STATE OF WISCONSIN

SUPREME COURT

Case No. 2014AP2488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
REVERSING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
WILLIAM M. ATKINSON, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-
Respondent-Petitioner
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

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S U P R E M E C O U R T

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ISSUE PRESENTED

When a defendant who pleads guilty or no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get, can the defect be remedied by reducing the sentence to the

maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea?

The court of appeals decided that reduction of the defendant's sentence was not an appropriate remedy when the defendant was misinformed that the maximum penalty was lower than the actual maximum, and that the only available remedy was withdrawal of the defendant's plea. *State v. Timothy L. Finley*, Case No. 2014AP2488-CR, slip op. ¶ 37 (Wis. Ct. App. Sept. 30, 2015) (Pet-Ap. 122).

STATEMENT OF THE CASE

Nature Of The Case

This is an appeal from a judgment and order of the Circuit Court for Brown County, William M. Atkinson, Judge, denying the motion of the defendant-appellant, Timothy L. Finley, Jr., to withdraw his plea to an enhanced charge of felony domestic abuse.

The Wisconsin Court of Appeals, District III, reversed in an opinion that has been published, *State v. Finley*, 2015 WI App 79, 365 Wis. 2d 275, 872 N.W.2d 344, holding that the only remedy when a defendant is erroneously told and believes that the maximum penalty is lower than the maximum actually allowed by law is withdrawal of the defendant's plea, and that the error could not be remedied by reducing the defendant's sentence to the term he was informed and believed he could get.

Facts And Procedure

Finley pleaded no contest to a charge of first-degree recklessly endangering safety with penalty enhancers for being a repeater and for using a dangerous weapon (90:5).

Both Finley's attorney and the circuit court erroneously told him that the maximum penalty that could be imposed on his plea was 19.5 years in prison (63:3; 90:4; 93.2:12, 15).

The stated maximum was four years less than the actual maximum of 23.5 years, derived by adding together 12.5 years for a Class F felony, 6 years for the repeater enhancer and 5 years for the weapon enhancer. *See* Wis. Stats. §§ 939.50(3)(f), 939.62(1)(c), 939.63(1)(b), 941.30(1) (2013-14). Counsel made a mathematical error adding up these numbers (93.2:15) which was repeated by the court.

Finley said he understood that the maximum penalty he faced was 19.5 years (90:4).

Despite the advice that the maximum penalty was 19.5 years, Finley was initially sentenced to the actual maximum of 23.5 years (92:30-31).

Finley filed a postconviction motion asking the circuit court to permit him to withdraw his plea or in the alternative to "commute his sentence to a total of 19.5 years based on the Wisconsin Supreme Court's recent decision in *State v. Gerald D. Taylor*, 2013 WI 34, [347] Wis. 2d [30], [829] N.W.2d [482] (decided April 23, 2013)" (63:1).

When this motion was denied on both alternatives, Finley filed his first appeal in the court of appeals (72).

Finley alternatively argued on his first appeal that he was entitled to reduction of his sentence, but the court of appeals declined to address this argument because it reversed on other grounds. *State v. Timothy L. Finley*, Case No. 2013AP1846-CR, slip op. ¶ 16 n.4 (Wis. Ct. App. Mar. 18, 2014) (Pet-Ap. 133-34). The court held that there was a violation of *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because the record failed to

show that Finley had been advised of the correct maximum penalty. Case No. 2013AP1846-CR, slip op. ¶ 16 (Pet-Ap. 133-34).

Under the procedure established in *Bangert*, the court of appeals reversed the first order denying Finley's motion to withdraw his plea, and remanded the case to the circuit court to give the state an opportunity to prove that, despite the misinformation he received from both his attorney and the court, Finley actually knew that the correct maximum was 23.5 years. Case No. 2013AP1846-CR, slip op. ¶ 16 (Pet-Ap. 133-34).

The state did not seek review of this decision.

