, in an unpublished opinion in a companion case [State v. Koll, 2008AP1403-CR] the court ordered withdrawal of Koll's plea because "Koll was actively misinformed as to a collateral consequence of his plea agreement and because the misinformation went to the heart of the plea agreement."

10. **Right to vote**. The text regarding the right to vote is based on CR-227.

11. **Restitution**. In State v. Dugan, 193 Wis.2d 610, 534 N.W.2d 897 (Ct. App. 1995), the court held that warning a guilty plea defendant that restitution may be required is not a mandatory component of the plea acceptance colloquy. But, in a footnote, the court stated:

> . . . we nonetheless think it the better practice for a sentencing court to include the [restitution] warning when taking a plea and to include the warning on the Moederndorfer questionnaire. 193 Wis.2d 610, 624, at footnote 7.

Section 973.20(1r) provides in part:

> When imposing sentence or ordering probation for any crime, . . . the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing, or, if the victim is deceased, to his or her estate, unless the court finds substantial reason not to do so and states the reason on the record.

12. The suggested questions should be modified to fit the case at hand and the preference of the trial judge. Some or all of the questions may be eliminated altogether if a similar inquiry has already been conducted to, for example, set bail, evaluate a waiver of counsel, etc. Additional questions will often be suggested by the defendant's responses.

13. Plea Agreements. If there is a plea agreement, it is recommended that it be put in writing and that the written description be made part of the record. If there is not a written agreement, it is essential that the agreement be carefully and completely described on the record. State ex rel. White v. Gray, 57 Wis.2d 17, 203 N.W.2d 638 (1973); State v. Lee, 88 Wis.2d 239, 26 N.W.2d 268 (1979).

Concessions to others; "Package agreements." The court must be alert for indications that the plea agreement contemplates concessions to a relative or close friend. This type of agreement "bears particular scrutiny by a trial or reviewing court conscious of the psychological pressures upon an accused such a situation creates." State ex rel. White v. Gray, 57 Wis.2d 17, 29, 203 N.W.2d 638 (1973). These agreements also must be reviewed from the point of view of whether they are in the public interest. State ex rel. White v. Gray, 57 Wis.2d 17, 29 30. Also see Seybold v. State, 61 Wis.2d 227, 212 N.W.2d 146 (1973).

Regarding "package plea agreements," see State v. Goyette, 2006 WI App 178, 295 Wis.2d 359, 722 N.W.2d 731. A "package plea agreement" refers to "a plea agreement that is contingent on two or more

codefendants all entering pleas according to the terms of the agreement. If one defendant does not enter a plea according to the agreement, the State is not bound by the agreement with respect to any of the defendants." 2006 WI App 178, ¶1. The court acknowledged that "package plea agreements carry with them the risk that one of the defendants will be improperly pressured into entering a plea," id. at ¶31, but found that any pressure felt in that case was not improper but was "self-imposed coercive element." See, Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974).

Charges "dismissed outright." State v. Frey, 2012 WI 99, 343 Wis.2d 358, 817 N.W.2d 436, concluded that "dismissed outright" has no particular meaning for sentencing or plea agreement purposes and reaffirmed the standard rule on what may be considered at sentencing: the sentencing court may consider dismissed charges for proper purposes; the defendant should have the opportunity to "refute the purported inaccuracies of the facts underlying the dismissed charges." In the context of plea agreements, "dismissed charges do not have a static meaning. They are a product of the parties' negotiations and they mean what the parties intend them to mean" subject to the exception "that a plea agreement involving one or more dismissed charges cannot limit what the judge may consider at sentencing." ¶¶77, 78.

"Conditional" pleas. Plea agreements sometimes attempt to provide the defendant with the right to appeal adverse pretrial rulings. These attempts at a "conditional guilty plea" do not confer upon defendants any right to appeal they do not otherwise have. Section 971.31(10) allows appeals of orders denying motions to suppress evidence or motions challenging the admissibility of a statement of the defendant notwithstanding the guilty plea. No other adverse pretrial rulings may be appealed after a plea of guilty, including those relating to the constitutionality of a statute or denying or granting a motion in limine. Review of those issues is waived by a guilty plea. State v. White, 112 Wis.2d 178, 332 N.W.2d 756 (1983); State v. Riekkoff, 112 Wis.2d 119, 332 N.W.2d 744 (1983). The two cases emphasize that there were no "conditional" guilty pleas in Wisconsin and attempts to create them will not be given effect by appellate courts. However, pleas entered on the assumption that they are "conditional" may be subject to withdrawal as not having been voluntarily and intelligently made. This was the result in both White and Riekkoff: the defendant was allowed to withdraw the plea. Thus, in reviewing plea agreements and in accepting pleas generally, the court should be alert for indications that the parties may be trying to create a "conditional" plea.

