STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP0003-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,
Defendant-Appellant.

ON PETITION TO BYPASS
THE COURT OF APPEALS,
ON APPEAL FROM JUDGMENTS OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN THE CIRCUIT COURT
FOR ST. CROIX COUNTY,
THE HONORABLE ERIC J. LUNDELL, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP0003-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,

Defendant-Appellant.

ON PETITION TO BYPASS
THE COURT OF APPEALS,
ON APPEAL FROM JUDGMENTS OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN THE CIRCUIT COURT
FOR ST. CROIX COUNTY,
THE HONORABLE ERIC J. LUNDELL, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

INTRODUCTION

This criminal appeal is before this court on the State's petition to bypass the court of appeals. Pursuant to this court's order of July 23, 2009, the State submits this supplemental brief to reply to the supplemental brief filed by Defendant Travis Vondell Cross.

SUPPLEMENTAL ARGUMENT

THE TRIAL COURT PROPERLY DENIED CROSS'S POST-SENTENCING MOTION FOR PLEA WITHDRAWAL.

A. The State has *not* proposed a "new test" for post-sentencing plea withdrawal, but rather seeks application of the existing "manifest injustice" test to a situation that has received conflicting treatment.

1. Introduction.

Cross seeks automatic plea withdrawal on the ground that when he pled guilty to a reduced charge of second-degree sexual assault of a child, he mistakenly believe that he faced *greater* potential punishment than he actually faced – that he faced maximum imprisonment of forty years (including maximum initial confinement of twenty-five years) when, in fact, he faced maximum imprisonment of thirty years (including maximum initial confinement of twenty years).

Respectfully, the State maintains that due process does not require a defendant to know the *precise* maximum potential punishment to tender a knowing, voluntary, and intelligent guilty plea. Rather, when, as in the present case, the defendant pleads guilty under a mistaken belief that he faces *greater* potential punishment than he actually faces, post-sentencing plea withdrawal is *not* automatic, but rather requires a showing of manifest injustice. In the present case, plea withdrawal is *not* warranted to correct a manifest injustice to Cross.

2. *State v. Harden* conflicts with *State v. Quiroz* and with numerous decisions in other jurisdictions.

Cross first suggests that *State v. Harden*, 2005 WI App 252, 287 Wis. 2d 871, 707 N.W.2d 173, and *State v. Quiroz*, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, do not meaningfully conflict (Cross's supplemental brief at 1-2). The State disagrees.

In both *Harden*, 287 Wis. 2d 871, ¶ 5, and *Quiroz*, 251 Wis. 2d 245, ¶ 16, the defendants, *in fact*, misunderstood the correct maximum potential punishment at the time of their pleas. Although in *Quiroz*, the trial court had informed the defendant of what proved to be the correct maximum, the court of appeals concluded that the defendant's *actual* misunderstanding (based on a belief that the trial court's calculation of the maximum was wrong) did not constitute a manifest injustice warranting plea withdrawal. *Id.*

In any event, *Harden does* directly conflict with decisions of other courts – set forth at pages 15 to 20 of the State's principal brief – which hold that a defendant is *not* automatically entitled to plea withdrawal despite the defendant's mistaken belief (reinforced by the trial court) that he faced *greater* potential punishment than he actually faced.

3. For *post-sentencing* motions for plea withdrawal, the "manifest injustice" test applies to *all* misunderstandings about the *precise* maximum potential punishment.

Cross assumes that the State's argument for application of the "manifest injustice" test for *post-sentencing* motions for plea withdrawal is limited to cases in which the defendant mistakenly believed he faced a *greater* potential punishment than he actually faced (Cross's supplemental brief at 2-3). Cross is mistaken.

For *post-sentencing* motions for plea withdrawal, the "manifest injustice" test – as opposed to automatic plea withdrawal – applies to *all* cases in which a defendant shows that he misunderstood the *precise* maximum potential punishment at the time of his guilty or no-contest plea, regardless of whether the defendant believed the potential punishment was less or greater than the actual maximum.

The State focuses on the scenario in which the defendant seeks post-sentencing plea withdrawal due to a mistaken belief that he faced a *greater* potential punishment than he actually faced, simply because that is the circumstance of the present case.

In some cases, a defendant's mistaken belief that he faced a *lesser* potential punishment than he actually faced also might not warrant plea withdrawal. For example, Federal Rule of Criminal Procedure 11(h) allows for harmless-error analysis of plea-colloquy omissions in federal court, and the 1983 Advisory Committee Notes to Rule 11(h) cite as one example of harmless error the situation in which "the judge *understated* the maximum penalty somewhat, but the penalty actually imposed did

not exceed that indicated in the warnings" (emphasis added).

