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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP2525-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYDIS TRINARD ODOM,

Defendant-Appellant.

On Certification from the Court of Appeals, District I, Reviewing the Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan, Presiding, and the Order Denying Supplemental Postconviction Relief, the Honorable Ellen R. Brostrom, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Were the mandatory multiple DNA surcharges assessed upon Mr. Odom's convictions a punishment, such that the circuit court was required to establish his understanding of the surcharges, pursuant to ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)?

   The circuit court said no. (54:6-7; App.153-54).

   The court of appeals certified this case to this Court. (App.101, 129).

2. Is Mr. Odom entitled to a ***Bangert*** hearing because the circuit court misadvised him about his eligibility for early-release programming?

   The circuit court said no. (29:2-3; App.156-57)

   The court of appeals certified this case to this Court. (App.101, 129).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant certification reflects that oral argument and publication are warranted.

STATEMENT OF FACTS

On March 15, 2014, Mr. Odom was charged by criminal complaint with two counts of second-degree sexual assault, one count of kidnapping, and one count of substantial battery. (2:1-2). At the initial appearance, Mr. Odom demanded a speedy trial. (33:10; 35:4-5). At the final pretrial conference, Mr. Odom's trial attorney informed the circuit court, the Honorable Timothy G. Dugan presiding, that

Mr. Odom intended to take his case to trial. (36:2). The circuit court requested that the State place its plea offer on the record in order to verify Mr. Odom's understanding of the offer. (36:2).

The State explained its offer: it would amend one of the two second-degree sexual assault counts to a third-degree sexual assault and dismiss and read in the other second-degree sexual assault count and the kidnapping count. (36:3). Then, in exchange for Mr. Odom's guilty pleas to the substantial battery count as charged and the amended third-degree sexual assault, the State would recommend four to five years of initial confinement and five years of extended supervision on the third-degree sexual assault count. (36:3). On the battery count, the State would recommend one-and-a-half years of initial confinement and three years of extended supervision, concurrent to the other sentence. (36:3).

Mr. Odom rejected this offer, explaining that he wanted to go to trial:

> THE COURT: Do you understand that's what they're offering?
>
> THE DEFENDANT: Yes. Yes.
>
> THE COURT: And do you want to go to trial?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. And you don't want to accept any plea negotiations?
>
> THE DEFENDANT: Not this one.
>
> THE COURT: Okay. That is the only one they're making.
>
> THE DEFENDANT: No.
>
> THE COURT: So if you don't want to accept it, the option is to go to trial, and I just want to make sure you know what they're offering and you're rejecting it, correct?

THE DEFENDANT: Yes.

(36:5).

On the day of trial, the complaining witness did not appear, and the State made a new plea offer to Mr. Odom. (37:2-3; App.171-72). The terms of the new offer were as follows: Mr. Odom would plead to the substantial battery as charged, contrary to WIS. STAT. § 940.19(2), two counts of fourth-degree sexual assault, contrary to WIS. STAT. § 940.225(3m), and one count of false imprisonment, contrary to WIS. STAT. § 940.30. (37:3; App.172). In exchange for his pleas, the State would recommend leaving the sentence to the circuit court's discretion, and it would not file any witness intimidation charges, which the State indicated it was prepared to do, absent a plea deal. (37:3-5; App.172-74).

After the State explained its new offer, Mr. Odom expressed significant hesitation about accepting the offer:

> THE COURT: All right. And, Mr. Odom, is that your understanding of what the State is offering at this time?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And do you want to accept that plea negotiation, or do you want to go to trial?
>
> THE DEFENDANT: Can I talk to [my attorney]?
>
> THE COURT: Briefly. You can turn off the microphone.
>
> (There was a discussion off the record between the defendant and [his attorney]).
>
> [DEFENSE COUNSEL]: I think I've answered all of his questions, Judge.
>
> THE COURT: All right. Mr. Odom, what do you want to do?
>
> (There was a discussion off the record between the defendant and [his attorney]).

(37:5; App.174).

Mr. Odom then requested permission to ask the court "some questions about the plea." (37:5; App.174). He first asked the court to explain the maximum penalty the plea deal carried. (37:6; App.175). The circuit court explained the maximum penalties associated with his case as charged, compared to the maximum penalties if he chose to accept the plea offer. (37:6-8; App.175-77). Mr. Odom next asked the court whether his convictions could be expunged, and then asked the court about his eligibility for early-release programs:

> THE DEFENDANT: Do people in sexual assault cases, are they eligible for boot camp or anything like that?
>
> THE COURT: You could be eligible for boot camp and I believe for substance abuse. That again would determine—Court would have to look at all the factors. And I also have to have a substance abuse issue need to be addressed for both of those programs.