Limits on sentencing advocacy. Wisconsin cases illustrate the apparent popularity of plea agreements that relate in some way to limitations on sentencing information or advocacy. Prosecutors may agree "not to oppose" a particular sentence or "to remain silent" at sentencing. One danger is that these agreements may conceal relevant information from the sentencing judge. "A plea agreement which does not allow the sentencing court to be appraised of relevant information is void [as] against public policy." State v. Naydihor, 2004 WI 43, Par. 21, 270 Wis.2d 585, 678 N.W.2d 220 (quoting State v. Ferguson, 166 Wis.2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991). Also see the discussion in SM 34 Sentencing Procedures, Standards, And Special Issues, section VII.B. The general rule is clear: The parties cannot agree to limit the information the sentencing judge will consider. Also see, State v. McQuay, 154 Wis.2d 116, 452 N.W.2d 377 (1990).

14. **Advising that the court is not bound by the agreement**. In State v. Hampton, 2004 WI 107, ¶42, 274 Wis.2d 379, 683 N.W.2d 14, the court held:

> The essence of the mandate is that the court must engage in a colloquy with the defendant on the record at the plea hearing to ascertain whether the defendant understands that the court is not bound by a sentencing recommendation from the prosecutor or any other term of the defendant's plea agreement. The plea colloquy is defective if it fails to produce an exchange on

the record that indicates that the defendant understands the court is free to disregard recommendations based on a plea agreement for sentencing.

Question 16 was modified in 2007 to address the Hampton requirement more directly than the previous version did.

[See footnote 15, below, where the issue of the court and plea agreements is discussed in more depth.]

15. **Plea Agreements and the Trial Judge.** It is the firm policy in Wisconsin that trial judges not involve themselves in plea bargaining. State v. Wolfe, 46 Wis.2d 478, 175 N.W.2d 216 (1970); State v. Erickson, 53 Wis.2d 474, 192 N.W.2d 872 (1972). A 2003 decision of the court of appeals re-emphasized this rule: ". . . we adopt a bright-line rule barring any form of judicial participation in plea negotiations before a plea agreement has been reached." State v. [Corey] Williams, 2003 WI App 116, ¶ 1, 265 Wis.2d 229, 666 N.W2d 58. But see, State v. Hunter, 2005 WI App 5, 278 Wis.2d 419, 692 N.W2d 256: "the Williams rule does not require automatic plea withdrawal whenever a court expresses its view of the strength of the State's case or advises a defendant to consider to the advisability of pursuing a disposition short of trial."

To assure that this policy is carried out, and to assure the integrity of the sentencing function (see Erickson, supra), the judge should make it clear to the defendant that the prosecutor's recommendations about the sentence are not binding on the court and that the court is free to impose the maximum sentence allowed by statute for the offense. See footnote 14, supra.

Advising that a plea agreement will not be followed. Some Wisconsin judges prefer the practice of letting the defendant know if a plea agreement recommends a disposition that the judge finds to be unacceptable and afford the defendant the opportunity to withdraw the guilty plea at that point. (Judges who follow this practice need to modify, or omit, questions 15 and 16.) This is similar to the practice recognized by the ABA Standards For Criminal Justice, which allows the parties to give advance notice of the plea agreement to the judge and allows the judge to indicate whether he or she would concur in the agreement if such concurrence is consistent with the material disclosed in the presentence report. Section 3.3, ABA Standards Relating To The Plea Of Guilty. Also see Rule 11(c) of the Federal Rules Of Criminal Procedure. The Wisconsin Supreme Court has declined to adopt this practice as a statewide requirement. Melby v. State, 70 Wis.2d 368, 234 N.W.2d 634 (1975).

The Wisconsin Supreme Court reviewed the issue in State v. [Adrian] Williams, 2000 WI 78, 236 Wis.2d 293, 613 N.W.2d 132. The defendant in this appeal asked the court "to adopt a new rule of procedure, which would require that if a trial judge anticipates exceeding the state's sentence recommendation under a plea agreement, the trial judge must inform the defendant of that fact and allow the defendant to withdraw his or her plea." ¶1. The court denied the request, reaffirming the traditional rule against judicial participation in the plea agreement process. [Also see, In re the Amendment of Rules, 128 Wis.2d 422 (1986), where the court rejected a petition of the Wisconsin Judicial Council that asked the court to adopt rules for a similar process.]

But see, State v. Marinez, 2008 WI App 105, 313 Wis.2d 490, 756 N.W.2d 570, where the court held that a trial judge may indicate that a plea agreement will not be followed and allow the defendant to withdraw the plea. The court reads the Williams decision, supra, as holding that this procedure should not be required and not that the practice is forbidden.

Promises not to charge or to dismiss or reduce pending charges. While the trial judge is clearly

not bound by the prosecutor's recommendations as to sentence, promises to drop pending charges or not to bring potential charges are largely beyond the judge's control. Promises not to pursue uncharged offenses are, of course, generally beyond judicial scrutiny. And, prosecutors are allowed great discretion in making decisions about the dismissal or reduction of pending charges as part of plea agreements. See, for example, United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), and United States v. Ammidown, 497 F.2d 617 (D.C. Cir. 1973). However, a trial court retains the authority to refuse to grant a motion to reduce or dismiss charges in limited situations: ". . . (p)rosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss 'in the public interest.'" State v. Kenyon, 85 Wis.2d 36, 45, 270 N.W.2d 160 (1978).