Nevertheless, it typically will be more difficult for a defendant to show a manifest injustice warranting *post-sentencing* plea withdrawal where the defendant mistakenly believed he faced a *greater* potential punishment than he actually faced. In such situations, the defendant does, in fact, know that he *could* be sentenced to *at least as much as* the correct lesser amount of imprisonment. Normally, as *Quiroz* and other courts have held, such a mistake is not reasonably likely to have influenced the defendant's plea decision (*see* State's principal brief at 15-20).[1]

4. The *amount* by which the defendant mis-understood the *precise* maximum potential punishment is but one factor in the analysis.

Cross also bemoans the absence from the State's argument of any bright-line rule for plea withdrawal based on the *amount* by which the defendant misunderstood the precise potential maximum punishment (Cross's supplemental brief at 3).

No such bright-line rule is appropriate, because the *amount* by which the defendant misunderstood the precise maximum potential punishment is but one factor in the analysis – whether assessed under the "manifest injustice" test for post-sentencing motions for plea withdrawal or

[1]In cases where the defendant makes such claim in a *pre-sentencing* motion for plea withdrawal, his claim will be governed by the "fair and just reason" test. *See, e.g., State v. Nawrocke*, 193 Wis. 2d 373, 378, 534 N.W.2d 624. "Basically, the higher burden [of manifest injustice for *post-sentencing* motions for plea withdrawal] is a deterrent to defendants testing the waters for possible punishments." *Nawrocke*, 193 Wis. 2d at 379-80 (brackets added).

under the "fair and just reason" test for pre-sentencing motions for plea withdrawal.

In some cases, a large variance in the amount by which the defendant misunderstood the precise maximum potential punishment will not constitute a manifest injustice warranting post-sentencing plea withdrawal – as demonstrated by the cases cited at pages 15 to 20 of the State's principal brief. In other cases, even a relatively small variance could make a difference to the plea decision, depending on the totality of the circumstances. The smaller the variance, the more difficult for a defendant to show that it truly affected his plea decision.

5. There is nothing equivocal about the meaning of "manifest injustice" as used in the present context.

Cross also posits that the State is using the term "manifest injustice" in contradictory senses (Cross's brief at 3). Cross misunderstands.

As outlined at page 11 of the State's principal brief, the denial of a constitutional right relevant to the defendant's plea decision *automatically* entitles the defendant to plea withdrawal. *See State v. Bangert*, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). The denial of such a constitutional right, therefore, necessarily will satisfy both the pre-sentencing test for plea withdrawal ("fair and just reason") and the post-sentencing test for plea withdrawal ("manifest injustice").

The State maintains, however, that when a defendant misunderstands the *precise* maximum potential punishment (including situations where the trial court contributed to the misunderstanding), the defendant *has not been denied a constitutional right warranting automatic plea withdrawal.*

> 6. Courts can duly assess, under the totality of the circumstances of the particular case, whether the defendant's misunderstanding of the *precise* maximum potential punishment was so crucial to the defendant's plea decision as to warrant plea withdrawal.

Cross further doubts the ability of trial courts to properly exercise their discretion in determining when a defendant's misunderstanding of the precise maximum potential punishment was so crucial to the defendant's plea decision as to warrant plea withdrawal (Cross's supplemental brief at 4). This complaint is unpersuasive.

This court has recognized the propriety of harmless-error analysis in guilty-plea appeals filed under Wis. Stat. § 971.31(10) from adverse suppression rulings. *See State v. Armstrong*, 225 Wis. 2d 121, 121-22, 591 N.W.2d 604 (1999). The test is whether there is a reasonable probability that but for the erroneous evidentiary ruling, the defendant would not have pleaded guilty or no contest and would have gone to trial. *See State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376; *State v. Sturgeon*, 231 Wis. 2d 487, 503-04, 605 N.W.2d 589 (Ct. App. 1999).

Factors relevant to determining harmless error in the foregoing context also are relevant to determining a "manifest injustice" for plea withdrawal when a defendant shows that he misunderstood the precise maximum potential punishment. Such factors include, for example: "the relative strength and weakness of the State's case and the defendant's case" to that point in the record; "the reasons, if any, expressed by the defendant for choosing to plead guilty" or no contest; and "the benefits obtained by

the defendant in exchange for the plea." *Sturgeon*, 231 Wis. 2d at 504.