(37:8-9; App.177-78).

In answering Mr. Odom's last question about his eligibility for the Challenge Incarceration Program (colloquially known as "boot camp") or the Substance Abuse Program, the circuit court failed to recognize that Mr. Odom was statutorily ineligible for both programs, as all of his offenses were crimes specified in Chapter 940. *See* WIS. STAT. § 973.01(3g), (3m).

The court told Mr. Odom, "It's your choice. No one's here pressuring you. Do one or the other." (38:11; App.180). Two additional off-the-record discussion occurred between Mr. Odom and his attorney, who then informed the court that Mr. Odom had decided to accept the plea offer. (37:11-12; App.180-81).

The circuit court conducted a plea colloquy, and Mr. Odom pled no contest to the two counts of fourth-degree

sexual assault, and guilty to the false imprisonment and substantial battery counts. (37:20-21; App.189-90). During the plea colloquy, the circuit court established that Mr. Odom understood the maximum potential imprisonment terms and the fines for the offenses; however, the court did not inform Mr. Odom or otherwise ensure that he understood that he faced mandatory, per-conviction DNA surcharges totaling $900 (two misdemeanors x $200) + (two felonies x $250). (37:13-15; App.182-84). *See* WIS. STAT. § 973.046(1r).

Mr. Odom was sentenced the next day. Pursuant to the plea agreement, the State did not recommend a specific sentence. (38:9; App.178). Defense counsel recommended a probationary term. (38:12; App.181). Defense counsel argued Mr. Odom, who was eighteen years old at the time of sentencing, had been exposed to "a lot of drug usage in the family" and that "he smoked marijuana a lot…as a teenager." (38:16; App.185). The court discussed various sentencing considerations and then imposed two concurrent sentences of nine months on each of the misdemeanor sexual assault counts[1]; a consecutive sentence of three years' initial confinement and three years' extended supervision on the false imprisonment count; and another consecutive sentence of one-and-a-half years' initial confinement and two years' extended supervision on the battery count. (38:38-39). The court found Mr. Odom ineligible for the Substance Abuse and Challenge Incarceration Programs, without explanation. (38:39). It also imposed the mandatory DNA surcharges of $900. (38:36-37).

[1] The circuit court's oral pronouncement regarding whether the sentences for the sexual assault counts were to be concurrent with or consecutive to each other was somewhat unclear; however, the court's intent was to make these sentences concurrent with each other. (28:12-13). The circuit court agreed that this was its intent after Mr. Odom raised this issue in his original postconviction motion, and the court ordered that the judgment of conviction be amended accordingly. (29:3; App.157).

Following entry of the judgment of conviction, Mr. Odom filed a timely notice of intent to pursue postconviction relief. (20). He filed a postconviction motion seeking plea withdrawal, arguing his pleas were not knowingly, intelligently, and voluntarily entered because the circuit court incorrectly advised him that it could find him eligible for the Substance Abuse and Challenge Incarceration Programs if he pled guilty. (28:7-12).

On April 20, 2015, the postconviction court denied the motion in a written order. (29:1-3; App.155-57). The court reasoned that it had simply told Mr. Odom there was a possibility he could be found eligible for early-release prison programming, and Mr. Odom's "claimed reliance on a possibility is not sufficient to warrant plea withdrawal." (29:2; App.156) (emphasis in original).

In so ruling, the court distinguished a number of cases involving alleged misadvice about other collateral consequences of a plea. (29:2-3; App.156-57). Those other collateral consequences included the requirement to register as a sex offender, ***State v. (Charles) Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543; the possibility of being subject to Chapter 980 proceedings and commitment, ***id.***; the possibility of deportation, ***State v. Rodriguez***, 221 Wis. 2d 487, 585 N.W.2d 701 (Ct. App. 1998); the waiver of the right to appellate review, ***State v. Riekkoff***, 112 Wis. 2d 119, 332 N.W.2d 744 (1983); and the loss of the right to possess a firearm, ***State v. Kohlkoff***, No.2012AP1144-CR, unpublished slip op. (WI App Feb. 14, 2013). (App.165-69).

The postconviction court explained that these cases were all "concerned with negative legal repercussions for the defendant, or unfortunate legal consequences that flowed from the conviction." (29:2-3; App.156-57). According to the postconviction court, "[a] misunderstanding about an early release program does not constitute a similar negative legal collateral consequence occurring beyond the service of the sentence." (29:3; App.157). On that basis, the circuit court

denied Mr. Odom's postconviction motion for plea withdrawal. (29:2-3; App.156-57).