The rule regarding "refusal to dismiss in the public interest" was reaffirmed in State v. Conger, 2010 WI 56, 325 Wis.2d 664, 797 N.W.2d 341. The court held that "a circuit court must review a plea agreement independently and may, if it appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest." ¶3. While what constitutes the public interest "is a consideration that is not capable of precise outlines . . . [and] the factors that a court may weigh . . . will vary from case to case. One appropriate factor among many may well be the viewpoint of law enforcement. . ." ¶4 [The primary concern in the case was a plea agreement calling for the reduction of felony charges to misdemeanors.]

For an application of the Kenyon standard, and a conclusion that a trial court erred in refusing to grant a prosecutor's motion to dismiss, see State v. Rivera-Hernandez, Nos. 2018AP311-CR & 2018AP312-CR, unpublished slip op. (WI App Feb. 20, 2019). A similar conclusion was reached in a federal case originating in Wisconsin, In Re United States Of America [U.S. v. Bitsky], 545 F.3d 450 (7th Cir. 2003).

Section 971.315 requires that "[b]efore a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with s. 971.095(2)." See footnote 2, supra.

Limits on sentencing advocacy. Certain types of plea agreements may indicate the need to assure that defendants understand what they have bargained for. This is increasingly common in situations where the agreement involves a prosecutor's commitment to make no recommendation as to sentence or "not to oppose" a particular sentence that the defendant may argue for. If the prosecutor promises to make no recommendations but the presentence report recommends a substantial sentence, has the defendant received what he has bargained for? Literally, he has, if the prosecutor has in fact not argued for the substantial sentence, but as a practical matter, the agreement is not being carried out. The trial judge may have a limited role to play in this situation: in determining whether the defendant understands the plea agreement, it may be appropriate to clarify that the prosecutor's agreement regarding sentence binds only the prosecutor and not the court or the person who may prepare the presentence report. See cases cited in footnote 13, above.

16. Read-ins. If the plea agreement includes "read-ins," the description of the agreement must include them. Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971). The offenses which are "read in" should be identified as accurately as possible to avoid later questions about the scope of the prosecutor's promise not to charge the other offenses. The text regarding read-ins is based on that found in CR-227.

In State v. Sulla, 2016 WI App 46, 369 Wis.2d 405, 880 N.W.2d 659, the defendant sought to withdraw his no contest pleas on the ground that he did not understand the effect a read-in charge could have at sentencing – even though the plea questionnaire and the judge's colloquy addressed the topic. The trial court denied his motion without a hearing; the court of appeals remanded the case for a hearing on Sulla's

claim. The supreme court reversed the court of appeals, concluding that no hearing was required and that the record of the plea hearing established that Sulla was fully advised of the effect of the read-ins. Two justices concurred, urging that special care be taken in this situation because, as with Alford pleas, there is a need for additional clarification – citing SM-32A, which addresses no contest and Alford pleas, as a model.

In State v. Straszkowski, 2008 WI 65, 310 Wis.2d 259, 750 N.W.2d 835, the defendant sought to withdraw his guilty plea, claiming he did not know that he was admitting that he committed crimes that were read in. The court held that plea withdrawal was not required and sought to clarify the nature of read-ins:

> ¶5 Although the case law on read-in charges is neither consistent nor clear, a proper reading of the history of Wisconsin's read-in procedure demonstrates that it is not a critical component of a read-in charge that the defendant admit guilt of the charge (or that the defendant's agreement to read in the charge be deemed an admission of guilt) for purposes of sentencing. In sum, no admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes and to be dismissed. To avoid confusion, prosecuting attorneys, defense counsel, and circuit courts should hereafter avoid (as they did in the instant case) the terminology "admit" or "deemed admitted" in referring to or explaining a defendant's agreement to read in a dismissed charge. A circuit court should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge.
>
> ¶6 Although we hold that no admission of guilt from a defendant is required for a read-in offense to be dismissed and considered for sentencing purposes, this decision does not bar a circuit court from accepting a defendant's admission of guilt of a read-in charge. This decision does not address what plea colloquy duties a circuit court might have with respect to such an admission, the issue the defendant raises. Our narrow holding is that an admission of guilt is not required by our read-in procedure and that the circuit court should avoid the terminology "admit" or "deemed admitted" in referring to or explaining a read-in charge for sentencing purposes except when a defendant does admit the read-in charge.

NOTE: In some cases, the plea agreement may call for an admission to uncharged offenses or dismissed charges as in, for example, sexual assault cases where the intent is to acknowledge all victims.