For reasons outlined at pages 24-26 of the State's principal brief, post-sentencing plea withdrawal is not warranted to correct a manifest injustice to Cross. To summarize:

- Although Cross mistakenly believed that he faced maximum potential imprisonment of forty years (including twenty-five years' initial confinement), he knew that he faced imprisonment *at least as much as* the correct lesser maximum imprisonment of thirty years (including twenty years' initial confinement).

- Cross achieved a highly favorable plea agreement that, in Cross's understanding, reduced his maximum potential imprisonment from sixty years (including forty years' initial confinement) to forty years (including twenty-five years' initial confinement). In reality, the plea agreement *was even more beneficial* to Cross, because it reduced his maximum exposure from sixty years' imprisonment to thirty years' imprisonment (including twenty years' initial confinement). Because Cross was age seventy-three when he pled guilty (13), the difference between twenty years and twenty-five years of initial confinement would not reasonably be crucial to his plea decision (nor would the difference between thirty years and forty years of total imprisonment).

- Cross's plea agreement also was highly desirable, because the prosecutor agreed to recommend only two years' imprisonment, to be served concurrently with Cross's existing Minnesota sentence (69:3-4).

- As both the criminal complaint and preliminary hearing reflect, the complainant, Alexandra D.F., alleged that Cross had sexual contact with her on *multiple* occasions (1:1; 67:7-11). Thus, when Cross achieved his plea agreement, he knew that the prosecutor could have

charged him with additional counts of first-degree sexual assault.

- Cross also presumably would have considered the prospect that the State's case against him would be enhanced if the trial court were to grant the State's pending motion to introduce evidence that Cross engaged in similar other acts of sexual touching against two other granddaughters (9:7).

- Cross received a sentence (thirty years) that was *less than* the potential sentence (forty years) that he believed was possible when he pled guilty. Moreover, because Cross filed his motion for plea withdrawal after sentencing, he had a chance to test his potential punishment.

7. Summary.

For all of the foregoing reasons, application of the discretionary "manifest injustice" test to Cross's post-sentencing motion for plea withdrawal is both reasonable and sound, and the trial court reasonably concluded that Cross has not satisfied this test.

B. Application of the discretionary "manifest injustice" test for post-sentencing plea withdrawal in the present context comports with Wis. Stat. § 971.08(1)(a).

Under Wis. Stat. § 971.08(1)(a), a trial court faced with a guilty or no-contest plea must "determine that the plea is made voluntarily with understanding of . . . *the potential punishment* if convicted." According to Cross, this language means that the defendant must understand the *precise* maximum potential punishment before a trial court may accept the defendant's guilty or no contest plea (Cross's supplemental brief at 4-6). The State disagrees.

Nothing in the statute says the defendant must know the *precise* maximum potential punishment to tender a valid guilty or no-contest plea, or that the trial court must accurately state the *precise* maximum potential punishment to the defendant during the plea colloquy. In fact, the case law frequently refers to this knowledge requirement as understanding "the range" of potential punishment, even in cases where no presumptive minimum penalty applies. *See, e.g., State v. Brown*, 2006 WI 100, ¶¶ 35, 44, 52, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Van Camp*, 213 Wis. 2d 131, 143, 569 N.W.2d 577 (1997); *Bangert*, 131 Wis. 2d at 261-62.[2]

Like Wis. Stat. § 971.08(1)(a), Fed. R. Crim. Proc. 11(c)(1) requires a federal district court to ensure that the pleading defendant understands the maximum possible penalty. But, as noted, the federal courts have held that a defendant's misunderstanding of the *precise* maximum penalty (including situations where the trial court contributed to the misunderstanding) does *not* automatically entitle the defendant to plea withdrawal.[3]

C. Application of the discretionary "manifest injustice" test for post-sentencing plea withdrawal in the present context also comports with this court's precedents.

Cross cites several decisions of this court for the undisputed proposition that "the defendant must understand the potential punishment that he or she faces

[2]Likewise, a defendant should *not* be automatically entitled to plea withdrawal if he misunderstood the *precise* maximum *fine* for the offense to which he pled guilty or no contest.

