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**STATE OF WISCONSIN,**

**Appeal Case No.: 2015-AP-2062 -CR**

Plaintiff-Respondent,

**v.**

**BRANDON E. JORDAN,**

Defendant-Appellant.

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**BRIEF OF DEFENDANT-APPELLANT  
BRANDON E. JORDAN**

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Appeal from Dane County Circuit Court, Branch 16, the Honorable  
Rhonda Lanford , Circuit Judge, Case No. 2012-CM-2861.

Respectfully submitted by:

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW AND  
STANDARD OF REVIEW**

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether defendant was returned to court for sentencing improperly because he was wrongly terminated from the Deferred Prosecution program in violation of his contractual and due process rights. **The trial court ruled that there were no contract or due process violations.**
2. Whether, because there was no factual basis for the plea, the failure to allow withdraw of defendant's guilty plea was erroneous. **The trial court ruled that defendant should not be allowed to withdraw his guilty plea.**

**STANDARD OF REVIEW**

The defendant's claim that he was terminated from his contract in violation of the deferred prosecution agreement's contractual provisions requires determination and interpretation of the terms of the contract. The standard of review regarding interpretation of the contract is de novo. *"The interpretation of a written contract is a question of law subject to de novo review."* State v. Toliver, 187 Wis.2d 346, 355, 523 N.W.2d 113 (Ct.App.1994).

Facts applicable to the determination would be reviewed under a deferential, clearly erroneous standard.

Like determinations of issues of contested search and seizures, the standard of review regarding the defendant's claim of termination from the deferred prosecution program in violation of his constitutional rights presents a question of constitutional fact that is reviewed under a two-step process.

*"A question of constitutional fact presents a mixed question of fact and law reviewed with a two-step process. Martwick, 231 Wis.2d 801, 604 N.W.2d 552, 2000 WI 5 at ¶ 16; State v. Phillips, 218 Wis.2d 180, 189, 577 N.W.2d 794 (1998). First, an appellate court reviews the circuit court's findings of historical fact under the clearly erroneous standard. Martwick, 231 Wis.2d 801, 604 N.W.2d 552, 2000 WI 5 at ¶ 18. Second, an appellate court reviews the circuit court's determination of constitutional fact de novo. Id." State v. Hajicek, 2001 WI 3, ¶15, 240 Wis. 2d 349, 358, 620 N.W.2d 781, 785.*

*"When presented with a question of constitutional fact, this court engages in a two-step inquiry." State v. Robinson, 2010 WI 80, ¶ 22, 327 Wis.2d 302, 786 N.W.2d 463 (citations omitted). "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous." Id. (citations omitted). "Second, we independently apply constitutional principles to those facts." Id. (citations omitted)." State v. Cummings, 2014 WI 88, ¶ 44, 357 Wis. 2d 1, 20-21, 850 N.W.2d 915, 924*

The trial court's decision denying Brandon Jordan's motion to withdraw his guilty plea is reviewed on the erroneous exercise of discretion standard. *"A court's decision to allow withdrawal of a guilty plea is a matter of discretion, subject to the erroneous exercise of discretion standard on review." State ex rel. Warren v. Schwarz, 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998).*

However, the cases indicate that if a factual basis for the plea is absent, there is a manifest injustice as a matter of law.

*“Therefore, if a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred. Id. (citing Morones v. State, 61 Wis.2d 544, 552, 213 N.W.2d 31 (1973)). (internal quotes omitted.) State v. Thomas, 2000 WI 13, ¶17, 232 Wis. 2d 714, 727, 605 N.W.2d 836, 843.*

Although this issue is stated to be reviewed on the basis of erroneous exercise of discretion, it appears to be a matter of law regarding whether there was a sufficient factual basis, and then if the trial court is incorrect on the issue, the trial court is committing an error of law, from which it follows the exercise of discretion was erroneous. *“A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision on facts in the record.” Lemere v. Lemere, 2003 WI 67, ¶ 14, 262 Wis. 2d 426, 436, 663 N.W.2d 789, 793; citing King v. King, 224 Wis.2d 235, 251, 590 N.W.2d 480 (1999).*

#### **STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION**

There is no need for oral argument in this case. The appeal may be decided on the record and briefs.