17. **Possibility of probation revocation**. Advice on the consequences of probation revocation is not expressly required by Wisconsin case law, but the Committee recommends that it be included to assure that defendants fully understand the potential penalty they are facing. See State v. James, 176 Wis.2d 230, 232 33, 500 N.W.2d 345 (Ct. App. 1993): "in accepting a negotiated plea for probation, the trial court should but is not required to advise the defendant of the potential maximum term to which he or she would be subjected in the event probation is revoked."

18. **Coercion**. The essence of the "coercion" aspect of a plea's voluntariness is that "[w]hen the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced." Rahhal v. State, 52 Wis.2d 144, 151, 187 N.W.2d 800 (1971). The Wisconsin cases have distinguished "self-imposed coercive elements" which do not affect the voluntary nature of the plea: religious beliefs and family desires, Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974); desire to avoid implicating the

defendant's wife, Drake v. State, 45 Wis.2d 226, 172 N.W.2d 664 (1969). Also see State ex rel. White v. Gray, 57 Wis.2d 17, 203 N.W.2d 638 (1973).

In State v. Basley, 2006 WI App 253, 298 Wis.2d 232, 726 N.W.2d 671, the alleged source of coercion was defense counsel's threat to withdraw on the morning of trial. The case was remanded for a hearing on the defendant's motion to withdraw his plea.

19. **Understanding the elements of the crime charged**. Like establishing the factual basis for the plea (see footnote 26), establishing that the defendant understands the crime charged need not be pursued in any single, set manner. Martinkoski v. State, 51 Wis.2d 237, 186 N.W.2d 302 (1971); State v. Bagnall, 61 Wis.2d 297, 212 N.W.2d 122 (1973). The court must "determine a defendant's understanding of the nature of the charge and establish that the defendant has an awareness of the essential elements of the crime." State v. McKee, 212 Wis.2d 488, 491, 569 N.W.2d 93 (1997), citing State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986). McKee rejected the defendant's argument that the trial court was required to specify which aspect of his conduct supported which of the charges against him. If the "essential elements" are identified in the plea colloquy, Bangert does not require that the court define or explain those elements. State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891.

In State v. Brown, 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906, the court ordered withdrawal of a guilty plea because the trial court did not address the facts or elements of the crimes in a manner sufficient to establish that the defendant understood the charges. The court extensively reviewed Bangert [referred to as "a timeless primer"] and again strongly encouraged courts to follow the full plea acceptance procedures as outlined in SM-32.

Methods. Bangert, supra, identified several methods that can be used to ascertain the defendant's understanding of the nature of the charges:

1) summarize the elements of the crime by reading from the appropriate jury instructions or from the applicable statute;

2) ask defense counsel whether he or she explained the nature of the charge to the defendant and request that counsel summarize the extent of the explanation, including a reiteration of the elements;

3) expressly refer to the record or other evidence of the defendant's understanding established before the plea hearing, including any signed statements.
131 Wis.2d 246, 268.

"Elements" outside the offense definition. The Committee recommends advising on all elements of the crime to which the plea is entered, including elements that are incorporated by reference in the offense definitions. One example is a crime requiring sexual contact – the definition of sexual contact requires that the touching be for a sexual purpose, an element that is sometimes overlooked. See, for example, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998), where plea withdrawal was ordered because the colloquy did not indicate that the defendant understood the State had to prove that the defendant's purpose in touching the child was his own sexual gratification. The same result was reached in State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18. Also see, State v. Bollig, 2000 WI 16, 232 Wis.2d 561, 605 N.W.2d 199: advice on the "purpose" element should have been given but the error was cured by other facts in the record. Also see, State ex rel Patel v. State, 2012 WI App 117, 344 Wis.2d 405, 824 N.W.2d 862 (in a child enticement case based on intent to engage in sexual contact, the purpose of the touching is

an element of the crime; however, coram nobis is not the proper remedy for addressing the trial court's failure to identify that element during the plea colloquy).

There are other similar situations:

- attempts – the elements of the intended crime must be included.
- felony murder – the elements of the underlying felony must be included.
- bail jumping based on commission of a new crime – the elements of the new crime must be included,

There is authority to the contrary with respect to at least two crimes. State v. Steele, 2011 WI App 34, 241 Wis.2d 269, 625 N.W.2d 595, involved a plea to burglary with intent to commit a felony. The court of appeals held that the failure to specify the intended felony in the colloquy was not a defect because the nature of the specific felony was not an essential element of the burglary charge. ¶9. State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, involved a plea to child enticement based on the intent to engage in sexual contact. The supreme court held that the failure to specify the elements of sexual contact in the colloquy was not a defect because it was not an essential element of the child enticement charge.

Despite the decisions in Hendricks and Steele holding that plea withdrawal is not required where there is arguably a shortfall in the elements addressed in the colloquy, the Committee concluded that the preferred plea acceptance practice is to include them.