The only witness called by the state at the remand hearing was the attorney who represented Finley when he entered his plea. Counsel testified that his usual practice was to advise his clients about the correct maximum penalty, but that he had no specific recollection of advising Finley of the correct maximum (93.2:9, 11). Counsel admitted that the written plea questionnaire stated the wrong maximum penalty, and that he went over the plea questionnaire, with the wrong penalty, with Finley (93.2:12, 15).

On this record, the state failed to meet its burden to prove by clear and convincing evidence that anyone ever told Finley the correct maximum penalty, much less that Finley actually knew the correct maximum penalty when he entered his plea.

Although Finley withdrew his alternative request for reduction of his sentence based on *Taylor*, the prosecutor picked up where Finley left off and urged the court to reduce Finley's sentence based on that case (93.2:23).

The circuit court ruled that Finley was "entitled to have his sentence modified to no more than the amount that was represented to him by the Court and stated on his Plea Questionnaire and Waiver of Rights Form and that was nineteen years and six months" (93.2:23).

The circuit court again denied Finley's motion to withdraw his plea (93.2:24), and Finley appealed again (111).

Decision Of The Court Of Appeals

On Finley's second appeal, the state did not attempt to argue that it had met its burden to prove that Finley knew the correct maximum penalty that could have been imposed. Case No. 2014AP2488-CR, slip op. ¶¶ 21, 23-24, 31, 36 (Pet-Ap. 112, 113-14, 118, 121-22).

Rather, the state argued that "'the question is more pragmatic, i.e., whether the defendant knew that the sentence [that] was *actually imposed* on him, whether the maximum or something less, could have been imposed.'" Case No. 2014AP2488-CR, slip op. ¶ 23 (Pet-Ap. 113). The state contended that when a defendant eventually receives a sentence equal to or less than the maximum sentence he was informed and believed he could get, here 19.5 years, the defendant is not entitled to withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 23 (Pet-Ap. 113).

The court of appeals thought the state's argument was not supported by the decision of this court in *Taylor*, the case that had been relied on at one time or another by both parties below. Case No. 2014AP2488-CR, slip op. ¶¶ 25-27 (Pet-Ap. 114-15).

The court of appeals acknowledged that *Taylor*, citing *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64,

reaffirmed that where the defendant was told that the maximum penalty was higher than the penalty actually authorized by law, the proper remedy may be to commute the defendant's sentence rather than let him withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 28 (Pet-Ap. 115-16).

But the court of appeals said that the situation in this case was not the same as in *Cross* because here the defendant was told that the sentence that could be imposed was lower than the correct maximum. Case No. 2014AP2488-CR, slip op. ¶ 29 (Pet-Ap. 116-17).

The court of appeals said there were at least two related problems with the state's argument that a reduction in the defendant's sentence could overcome, as a matter of due process, the fact that the defendant's plea was not entered knowingly, intelligently and voluntarily because he misunderstood the potential maximum penalty to be less than it really was. Case No. 2014AP2488-CR, slip op. ¶ 32 (Pet-Ap. 118).

The first problem, according to the court of appeals, is that Wis. Stat. § 973.13, which provides that a sentence in excess of the maximum authorized by law is automatically commuted to the legal maximum, does not apply in this case where no sentence in excess of the legal maximum was ever imposed. Case No. 2014AP2488-CR, slip op. ¶ 31 (Pet-Ap. 118).

The court of appeals said that a second and more significant problem with the state's argument was that it conflated *Taylor*'s analysis of whether the defendant's plea was entered knowingly, intelligently and voluntarily with *Taylor's* analysis of whether the defendant was entitled to plea withdrawal on some other basis of manifest injustice. Case No. 2014AP2488-CR, slip op. ¶ 34 (Pet-Ap. 119-20).

In conclusion the court of appeals stated,

> Therefore, because Finley's plea was not entered knowingly, intelligently, and voluntarily, we conclude his plea was entered in violation of his right to due process, which establishes a manifest injustice requiring plea withdrawal. As we read *Taylor* and other supreme court precedent, and given the parties' arguments in this appeal, such a violation is not curable, after the fact, by "commutation" of an otherwise lawful sentence down to the maximum amount of punishment the defendant was incorrectly informed he or she faced at the time of the plea.