The decision of the court should be published because the law on defendant's rights under deferred prosecution agreements should be

clarified to make it clear that defendants have contractual rights and due-process rights regarding their interest in enforcement of the provisions of deferred prosecution agreements.

### **STATEMENT OF THE CASE**

In Dane County Case Number 2012-CM-2861, Defendant Brandon E. Jordan (hereinafter “Jordan”, “Brandon” or “Defendant”) was charged with a violation of Wis. Stat. §813.125(7), “Violation of Harassment Restraining Order”. The complaint alleged that on November 25<sup>th</sup>, 2012, Brandon Jordan violated an harassment restraining order that had been issued in Dane County Case No. 2009-CV-352, directing him to not to have contact with Jennifer Hamill and to avoid her residence and premises temporarily occupied by her (Record Item 1, Appendix p. 3-5 ).

The complaint alleged that Brandon Jordan violated the injunction by having contact with Jennifer Hamill at a bar in Madison. On April 26<sup>th</sup>, 2013, Jordan pled guilty to the charge as part of an agreement for entry into the Dane County District Attorney’s Deferred Prosecution Program (R18). The facts are disputed about the circumstances involving Mr. Jordan’s termination from the program. It appears that the State contends the deferred prosecution agreement was revoked as early as July 2<sup>nd</sup>, 2014. However it is undisputed that on July 17<sup>th</sup>, 2014, Brandon Jordan was



referred for continuation in the deferred prosecution program and the terms of his signature bond were modified as part of the reinstitution process (R25, 26). Subsequently on or about January 2<sup>nd</sup>, 2015, the District Attorney's office again terminated Mr. Jordan from participation in the program (R29, Ap. 8).

As a result of the communication from the Deferred Prosecution program, the Court scheduled the matter for adjudication and sentencing on February 18<sup>th</sup>, 2015 (R33). Mr. Jordan objected to the court proceeding to sentencing. The court delayed the sentencing and allowed Jordan to raise his objection by written motions, which motions were filed on March 11<sup>th</sup>, 2015, to raise the issue that he was being improperly terminated from the deferred prosecution program in violation of his contractual and constitutional rights. (R34-39). The court denied the defendant's motions and proceeded to sentencing on April 21<sup>st</sup>, 2015 (R42 and R59, Transcript of Proceeding). The defendant filed timely post-conviction motions which were heard and denied by the Court (R60, Transcript of 9.11.15 hearing), by an order dated September 29<sup>th</sup>, 2015 (R56, Ap.2). The defendant moved to be allowed to withdrawal his guilty plea because there was no factual

basis for the plea. The defendant timely appealed from his conviction and denial of his post-conviction motions (R57).

### **STATEMENT OF THE FACTS**

1. It is undisputed that Brandon Jordan pled guilty to the charge of violation of an harassment restraining order, contrary to Wis. Stat. §813.125(7), as part of a plea agreement that adjudication would be withheld and he would be referred to the Dane County District Attorney's Deferred Prosecution program. (R18-19).
2. It is undisputed that the program and the contract signed by Jordan contained due process rights for him in the event termination of his participation was sought by the program workers or the Director, including the right to have the dispute reviewed by the District Attorney, prior to termination of the defendant's participation in the program. (Ex. A of R39, Ap. 10-11).
3. It is undisputed that termination from the program results in return to court for adjudication of guilt, entry of conviction, and sentencing.