Inconsistencies between the plea questionnaire and the oral colloquy. In State v. Brandt, 226 Wis.2d 610, 594 N.W.2d 759 (1999), the defendant sought to withdraw his plea because a written form that was used was inaccurate as to the elements of the crime. However, the trial court conducted a complete and accurate oral colloquy. The supreme court concluded that "where . . . a circuit court ignored the plea questionnaire in its colloquy concerning the elements of the crimes, the adequacy of that colloquy rises or falls on the circuit court's discussion at the plea hearing. In such cases, the adequacy or deficiency of the plea questionnaire is not at issue because it does not constitute the basis on which the plea is accepted." 226 Wis.2d 610, ¶24.

20. **Special issues**. The duty to inquire may extend beyond the statutorily defined elements of the offense. So-called penalty enhancers, such as committing a crime while armed with a dangerous weapon (§ 939.63), should be included in the description of the "elements" of the crime. (See footnote 4, supra, for a complete list of penalty enhancers.)

Likewise, especially complicated issues relating to the charge should also be explored. For example, if the defendant is charged as an aider and abettor, the court should make it clear that if the plea is accepted, the defendant stands in exactly the same position as the one who directly committed the crime. See Nash v. Israel, 707 F.2d 298 (7th Cir. 1983). The plea colloquy must address party to crime liability in order to show that the defendant had the necessary understanding of the crime charged. State v. Howell, 2007 WI 75, ¶¶44-51, 301 Wis.2d 350, 734 N.W.2d 48; State v.[James] Brown, 2006 WI 10, ¶55, 293 Wis.2d 594, 716 N.W.2d 906. But see, State v. [Calvin] Brown, 2012 WI App 139, ¶15, 345 Wis.2d 333, 824 N.W.2d 916, holding that advice on party to crime liability would have been superfluous where the facts showed that the defendant directly committed the crime (even though the charge referred to party to crime).

Defenses. Inquiry into defenses which are fairly raised by the facts known to the judge is recommended at this point in the plea acceptance procedure. For example, if, in a battery case, there is evidence that might support a claim of self-defense, the court should inquire to assure that it has at least

been considered by the defendant and defense counsel. Case law has discussed this issue in connection with the factual basis requirement. See footnote 26.

In State v. Ravesteijn, 2006 WI App 250, 297 Wis.2d 663, 727 N.W.2d 53, the defendant challenged his guilty plea to kidnapping for ransom on the ground that he was not advised by the court that the penalty could be reduced from a Class B to a Class C felony if the victim was released without permanent physical injury. The court of appeals apparently holds that the plea was valid, but:

> ¶31. . . . . Ravesteijn's unknowing waiver of the opportunity to reduce the charge to a Class C felony and thereby reduce his potential punishment resulted in manifest injustice. Resentencing is all that is necessary to correct the injustice done here. Therefore the sentence imposed pursuant to Wis. Stat. § 940.31(2)(a), a Class B felony, is set aside and vacated. The cause is remanded for a determination of whether Ravesteijn is guilty of a Class B or Class C felony.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, 2000 WI App. 158, 238 Wis.2d 74, 616 N.W.2d 144, to conclude that the entire definition of sexual intercourse in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction."

21. **Equivocal or vague responses**. If the defendant denies an element of the crime, or equivocates about its existence, a careful inquiry must be made to assure that the defendant actually wants to plead guilty to that crime. The denial or vague response may be an indication that the defendant is not certain about admitting guilt. Responses of that nature should not be considered the equivalent of an express intention to plead no contest or to enter an Alford plea. See the discussion in SM 32A regarding the special considerations in accepting no contest and Alford pleas.

If, after further inquiry, the defendant persists in denying an essential element, the court should not accept the guilty plea (unless an Alford plea is expressly being pursued). Johnson v. State, 53 Wis.2d 787, 193 N.W.2d 659 (1972); State v. Stuart, 50 Wis.2d 66, 183 N.W.2d 155 (1971).

22. The material in brackets was added in 1995 in part as a response to the decision in State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995), see footnote 7, supra.

The Committee does not encourage or recommend the routine acceptance of Alford or no contest pleas. The alternatives provided are intended to assure that, if the trial court decides to accept those pleas, the defendant clearly understands the consequences and that a complete record is made of that understanding.

23. **Waiver of trial-related rights**. State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), reaffirmed the requirement that the trial court make a record of the defendant's understanding of the constitutional rights being waived by the plea. The court also stated:

> Henceforth, we will also require as a function of our supervisory powers that state courts at the plea hearing follow the provisions set forth in Wis JI-Criminal SM-32 (1985), Part V, Waiver of

> Constitutional Rights, or specifically refer to some portion of the record or communication between defense counsel and defendant which affirmatively exhibits defendant's knowledge of the constitutional rights he will be waiving. The court must then as before, ascertain whether the defendant understands he will be waiving certain constitutional rights by virtue of his guilty or no contest plea. 131 Wis.2d 246, 271 72.

[NOTE: What Bangert refers to as "Part V" is numbered "VI." in this version.]