Case No. 2014AP2488-CR, slip op. ¶ 37 (Pet-Ap. 122).

The court of appeals reversed the judgment and order of the circuit court, and remanded the case with instructions to grant Finley's motion to withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 37 (Pet-Ap. 122).

ARGUMENT

When a defendant who pleads guilty or no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get, the defect may be remedied by reducing the sentence to the maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea.

The issue on this appeal is not whether Finley knew the correct maximum penalty. The state has acknowledged that he did not. The record shows that Finley was erroneously

informed and believed that the maximum penalty was 19.5 years rather than the actual maximum of 23.5 years.

The single issue presented for decision is whether the only remedy for this error is plea withdrawal, or whether the error can be better remedied by reduction of Finley's sentence to the maximum penalty he was informed and believed he could receive.

This court has held that reduction of the sentence can be an appropriate remedy when the defendant was misinformed that the maximum penalty was higher than it really was. *State v. Taylor*, 2013 WI 34, ¶ 33, 347 Wis. 2d 30, 829 N.W.2d 482; *Cross*, 326 Wis. 2d 492, ¶ 34.

The court has yet to authoritatively decide whether reduction of the sentence can also be an appropriate remedy when the defendant was misinformed that the maximum penalty was lower than it really was. But *Taylor, Cross* and other cases suggest that sentence reduction is an appropriate remedy in both situations.

Taylor, citing *Cross*, repeated the general proposition that a plea that is not entered knowingly, intelligently and voluntarily violates fundamental due process so that the plea may be withdrawn as a matter of right. *Taylor*, 347 Wis. 2d 30, ¶ 25 (citing *Cross*, 326 Wis. 2d 492, ¶ 14).

But *Cross* subsequently quoted a decision of the United States Supreme Court holding that a defendant is not entitled to withdraw his plea simply because he misapprehended the likely penalties attached to alternative courses of action, and it turned out that the maximum penalty then assumed to be applicable was inapplicable. *Cross*, 326 Wis. 2d 492, ¶ 29 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

Cross went on to say, in accord with the great weight of authority from other state and federal courts, that "the failure of the defendant to know and understand the precise maximum . . . is not a per se violation of the defendant's due process rights." *Cross*, 326 Wis. 2d 492, ¶¶ 33, 36. "[A] defendant's due process rights are not necessarily violated when he is incorrectly informed of the maximum potential imprisonment." *Cross*, 326 Wis. 2d 492, ¶ 37.

Taylor repeated that incorrectly informing the defendant of the maximum penalty does not necessarily violate his due process rights, and added that "in some circumstances, a guilty plea will still be knowing, intelligent and voluntary . . . when the defendant is informed of the incorrect maximum sentence." *Taylor*, 347 Wis. 2d 30, ¶ 33 & n.8.

If a defendant's failure to know and understand the correct maximum penalty is not a per se violation of the defendant's due process rights, then withdrawal of his plea is not a per se remedy for the entry of his plea without such knowledge.

Indeed, when a defendant appeals an order refusing to allow him to withdraw his plea, the issue is not whether the plea should have been accepted but whether, long after the plea was accepted, the defendant should be permitted to withdraw it. *State v. Thomas*, 2000 WI 13, ¶ 23, 232 Wis. 2d 714, 605 N.W.2d 836; *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988); *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). Thus, the relevant inquiry includes not just whether there was a violation of some rule or right when the defendant entered his plea, but also what should be done to correct any violation.