4. The only time Brandon Jordan was afforded part of the due process rights under the Deferred Prosecution Agreement (hereinafter also "DPA") was when he received a warning letter.
5. The warning letter was resolved by a contract extension from the original termination date of March 12, 2014 to September 12, 2014 (R21, Ap. 9).
6. The Deferred Prosecution unit purported to terminate Brandon Jordan from the program by a letter to the court dated June 27, 2014, and filed with the court on July 2, 2014 (R22, Ap. 6-7).
7. Brandon Jordan was not afforded his due process rights prior to the purported termination.
8. Jordan timely asserted his rights to enforcement of the contractual provisions of the DPA prior to sentencing.
9. There were defects in the plea colloquy because no factual basis for the conviction was established. (Complaint, R1, Appendix A3-5)
10. There could be no factual basis for the conviction because no crime had been committed.

## **ARGUMENT**

**A. THE TERMINATION FROM THE DEFERRED PROSECUTION PROGRAM VIOLATED THE CONTRACTUAL PROVISIONS OF THE**

## AGREEMENT AND BRANDON JORDAN'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

The deferred prosecution agreement is a contract between the defendant and the District Attorney. The contract creates an obligation on the defendant to perform according to its terms to have the benefit of the contractual bargain. As a contract, the defendant is also entitled to the benefits of all contract provisions. See *State v. Kaczmariski*, 2009 WI App 117, ¶10, 320 Wis. 2d 811, 820, 772 N.W.2d 702, 707, as follows:

*"Both the State and Kaczmariski agree that the deferred prosecution agreement is analogous to a contract and therefore we draw upon principles of contract law in determining the respective rights of the parties to the agreement. See State v. Roou, 2007 WI App 193, ¶ 25, 305 Wis.2d 164, 738 N.W.2d 173, (applying contract-law principles in the context of a plea agreement)." State v. Kaczmariski, 2009 WI App 117, ¶10, 320 Wis. 2d 811, 820, 772 N.W.2d 702, 707.*

The agreement provides specifically:

*"If you sign a contract and fail to follow through with the agreed upon conditions, the following procedures will be followed by this program: (1) You will be sent a warning letter by your assigned counselor, which will outline your non-compliance. This letter will ask you to appear for a case review appointment. If the conflict is resolved, you will receive a letter summarizing the issues discussed and the agreed upon steps which will be taken to complete the contract within the program." (Ex. A of R39, Ap. 10-11 )*

Because there were initial missteps in Brandon's performance of his obligations under the program, he was sent a warning letter on August 2013, in compliance with the provisions of the DPA cited above. All issues regarding the claims of non-performance were resolved by the contract

extension, extending the time of the DPA through September 12, 2014. The contract extension provided that he had until September 12, 2014 to complete the treatment recommended. (R21, Ap. 9).

Nothing in the record shows any further due process or compliance with the contractually required grievance procedures before the Deferred Prosecution Director's letter to the court dated June 27, 2014 (R22, Ap. 6-7) stating Jordan was terminated from the program and returned to court for adjudication and sentencing. He was not given a new warning letter from his assigned counselor, so he did not have an opportunity to appear before the counselor to resolve the issues, as he had done previously, and as is required under the DPA. Thus he was also not afforded the two additional steps provided for under the DPA, had he not been able to resolve the non-compliance issues directly with his counselor.

The step the program skipped, the warning letter, would have resulted in another in-person meeting where issues could have been resolved, or a "pending termination" letter would have been issued that would have allowed an appeal to the Director of the Deferred Prosecution Unit. (Ex. A of R39, Ap. 10-11). The importance of this step in the grievance procedure cannot be overstated or gainsaid. Significantly the procedure

states, that upon appeal to the Director, *"Again, every attempt will be made to resolve this issue with you at this meeting."* It cannot be denied that the right to attempt to resolve non-compliance issues in a meeting with the Director of the program is a significant contractual and due process right.

Had the appeal to the Director not been successful, the last step in the grievance procedure is an appeal to the elected District Attorney himself. The procedure provides for a written response from the District Attorney.