In State v. Pegeese, 2019 WI 60, 387 Wis.2d 119, 928 N.W.2d 590, the Wisconsin Supreme Court concluded that courts are not required to address each constitutional right that is waived:

¶4 . . . We further decline to exercise our superintending authority to impose a specific requirement that at a plea hearing circuit courts must individually recite and specifically address each constitutional right being waived and then otherwise verify the defendant's understanding of each constitutional right being waived.

However, the decision refers to SM-32 in footnote 8 at ¶41:

8. Though today we do not require circuit courts to recite any particular magic words when conducting a plea colloquy, circuit courts should be mindful of the suggested plea colloquy in Wis JI–Criminal SM-32 (2007). See Bangert, 131 Wis. 2d at 268 (stating that circuit courts can use Wis JI–Criminal SM-32 (1985) as one method of fulfilling the requirements under Bangert).

There must be assurance that the defendant is personally waiving trial-related constitutional rights, even if a written plea acceptance form is used. See State v. Moederndorfer, 141 Wis.2d 823, 416 N.W.2d 627 (Ct. App. 1987) and State v. Hansen, 168 Wis.2d 749, 485 N.W.2d 74 (Ct. App. 1992). If the defendant attempts to enter a no contest plea but refuses to waive any constitutional rights, the plea should not be accepted. See State v. Minniecheske, 127 Wis.2d 234, 378 N.W.2d 283 (1985).

The material in this section was revised in 2019 to make it more consistent and understandable. No change in substance was intended.

24. Trial courts may wish to change the wording of the first part of question 23 for Alford pleas. The following is suggested:

> "By entering an Alford plea, you are conceding that the State has strong evidence that you committed the crime and, thus, ..."

25. **Entry of the plea**. Note that SM-32 advises that the plea be "entered" at this point, but not "accepted." The distinction is an important one, because jeopardy attaches upon the acceptance of the plea. State v. Comstock, 168 Wis.2d 915, 947, 485 N.W.2d 354 (1992). The procedures set forth to this point are intended to assure that the plea is voluntarily and understandingly made. Before formally accepting the plea, the court must also be satisfied that a factual basis exists.

26. **Factual Basis**. In Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969), the Wisconsin Supreme Court held that the then-existing procedures of Rule 11 of the Federal Rules of Criminal Procedure were required in state courts as a matter of federal constitutional law, citing Boykin v. Alabama, 395 U.S. 238 (1969). [It is now clear that Rule 11 procedures are not constitutionally required in state practice. State v. Bangert, supra, footnote 20, at 259 60.] The text of what is now Rule 11(b)(3) is the source of the "factual

basis for the plea" requirement: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."

The statutory requirement in Wisconsin is that the court "make such inquiry as satisfies it that the defendant in fact committed the crime charged." Section 971.08(1)(b). It may be helpful to view the factual basis as requiring that facts be presented to support a finding that each element of the crime is present.

Wisconsin cases have referred to the purpose of the factual basis as "determining whether the facts, if proved, constitute the offense charged and whether the defendant's conduct does not amount to a defense." Edwards v. State, 51 Wis.2d 231, 236, 186 N.W.2d 193 (1971). In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court held that:

> . . . a factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one. ¶16

Two justices dissented, citing the earlier cases like Edwards for the "does not constitute a defense" rule. The majority apparently accepted this as a general rule, but concluded it did not apply on the facts of the Black case.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry. See the discussion in footnote 20, supra.

The Committee recommends that the trial court inquire into defenses that are fairly raised by the facts relied on to establish the factual basis for the plea.

27. **Factual Basis for a Related Crime**. In most cases, a factual basis is established for the crime to which the plea is entered. Sometimes, usually in the context of a plea bargain, a plea is offered to a crime that does not closely match the conduct which the factual basis establishes. For example, a defendant may plead guilty to a disorderly conduct charge in a case originally charged as theft or burglary. In the Committee's judgment, it should be sufficient if a factual basis is shown for a more serious offense that is related to the defendant's conduct. This should be the case even if a true greater-and-lesser included offense relationship does not exist. A flexible approach is especially important in light of the strict "statutory elements" test used to analyze lesser included offenses. See, for example, Randolph v. State, 83 Wis.2d 663, 266 N.W.2d 334 (1978). Also see, SM-6, Jury Instructions On Lesser Included Offenses.

This conclusion is arguably inconsistent with part of the description of the factual basis requirement in Ernst v. State, 43 Wis.2d 661, 170 N.W.2d 713 (1969). Ernst quoted Federal Rule 11 and McCarthy v. United States, 394 U.S. 459 (1969), in stating that the record must show that the conduct which the defendant admits, ". . . constitutes the offense charged in the indictment or information, or an offense included therein to which the defendant is pleading guilty." (Emphasis added.) Taken literally, this would mean, for example, that on a negotiated plea of guilty to disorderly conduct arising out of theft, the court could not accept the plea since disorderly conduct is not a lesser included offense of theft. It is the opinion of the Committee, however, that the Wisconsin Supreme Court did not intend to so confine or narrow guilty plea practice and that the requirements of Ernst are met if the trial court satisfies itself that the plea is

voluntarily and understandingly made and that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the defendant's conduct. Two decisions of the Wisconsin Court of Appeals reach different results on this issue.