Proportionality between a wrong and its remedy is an essential concept of justice. *Stone v. Powell*, 428 U.S. 465, 490

(1976). Therefore, remedies should be tailored to the injury they try to right without unnecessarily infringing on competing interests. *State v. Anderson*, 2006 WI 77, ¶ 75, 291 Wis. 2d 673, 717 N.W.2d 74, *modified on other grounds State v. Alexander*, 2013 WI 70, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126; *State v. Webb*, 160 Wis. 2d 622, 630, 467 N.W.2d 108 (1991); *Bubolz v. Dane County*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990); *State v. Monje*, 109 Wis. 2d 138, 147, 325 N.W.2d 695 (1982); *Kutchera v. State*, 69 Wis. 2d 534, 542-43, 230 N.W.2d 750 (1975).

In the circumstances presented in this case, the injury is entering a plea mistakenly believing that the maximum sentence was less than the actual maximum to which the defendant could be sentenced. The competing consideration is the interest of the state, the victim and the witnesses in the finality of criminal convictions, without having to litigate the defendant's guilt at a trial necessitated long after the crime was committed and the issue of the defendant's guilt was apparently resolved. *Taylor*, 347 Wis. 2d 30, ¶ 48.

The defendant's injury because of this misinformation can be effectively corrected without infringing on the state's interest in finality by reducing a sentence that is higher than the defendant thought he could get to a sentence that is in accord with the penalty the defendant was informed and believed he could receive when he entered his plea.

Reducing the defendant's sentence in this way effectively corrects the misinformation he received and the misunderstanding he had when he entered his plea.

The purpose of informing the defendant of the maximum penalty is to assist him in making an intelligent decision whether to plead guilty. A defendant who is contemplating a plea must decide whether he is willing to put himself in a position where he could end up having to spend as much time

in jail as the maximum amount of time he is told he could have to spend there.

A plea entered with a mistaken belief that the maximum penalty is less than it really is is no less knowing than a plea entered with knowledge of the correct maximum penalty when the lesser incorrect maximum is imposed. In both cases, a maximum penalty is stated, the defendant agrees to plead knowing he could get the stated penalty, and he gets the penalty he knew he could get when he entered his plea.

A defendant who is sentenced to the maximum penalty he is told, regardless of whether it is the correct maximum or not, knew he was taking a risk that he could be sentenced to that much time behind bars. The defendant knew when he decided to enter his plea that he could be sentenced to the very sentence he actually receives.

A defendant who is told when he enters his plea that the maximum penalty is 19.5 years, and who is sentenced to 19.5 years, cannot complain that he was blindsided by getting a sentence he did not know and anticipate he could get. *See State v. Denk*, 2008 WI 130, ¶¶ 78, 80, 316 Wis. 2d 5, 758 N.W.2d 775 (a defendant is not entitled to withdraw his plea when he receives the benefit of his plea bargain at sentencing).

Under these circumstances, the failure to inform the defendant that he could potentially get a greater sentence than the one he actually gets is inconsequential under either the harmless error or manifest injustice standards.

A defendant's failure to know the precise maximum is harmless if it does not affect his substantial rights. *Cross*, 326 Wis. 2d 492, ¶ 36. *See State v. Denson*, 2011 WI 70, ¶ 69 n.13, 335 Wis. 2d 681, 799 N.W.2d 831 (the harmless error rule prohibits

reversal for even constitutional errors not affecting a party's substantial rights).

The defendant's failure to know the correct maximum penalty is a harmless insubstantial defect when he did not get that penalty, or any other penalty greater than the sentence he was told he could receive. *Taylor*, 347 Wis. 2d 30, ¶¶ 34, 41, 52; *State v. Brown*, 2006 WI 100, ¶ 78, 293 Wis. 2d 594, 716 N.W.2d 906. In the end there would simply be a hypothetical risk that never materialized. What the defendant did not know did not hurt him.

Withdrawal of a plea may be necessary to correct a manifest injustice if the defendant proves that his plea was entered "'without knowledge . . . that the sentence actually imposed could be imposed.'" *State v. Reppin*, 35 Wis. 2d 377, 385 n.2, 151 N.W.2d 9 (1967) (quoting tentative ABA Standard 2.1(a)(ii)(3)). *Accord, e.g., State v. Rock*, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979); *Ernst v. State*, 43 Wis. 2d 661, 666, 170 N.W.2d 713 (1969), *modified in part on other grounds, Bangert*, 131 Wis. 2d at 260.