None of these steps were provided to Brandon Jordan, and the District Attorney has never alleged they were. Rather the State relies on the chronology stated in the State's brief to the trial court, (R40, pages 1-3). The trial court adopted the chronology as its findings at the hearing on April 21, 2015 (Transcript, R59, page 5, line 18 through page 6, line 6.)

Jordan was ordered to appear in court on July 17, 2014, when the court scheduled the matter for adjudication and sentencing in response to the Deferred Prosecution program's letter of June 27, 2014. The issues were resolved by an agreement that Mr. Jordan continue in the program or at least work on achieving re-entry into the program. As a result, there was

no need to raise contractual or constitutional issues before the court at that time.

In fact there was no actual hearing before the court (R25). The matter was adjourned by agreement of the parties to attempt to resolve the alleged non-compliance issues. It was only when that process was terminated by a letter from the Deferred Prosecution program dated December 30, 2014, and the matter actually came before the court for adjudication and sentencing, that it became necessary to raise the issues that the defense contended prevented the court from proceeding to sentencing. Significantly the account of the District Attorney of the chronology shows that Brandon was told that he had to provide information to the program by November 21, 2014, and he in fact hand-delivered information in response to that request on that very date.

In any event, there is nothing in the record that establishes the defendant was given the benefit of the contractual provisions stated in the grievance procedure. Thus his contractual and substantive due process rights were clearly violated. The remedy is clearly either a referral to the program for completion, with directions that the due process and

contractually rights be strictly enforced for any purported termination, or the charges should be vacated and dismissed with prejudice.

*"The interpretation of a written contract is a question of law subject to de novo review. State v. Toliver, 187 Wis.2d 346, 355, 523 N.W.2d 113 (Ct.App.1994). "[W]hen terms of a contract are plain and unambiguous, we will construe the contract as it stands." Id. We construe ambiguous language in a contract against the drafter. Walters v. National Props., LLC, 2005 WI 87, ¶ 14, 282 Wis.2d 176, 699 N.W.2d 71." State v. Kaczmariski, 2009 WI App 117, ¶ 10, 320 Wis. 2d 811, 820, 772 N.W.2d 702, 707.*

It is not a mere contractual right that is at issue here, it is the defendant's constitutional right to due process. Once Brandon Jordan gave up his constitutional right to contest the charges, in return for entry into the Deferred Prosecution program, it is fundamentally unfair to not provide the process that was due under the agreement.

There can be no question that such process was not provided. Nor can it be reasonably contended that there was a waiver. The attempt to resolve the program's claimed issues of non-performance by agreement in no way waives the right to have the process provided for, in the event the informal attempts to resolve the issues broke down, as they did here. It ended up being the State's position that Brandon Jordan was terminated from the program by the letter dated June 27, 2014, and filed with the court July 2, 2014. (R22, Ap. 6-7). There is no question that the due process rights afforded under the contract were not provided prior to the termination.



The letter itself shows that a warning letter was issued on August 8, 2013. But that was the only step of the due process procedure that was followed. The record is clear, as also recited in the letter, that those issues were resolved by the six month contract extension, which extended the time for compliance until September 12, 2014.

Therefore the only reasonable interpretation of the contract was that, if termination were to be attempted, that there would have to be a new warning letter, from which all the further due process rights of the grievance procedure would emanate. Nowhere in the contract does it state that the director can unilaterally terminate a defendant by a letter to the court, as was done here on June 27, 2014, totally side-stepping all due process requirements of the program.

Most important, there was never a chance to present the issues to the elected District Attorney; who has complete independence as a constitutional officer to weigh the issues of the defendant's alleged non-compliance against the defendant's explanation and continued sincere desire to remain in the program and avoid a criminal conviction.