[3]Cross's suggestion at page 5 of his supplemental brief that "reversible error occurs unless there had been 'substantial compliance'" with "a mandatory statutory procedure" is inapposite. Cross relies on cases of non-compliance with *jury-selection* procedures in which harmless-error analysis *was* applied.

before entering a guilty plea" (Cross's supplemental brief at 7). None of those decisions, however, holds that a defendant's misunderstanding of the *precise* maximum potential punishment automatically requires plea withdrawal:

- In *Brown*, 293 Wis. 2d 594, ¶¶ 45-77, the plea colloquy did not adequately explore the nature of the charges or the rights being waived. Moreover, the trial court's failure to ensure the defendant's understanding that consecutive sentences could be imposed did not require plea withdrawal. *Id.*, ¶ 78.

- In *State v. Byrge*, 2000 WI 101, ¶ 68, 237 Wis. 2d 197, 614 N.W.2d 477, a first-degree intentional homicide case in which the trial court determined the parole-eligibility date, the plea colloquy *entirely* omitted "parole eligibility information."

- In *State v. Bollig*, 2000 WI 6, ¶¶ 47-57, 232 Wis. 2d 561, 605 N.W.2d 199, the trial court's failure to inform the defendant of the sex-offender registration requirement did not require plea withdrawal, and the defendant understood the essential elements of the charged crime.

- In both *Van Camp*, 213 Wis. 2d at 142-43, 151-52, and *State v. Bartelt*, 112 Wis. 2d 467, 472-77, 334 N.W.2d 91 (1983), the trial court did not inform the defendant *at all* of the maximum potential punishment, nor did it advise the defendant of the trial rights being waived.

D. Application of the discretionary "manifest injustice" test for post-sentencing plea withdrawal in the present context also comports with due process.

Lastly, Cross argues that due process dictates automatic plea withdrawal if a defendant misunderstood the *precise* maximum potential punishment at the time of the defendant's guilty or no-contest plea (Cross's supplemental brief at 7-9).

Other than *State v. Harden*, however, Cross cites to no decision that articulates this proposition. As discussed, Cross's other case citations are not on point. In fact, the Supreme Court effectively has ratified the State's position that *no constitutional violation* warranting automatic plea withdrawal occurs simply because the defendant misunderstands the *precise* maximum potential punishment:

> We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops . . . that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Brady v. United States, 397 U.S. 742, 757 (1970). The defendant in *Brady* was *not* entitled to automatic plea withdrawal even though he mistakenly believed he faced the death penalty. *Id.* at 743-44, 756.

Cross's reliance at pages 8-9 of his supplemental brief on *Mabry v. Johnson*, 467 U.S. 504 (1984), and *Henderson v. Morgan*, 426 U.S. 637 (1976), also is misplaced. Neither case supports the proposition that a pleading defendant's misunderstanding about the *precise* maximum potential punishment automatically entitles the defendant to plea withdrawal.

In *Mabry v. Johnson*, 467 U.S. at 509-11, the Court held that the defendant's acceptance of the prosecutor's first proposed plea agreement (later withdrawn) did not create a constitutional right to have the agreement specifically enforced. In its discussion, the Court recited the unremarkable proposition that due process requires a pleading defendant to be "fairly apprised of [the direct] consequences" of a guilty plea. *Id.* at 509.

In *Henderson v. Morgan*, 426 U.S. at 644-47, the Court held that the failure of the trial court and defense counsel to explain to a mentally-challenged defendant the "intent" *element* of the homicide charge rendered the defendant's guilty plea involuntary. In such a scenario, the prospect that the defendant still would have pled guilty if he had understood the "intent" *element* does not foreclose plea withdrawal. *Id.* at 644 n.12. As the State suggests at page 22 n.5 of its principal brief, misunderstanding the *nature of the charge* presents a qualitatively different situation than being numerically mistaken about the *precise* maximum potential punishment.[4]

[4]For this reason, too, *Henderson v. Morgan* does not trump the conclusion in *State v. Sutton*, 2006 WI App 118, ¶¶ 9-15, 294 Wis. 2d 330, 718 N.W.2d 146, that a pleading defendant in the wake of truth-in-sentencing does not have to know the precise maximum initial confinement.

CONCLUSION

For the reasons set forth in the State's principal brief and this supplemental brief, this court should affirm the judgments of conviction and postconviction order denying plea withdrawal.

Dated at Madison, Wisconsin: August 20, 2009.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JAMES M. FREIMUTH
Assistant Attorney General
State Bar #1012732

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904
(608) 266-9594 (Fax)
freimuthjm@doj.state.wi.us

BRIEF CERTIFICATION

I certify that this supplemental brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,948 words.

_____
JAMES M. FREIMUTH

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of August, 2009.

_____
JAMES M. FREIMUTH
Assistant Attorney General