If "the defendant's sentence does not exceed that stated as possible by the judge, there is no manifest injustice." III American Bar Association Standards for Criminal Justice, Pleas of Guilty, commentary to present Standard 14-2.1(b)(ii)(C) at p.14-57 (2d ed. 1986 supp.).[1]

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[1] When a defendant attempts to withdraw his plea, the manifest injustice test rather than the harmless error test applies. *Taylor*, 347 Wis. 2d 30, ¶ 43.

The important practical difference in the two tests is the allocation of the burden of proof. The burden of proving harmless error, i.e., lack of prejudice, is on the state. *State v. Harvey*, 2002 WI

Courts in other jurisdictions have agreed.

Stating the rule, the court held in *Commonwealth v. Barbosa*, 2003 PA Super 77, 819 A.2d 81, that "if a defendant enters an open guilty plea and justifiably believes that the maximum sentence is less than what he could receive by law, he may not be permitted to withdraw the plea unless he receives a sentence greater than what he was told." *Barbosa*, 819 A.2d 81, ¶ 5.

Spelling out the justification for this rule, the court said in *Cole v. State*, 850 S.W.2d 406 (Mo. Ct. App. 1993), that where the sentence conforms to precisely what the defendant understood to be the maximum sentence to which he exposed himself by his plea, the defendant understood the consequences of his plea. *Cole*, 850 S.W.2d at 409-10 (citing *United States v. Rodrigue*, 545 F.2d 75 (8th Cir. 1976); *Bell v. United States*, 521 F.2d 713 (4th Cir. 1975); *United States v. Sheppard*, 588 F.2d 917 (4th Cir. 1978)). *See also United States v. Iaquinta*, 719 F.2d 83, 85 n.4 (4th Cir. 1983); *Bachner v. United States*, 517 F.2d 589, 597 (7th Cir. 1975); *United States v. Aviles*, 405 F. Supp. 1374, 1380-82 (S.D. N.Y. 1975); *Vanzandt v. State*, 212 S.W.3d 228, 235-36 (Mo. Ct. App. 2007) (reaffirming rule in *Cole*).

93, ¶ 40, 254 Wis. 2d 442, 647 N.W.2d 189. The defendant has the burden to show manifest injustice. *State v. Dawson*, 2004 WI App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12; *Thomas*, 232 Wis. 2d 714, ¶ 16.

To show manifest injustice the defendant must show there is a serious flaw in the fundamental integrity of his plea. *Dawson*, 276 Wis. 2d 418, ¶ 6; *Thomas*, 232 Wis. 2d 714, ¶ 16. This is conceptually the same as showing there was some error that adversely affected his substantial rights, i.e., that the error was prejudicial and not harmless.

This is simply common sense. When the defendant knows when he enters the plea that he could get the sentence he ultimately gets, the defendant knowingly takes the risk that by pleading guilty or no contest he could get that very same sentence.

If the defendant enters a plea believing he could get no more than a particular sentence, and he initially gets a greater sentence, but his sentence is ultimately reduced to a penalty that is no more than the one he was told and believed he could get, he assumes the same position as a defendant who is sentenced in the first instance to the lesser maximum he is told and believes he could get. He is not permanently injured when the failure to advise him of the correct maximum penalty is corrected by reducing his sentence in accord with his expectations. *See Taylor*, 347 Wis. 2d 30, ¶¶ 41, 52; *Brown*, 293 Wis. 2d 594, ¶ 78.

In the ordinary case, there is no sound reason to correct a defect in the information a defendant was provided about the maximum sentence by allowing him to withdraw his plea rather than by reducing his sentence to one he was informed and believed he could receive. Plea withdrawal in this situation is simply a windfall that is disproportionate to the problem.