The trial court was clearly erroneous when it held that the defendant received his due process rights. Transcript of April 11 court hearing, R59,

page 8. *State v. Scott*, 230 Wis. 2d 643, 651-52, 602 N.W.2d 296, 300 (Ct. App. 1999) makes it clear that when the defendant has waived his right to trial based on an agreement with the District Attorney, he is entitled to have that agreement enforced. As he was terminated from the program in June 2014 without the process that was specified under the agreement, and was never re-admitted, he was denied his due process rights in violation of his constitutional rights. What happened was fundamentally unfair and illegal. Justice will have miscarried in this case unless this court vacates his conviction.

*"Principles of substantive due process are implicated by and inherent in the process of enforcing a plea agreement. See State v. Wills, 187 Wis.2d 529, 537, 523 N.W.2d 569, 572 (Ct.App.1994), aff'd, 193 Wis.2d 273, 533 N.W.2d 165 (1995); see also State v. Rivest, 106 Wis.2d 406, 413, 316 N.W.2d 395, 399 (1982). 'Although a defendant has no right to call upon the prosecution to perform while the [plea] agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled.' Wills, 187 Wis.2d at 537, 523 N.W.2d at 572 (quoted source omitted). Substantive due process is equated with the concept of fundamental fairness. See Aldens, Inc. v. LaFollette, 552 F.2d 745, 750 (7th Cir.1977). Inevitably, substantive due process impels enforcement of plea agreements where the defendant has entered a plea of guilty or no contest." State v. Scott, 230 Wis. 2d 643, 651-52, 602 N.W.2d 296, 300 (Ct. App. 1999).*

**B. THERE WAS NO FACTUAL BASIS FOR THE CHARGE AND THE FAILURE TO ALLOW BRANDON JORDAN TO WITHDRAW HIS GUILTY PLEA RESULTED IN A MANIFEST INJUSTICE.**

Upon return to court for sentencing, over his clearly articulated and correct objection that he was denied due process and contractual rights by being terminated from the Deferred Prosecution program, without a warning letter to initiate the termination process in accord with the contract provisions, Brandon Jordan was convicted and sentenced. He timely moved to be allowed to withdraw his plea.

His plea was not based on any factual foundation, as no crime had been committed. He should have been allowed to withdraw his plea. It is a manifest injustice that must be reversed. It is manifestly unjust to be convicted of a crime that was never committed, and for which no factual basis ever existed.

Many Wisconsin cases have held that it is manifestly unjust for a defendant to be convicted of a crime when there is no factual basis for the crime, even if the defendant erroneously stipulates that there is a factual basis at the time of entry of a guilty or no contest plea.

*“Establishment of a factual basis for a plea to the charged crime is separate and distinct from the requirement that the voluntariness of the plea be established to the trial court's satisfaction. White v. State, 85 Wis.2d 485, 491, 271 N.W.2d 97, 99 (1978). In addition to establishing that the plea is voluntarily and understandingly entered, the trial court must, before accepting it, ‘personally determine that the conduct which the defendant admits constitutes the offense ... to which the defendant has pleaded guilty.’ Broadie v. State, 68 Wis.2d 420, 423, 228 N.W.2d 687, 689 (1975). And the ‘failure of the trial court to establish a factual basis showing that the conduct which the defendant admits constitutes the offense ... to which the defendant pleads, is evidence that a manifest injustice*

*has occurred,' warranting withdrawal of the plea. White, 85 Wis.2d at 488, 271 N.W.2d at 98." State v. Harrington, 181 Wis. 2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994).*

The trial court did not in fact establish that the defendant admitted conduct that constituted the offense, or that conduct constituting the offense occurred. The Court asked counsel if the court could use the complaint as a factual basis for the plea. Counsel agreed (R58, p.7). Crucially, the Court did not review the facts, neither with counsel nor with defendant, and did not establish that the facts stated in the complaint constituted the offense. All the court established with Brandon Jordan was that he admitted that the facts stated in the complaint were true (R58, p.7), not that the admitted facts constituted the crime charged. Wisconsin law makes it clear that under the circumstances described here, the resulting conviction creates a manifest injustice, which allows the defendant to withdraw his guilty plea.