In State v. Harrell, 182 Wis.2d 408, 513 N.W.2d 676 (Ct. App. 1994), the defendant was charged with three counts of first degree sexual assault of a child; another count was added after the preliminary examination. A plea agreement was reached whereby the defendant entered a no contest plea to one count of second degree sexual assault of a child and one count of third degree sexual assault. The parties agreed to use the complaint as the factual basis. The defendant moved to withdraw his plea after sentencing, claiming that he was not advised he was waiving his right to a unanimous jury and that no factual basis was established for the third degree sexual assault offense because there was no showing of "without consent." The court of appeals rejected both claims. As to the factual basis issue, the court noted that more flexibility is allowed when there is a plea bargain. It is enough if a factual basis is shown for the offense to which the plea is entered or for a more serious offense reasonably related to that offense. In a footnote, the court indicated its decision "adopts in part the reasoning of the Wisconsin Jury Instruction Committee," citing SM 32. 182 Wis.2d 408, 418.

In State v. Harrington, 181 Wis.2d 985, 512 N.W.2d 261 (Ct. App. 1994), the defendant was charged with burglary and agreed to plead no contest to felony theft. The probable cause statement in the complaint was not changed. The parties stipulated that the complaint furnished a factual basis for the plea and the defendant was found guilty of felony theft. On appeal, the court found that the complaint furnished a factual basis for burglary but not for felony theft because there were no facts regarding the value of the stolen property. The court said that the state pointed to no authority for the proposition that a factual basis for the more serious offense is sufficient and granted relief to the defendant. SM 32 was not mentioned. The relief granted was to remand for sentencing on misdemeanor theft – not withdrawal of the plea, citing State v. White, 85 Wis.2d 485, 271 N.W.2d 97 (1978).

Harrell and Harrington flatly contradict one another. The conflict was not reviewed: the petition to review in Harrell was dismissed as untimely; no petition to review was filed in Harrington. No published decision has resolved this conflict although two decisions have appeared to accept the Harrell rule. In State v. Smith, 202 Wis.2d 21, 549 N.W.2d 232 (1996), the court held that an Alford plea could not be accepted to a crime that it was "legally impossible" for him to commit. "Strong proof of guilt" could not be found in that situation because the crime to which the plea was entered required that the victim be under the age of 16 and it was undisputed that the victim was 16 years old. The court acknowledged the Harrell decision, but found it inapplicable in this situation because there could not be "strong proof" of the age element of the crime. In State v. West, 214 Wis.2d 468, 571 N.W.2d 196 (Ct. App. 1997), the court of appeals declined to apply Harrell because the crime to which the plea was offered and the crime for which a factual basis was offered had the same penalty. Thus, the court held, there was no factual basis for the crime of conviction or for a more serious offense.

In light of this history, the Committee reaffirms its conclusion that it should be sufficient "that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the defendant's conduct." Trial judges should be cautious of offers to "stipulate to the complaint" as the factual basis, where the plea is to a different offense than the one charged in the complaint.

28. **Alford pleas – "strong evidence of guilt."** To accept an Alford plea, the court must find that the evidence the State would offer at trial constitutes "strong proof of guilt." State v. Garcia, 192 Wis. 2d 845, 859 60, 532 N.W.2d 111 (1995). Also see, State v. Johnson, 105 Wis.2d 657, 663, 314 N.W.2d 897 (Ct. App. 1991). "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." State v. Smith, 202 Wis.2d 21, 27, 549 N.W.2d 232 (1996). "'Strong proof of guilt' is not the equivalent of proof beyond a reasonable doubt, but it is 'clearly greater than what is needed to meet the factual basis requirement under a guilty plea.'" State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 645, 579 N.W.2d 698 (1998), citing State v. Smith, supra.

The Alford decision used the phrase "strong evidence of guilt," while the Wisconsin decisions tend to use "strong proof of guilt." The Committee does not believe there is a significant difference between "evidence" and "proof" in this context; the term "strong evidence of guilt" is used in the Special Material.

29. Factual basis – methods. Edwards v. State, 51 Wis.2d 231, 186 N.W.2d 193 (1971); Morones v. State, 61 Wis.2d 544, 213 N.W.2d 31 (1972). Accepted methods are listed in the text accompanying notes 31 34. The same rule applies to Alford pleas, which do not require any specific method for establishing a factual basis showing strong proof of guilt. State v. Nash, 2020 WI 85, ¶¶36-39, 47-49, 394 Wis.2d 238, 951 N.W.2d 404.