Withdrawing a plea is not necessary to correct misinformation when the incorrect information is subsequently treated as though it was the correct information and the defendant is sentenced on the basis of the information he thought was correct.

"We told you what you could get and you are now getting what we told you" equitably solves the problem for all concerned. By reducing his sentence to one the defendant was informed and believed he could receive the defendant is fully

restored to the same position he believed he was in when he entered his plea.

Indeed, reduction of the sentence is a more generous remedy for a defendant who is misinformed that the maximum penalty is lower than it actually is than for a defendant, like Cross, who was misinformed that the maximum penalty was higher than it really was. A defendant who is misinformed that the maximum penalty is higher than it actually is has his sentence reduced to the actual maximum penalty. *Cross*, 326 Wis. 2d 492, ¶ 34. But a defendant who is misinformed that the maximum penalty is lower than it actually is has his sentence reduced to a term below the actual maximum.

By reducing the defendant's sentence, the defendant benefits from the court's error in failing to correctly advise him of the higher maximum penalty by having his sentence capped at a term of imprisonment that is less than he could have received if he had been advised correctly, and less than the court originally thought was appropriate. In effect, the de facto maximum becomes the lesser penalty stated by the court instead of the greater penalty stated by the law.

If sentence reduction is a proper remedy when a misinformed defendant's sentence is reduced to the actual maximum penalty, it is certainly a proper remedy when a misinformed defendant's sentence is reduced to a term that is less than the actual maximum.

Another benefit of sentence reduction rather than plea withdrawal as a remedy is that it prevents a defendant from taking advantage of the misinformation to get rid of a substantial sentence when the real problem is not his plea but the long sentence he knew could be imposed but was hoping would not be. *See Taylor*, 347 Wis. 2d 30, ¶ 49.

So withdrawal of a plea is not required as the remedy if a court provides an adequate alternative remedy, fair to both the defendant and the state, by reducing the defendant's sentence to one that does not exceed the sentence he was told he could get and believed he could get when he pleaded. *United States v. Lewis*, 875 F.2d 444, 445 (5th Cir. 1989); *Sheppard*, 588 F.2d at 918.

The state does not mean to suggest that reduction of the defendant's sentence is the only remedy when the defendant is misinformed of the correct maximum penalty. In an exceptional case there may be a manifest injustice that requires withdrawal of the plea. *See Taylor*, 347 Wis. 2d 30, ¶ 25; *Cross*, 326 Wis. 2d 492, ¶ 14. But in the ordinary case reduction of the sentence is the less drastic and therefore preferred remedy. *See State v. Harris*, 2008 WI 15, ¶ 96 n.47, 307 Wis. 2d 555, 745 N.W.2d 397 (the less drastic remedy is favored).

This is not an exceptional case that calls for withdrawal of Finley's plea. Indeed, Finley's original position was that his misunderstanding of the correct maximum sentence could be remedied by reducing his sentence to the one he was told and believed he could receive.

There is no fundamental flaw in the integrity of Finley's plea. There is no manifest injustice in holding Finley to his plea. There is no reason to allow him to withdraw it when the defect in taking that plea has been adequately remedied by reducing his sentence to the sentence he knew he could get and was willing to accept when he entered his plea.

In this case, the court of appeals erred by holding that the only remedy that can correct a manifest injustice caused when the defendant is misinformed that the maximum potential penalty is less than the statutory maximum is plea withdrawal. The problem is adequately corrected by reducing the defendant's sentence to the maximum he was informed and

believed he could receive. This remedy serves the interests of both the defendant and the state in the unfortunate situation where the plea information is incorrect.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals should be reversed, and the judgment and order of the circuit court should be reinstated and affirmed.

Dated: February 10, 2016.

BRAD D. SCHIMEL
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
State Bar #1009785

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523 (Phone)
(608) 266-9594 (Fax)
balistreritj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,469 words.

Dated this 10th day of February, 2016.

_____

Thomas J. Balistreri
Assistant Attorney General

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 10th day of February, 2016.

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Thomas J. Balistreri
Assistant Attorney General