In *White v. State*, *supra*, the defendant pled guilty to a felony theft charge, which charge required proof that the value of the item stolen be over a certain amount. As there was no proof that the item had the requisite value, the Court held there was no establishment of a factual

basis for the plea, found that there was a “*manifest injustice*”, and the felony conviction could not stand.

The Court of Appeals in *Harrington*, *supra*, rejected the contention that the defendant’s counsel’s stipulation as to the factual basis for the plea should be conclusive of the issue. *Harrington*, *supra*, at 988-989. Because there were no facts to support the element of value necessary to sustain the plea, the Court held that the trial court’s conclusion that the facts supported the charge to which the defendant pled was clearly erroneous. Further, following *White*, the Court held that the lack of a factual basis made it manifestly unjust to allow the conviction.<sup>1</sup>

Application of the principles discussed in the federal case of *Wagner v. Washington Cnty.*, 493 F.3d 833, (7th Cir. 2007), illustrates the manifest injustice that would persist if Brandon Jordan’s conviction were not reversed and his guilty plea not vacated. The case illustrates how the conduct alleged in this case did not constitute the crime charged.

In *Wagner*, the Metzgers had a harassment injunction against Wagner, with essentially the same terms as the one Jennifer Hamill had against Brandon Jordan. The requirement was to avoid the other parties’

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<sup>1</sup> Because both *White* and *Harrington*, involved cases where the facts did not support the felony offense to which they had pled guilty, but did support the misdemeanor level of the same charge, their cases were remanded for conviction of the misdemeanors and sentencing. The difference here is that no crime was established, so the remedy is to reverse and remand to allow the withdrawal of the guilty plea.

residence and any premises “temporarily occupied” by the other party. The federal court, in resolving the question of whether deputies had probable cause to arrest Wagner for a violation of the injunction, when he had been at a public meeting *prior* to the Metzgers’ arrival to attend the same meeting, held that the Metzgers could not use the injunction to harass Wagner, noting the necessary construction of the prohibitions of the injunction.

The 7<sup>th</sup> Circuit Court of Appeals noted, *ibid* at 837, that given a contrary interpretation,

*“The possibilities for the Metzgers to use the injunction to harass Wagner would be limitless; the Metzgers could follow Wagner around town and force him to leave stores, restaurants, movie theaters, hospitals, et cetera. The district court, by selectively quoting the language of the harassment injunctions, overstated the command of those court orders. The orders do not prohibit Wagner from “being on” any premises occupied by the Metzgers; rather, the orders command that he avoid such premises.”*

The facts alleged in the instant complaint (R1, Ap. 3-5) are of the same cloth. Brandon Jordan was at a bar in downtown Madison, and Jennifer Hamill came to the bar after he was there. She called the police upon seeing him, and using her injunction as a sword, not as its intended shield, had Brandon Jordan arrested. Not only was there no crime, there was not even probable cause for the arrest. *Wagner*, *id*.

This is where the defective plea colloquy aids in the analysis. There was no on the record discussion of the elements of the alleged crime with Brandon at the time of the entry of his guilty plea. Had there been, it probably would have become obvious that the facts alleged did not constitute the crime charged. Per WIS JI-CRIMINAL 2040, (Ap. 12-16) the crime of violating a harassment injunction has three elements, the third containing compound requirements. The first element is that the injunction was issued. There is no dispute that the first element was satisfied.

The second element is that the defendant committed an act that violated the terms of the injunction. As shown above, the actions of Brandon Jordan on the night in question did not violate the injunction. The injunction did not require him to leave the bar upon the arrival of Jennifer Hamill. The third element requires both that the defendant knew the injunction had been issued and that he knew that his acts violated its terms. Obviously he could not know that his acts violated the terms of the injunction, because they didn't.