Some courts follow a practice of personally addressing defendants to establish the factual basis, or of asking defendants if they agree with the facts established by the state. It may not be possible to require defendants to incriminate themselves, even though the guilty plea is being entered. In a different context, the Wisconsin Supreme Court held that the privilege against self-incrimination survives a plea of guilty and continues at least until sentencing. State v. McConnohie, 121 Wis.2d 57, 358 N.W.2d 256 (1984). Also see, Mitchell v. U.S., 526 U.S. 314 (1999): neither a guilty plea nor making statements at the plea colloquy waive the 5th Amendment privilege.

The relationship between determining the factual basis and the defendant's agreement that a factual basis exists was considered in State v. Thomas, 2000 WI 13, 232 Wis.2d 714, 605 N.W.2d 836. The court held that "the defendant need not admit to the factual basis in his or her own words; the defense counsel's statements suffice." 232 Wis.2d 714, ¶18. "All that is required is for the factual basis to be developed on the record – several sources can supply the facts." 232 Wis.2d 714, ¶20. "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." 232 Wis.2d 714,¶22.

Not only is a full confession not required, a guilty plea may be accepted even if the defendant maintains innocence. North Carolina v. Alford, 400 U.S. 25 (1970); State v. Garcia, 192 Wis.2d 845, 532 N.W.2d 111 (1995). See footnote 24, supra. [For a discussion of the acceptance and effects of an "Alford plea, see SM 32A, No Contest And Alford Pleas. SM 32A emphasizes that before an Alford plea is accepted, the judge take care to insure that there is strong evidence of guilt and that the defendant clearly wants to plead guilty despite his claim of innocence, with full understanding of the charge, of its consequences, and with the advice of competent counsel.]

30. Edwards, supra, 51 Wis.2d 231, 236.

31. Edwards, Morones, supra. But see Christian v. State, 54 Wis.2d 447, 195 N.W.2d 470 (1972), holding, in absence of stipulation of parties, that while the record of the preliminary did show the critical facts of the case, alone it would not have been enough to establish factual basis for the plea.

32. Edwards, supra; Spinella v. State, 85 Wis.2d 494, 271 N.W.2d 91 (1978).

33. Bressette v. State, 54 Wis.2d 232, 194 N.W.2d 635 (1972); State v. Jackson, 69 Wis.2d 266, 230

N.W.2d 832 (1975); and Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974).

34. Craker v. State, 66 Wis.2d 222, 223 N.W.2d 872 (1974).

35. Even if there is a stipulation to the factual basis, the court must find that facts are established which are sufficient to support all the required elements of the crime.

36. **Repeater provisions**. Repeater provisions can be an issue at three different stages of the plea acceptance procedure: 1) when the maximum penalty for the offense is identified – see footnote 3, supra, recommending that "all applicable penalty enhancers should be included in the description of the maximum penalty, such as repeater allegations under § 939.62. . ."; 2) when the defendant's understanding of the crime charged is determined – see footnote 19, supra, advising that this duty may extend beyond the statutorily defined elements of the offense to things like penalty enhancers; and, 3) when the factual basis for the plea is established – question 31 was added to meet this need, not only to assure the validity of the plea but also to provide the proof of repeater status required before sentencing.

Adding a question like number 31 was suggested by the court of appeals in State v. Goldstein, 182 Wis.2d 251, 261, 513 N.W.2d 631 (Ct. App. 1994):

One simple and direct question to the defendant from either the prosecutor or the trial judge asking whether the defendant admits to the repeater allegation will, in most cases, resolve the issue. We suggest that trial judges include this question in their colloquy with the defendant at the plea hearing (if there is one) or, otherwise, at the time of sentencing.

The Wisconsin Supreme Court has given similar advice in a case involving sentencing as a repeater after a jury trial: "The trial court may ask the defendant the direct question while observing the defendant's criminal record before him whether the defendant was convicted on a particular date of a specific crime. . . ." State v. Farr, 119 Wis.2d 651, 659, 350 N.W.2d 640 (1984).

Question 31 is modeled after the one suggested in Farr.

37. In the Committee's judgment, it should be sufficient if a factual basis is shown for a more serious offense that is related to the defendant's conduct. See the discussion in footnote 27, supra.

38. It is at this point that the plea is formally accepted. This is when jeopardy attaches. See State v. Comstock, discussed in footnote 25, supra.

39. In the usual case, the court states that the defendant is adjudged convicted immediately after the finding of guilty is made. However, practices are common which stop short of a finding of guilt or entry of a judgment of conviction. The court should accept the plea but defer making a finding of guilt. Section 961.47, Conditional Discharge for Possession as First Offense, authorizes this sort of procedure. Persons found guilty of possession of a controlled substance under § 961.41(3g)(b), and who have not previously been convicted of a crime involving controlled substances, are eligible for special disposition under this section. No judgment of conviction is entered, and the defendant avoids a criminal conviction if probation is successfully completed. (Section 961.47 states that a "judgment of guilt" is not entered. The Committee believes "judgment of guilt" is the equivalent of "judgment of conviction.")