Had these elements been discussed on the record with Brandon, it is doubtful that he would have continued with his decision to plead guilty, because it would have become obvious that the State could not prove the

offense charged. Since the colloquy was defective by this omission, the plea ended up being entered when there was no factual basis for the conviction. Under such circumstances, there is no factual basis for the plea, and Brandon Jordan is entitled to withdraw the plea to avoid “manifest injustice.”<sup>2</sup>

Although there is no one required procedure to determine that a factual basis for the crime exists, and that the defendant knowingly pleads guilty with an awareness of the elements and how his conduct actually violated the law, it is clear that the plea in this case did not meet the required standards. The following quote from *State v. Thomas*, 2000 WI 13, ¶ 22, 232 Wis. 2d 714, 729-30, 605 N.W.2d 836, 844, makes it clear that the factual basis must indeed be established. Simply stated, the conduct to which the defendant admits must constitute a crime, or there is none, and any plea thereby entered must be allowed to be withdrawn.

*“Similarly, Wis. Stat. § 971.08(b), Wisconsin's codification of Rule 11(f), does not specifically require a defendant to articulate personally the factual basis presented. Section 971.08 states that a court must “[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged.” The phrase,*

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<sup>2</sup> It is important to note that the claimed right to withdraw a guilty plea based on the lack of a factual basis is a separate and distinct claim from the claim of the right to withdraw a guilty plea because it was not made freely, knowingly, and voluntarily. The latter claim was made by the defendant at the trial court level, but the adverse determination on that issue is not being appealed. Although the two bases for plea withdrawal are clearly interrelated, they are separate and distinct. It appears the trial court conflated the two issues (R60, p. 44).



*"such inquiry," indicates that 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."* (emphasis added).

### **CONCLUSION AND RELIEF REQUESTED**

Brandon Jordan pled guilty to a crime he did not commit. In return for his guilty plea, upon agreement with the District Attorney, the parties requested the court to withhold adjudication and refer Brandon to the Deferred Prosecution program. The Court did withhold adjudication and Brandon was referred to the program.

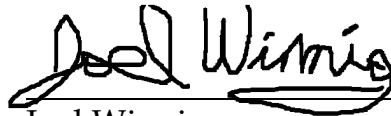
Issues arose regarding compliance with the program requirements and Brandon was issued a warning letter. He resolved the issues by agreeing to a contract extension. Almost immediately after the extension was agreed upon, the program unilaterally terminated him by sending a letter to the court in June 2014, stating that he had been terminated. Brandon was not given the benefit of the contractually agreed provisions prior to termination. On both a contractual and due process basis, he was entitled to a grievance procedure that was not provided. Wisconsin law holds that he is entitled to the benefit of his bargain. He gave up his constitutional right to contest the charge by agreeing to a deferred

prosecution disposition. He is constitutionally entitled to enforcement of his agreement. He should not have been returned to court for sentencing.

In addition, as a separate and distinct ground for relief, the plea was defective because there was no factual basis for the conviction. Without a factual basis, the conviction is a manifest injustice. The complaint did not allege a crime.

The conviction in this case must be reversed and the case remanded with an order that Brandon Jordan be allowed to withdraw his guilty plea, or in the alternative, that he be re-admitted to the Deferred Prosecution program, where upon completion, the charges would be dismissed.

Respectfully submitted this 8<sup>th</sup> day of April, 2016

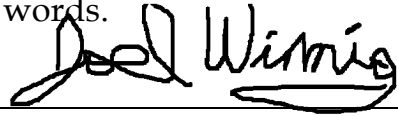
A handwritten signature in black ink, appearing to read "Joel Winnig", is written over a horizontal line.

4.7.16

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**Certification pursuant to Rule 809.19(8)(d)**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4108 words.

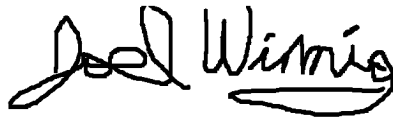


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**Certification pursuant to Rule 809.19 (12) (f)**

I hereby certify that the text of the electronic copy of this brief is identical to the paper copy of this brief.



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