Shortly after the postconviction court issued its denial of Mr. Odom's postconviction motion, the court of appeals issued its decision in ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. In ***Radaj***, the court of appeals held that the new mandatory DNA surcharge is a punishment that violates ex post facto law as applied to a defendant who committed multiple felonies prior to the effective date of the amended statute mandating the surcharge. ***Id.***, ¶¶14, 35. As a result of this decision, Mr. Odom requested permission to file a supplemental postconviction for plea withdrawal on new grounds, which the court of appeals granted. (41).

Mr. Odom filed a supplemental postconviction motion requesting an evidentiary hearing and plea withdrawal, arguing his pleas were not knowingly, intelligently, and voluntarily entered because the circuit court failed to establish that he understood he faced a mandatory $900 in DNA surcharges as a result of his pleas. (44). Mr. Odom asserted that under ***Radaj***, the surcharges were part of the range of punishments he faced, and therefore the circuit court was required to establish his understanding of the surcharges, pursuant to ***Bangert***, 131 Wis. 2d 246. (44:3-7).

On November 17, 2015, the Honorable Ellen R. Brostrom denied Mr. Odom's supplemental postconviction motion in a written order. (54; App.148). The postconviction court concluded Mr. Odom was not entitled to a hearing under ***Bangert***, describing his reading of ***Radaj*** as "overbroad." (54:3; App.150). It noted Mr. Odom had relied exclusively on ***Radaj*** to support his contention that the DNA surcharges were punitive, but that the court of appeals had carefully circumscribed ***Radaj*** such that the decision applied only to defendants who had committed offenses before the new DNA surcharge statute took effect. (54:5; App.152). The postconviction court reasoned that although the surcharge may have a punitive effect in some cases, the surcharge "is

not a direct consequence of a guilty or no contest plea." (54:6; App.153).

In reaching this conclusion, the postconviction court relied on the court of appeals' then-recent, post-***Radaj*** decision in ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, which held "that the DNA surcharge is not a punishment" as applied to a defendant with a single conviction. (54:5-6; App.152-53). The postconviction court concluded that because the DNA surcharges were not a punishment as applied to a defendant with a single conviction, Mr. Odom's surcharges were merely a collateral consequence of a plea with punitive effect in some cases, not a direct punishment. (54:6-7; App.153-54).

Mr. Odom appealed the denial of his original and supplemental postconviction motions for plea withdrawal. (52). On November 9, 2016, the court of appeals certified this case to this Court for review. (***State v. Odom***, No.2015AP2525-CR, *certification* by Wisconsin Court of Appeals)(Wis. Ct. App. Nov. 9, 2016)(hereinafter "Certification 1")(App.129-47). The court of appeals asked whether the imposition of multiple DNA surcharges constituted "potential punishment" under WIS. STAT. § 971.08(1)(a) such that a court's failure to advise a defendant about them before accepting his or her plea establishes a prima facie showing that the defendant's plea was unknowing, involuntary, and unintelligent. (Certification 1 at p.1; App.129).

On January 9, 2017, this Court refused the certification. The court of appeals subsequently ordered that Mr. Odom's appeal be held in abeyance pending this Court's resolution of ***Scruggs***. This Court issued an opinion in ***State v. Scruggs***, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786 on February 23, 2017, affirming the court of appeals.

Then, on June 28, 2017, the court of appeals again certified this case to this Court. ***State v. Odom***, No.2015AP2525-CR, *certification* by Wisconsin Court of Appeals)(Wis. Ct. App. June 28, 2017)(hereinafter "Certification 2") (App.101-28). This time, the court of appeals asked *how* to decide the question previously-described in its first certification: specifically, is the intent-effects test, as applied to ex post facto claims in ***Radaj*** and ***Scruggs***, the same analysis that was applied to a plea withdrawal claim in ***State v. Bollig***, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199? (Certification 2 at p.1-2; App.101-102). The court of appeals further wondered whether, if the analysis used in ***Radaj*** and ***Scruggs*** is the same as that used in ***Bollig***, ***Radaj*** should be overruled in light of this Court's recent decision in ***Scruggs***. (Certification 2 at p.2; App.102). Lastly, the certification explained the court of appeals' belief that Mr. Odom's second argument, regarding the circuit court's affirmative misadvice about early-release programming, was properly denied. (Certification 2 at p.28; App.128). On September 12, 2017, this Court granted certification and accepted for review all issues raised before the court of appeals.

ARGUMENT

I. Mr. Odom is Entitled to an Evidentiary Hearing Because He Was Not Advised During His Plea Hearing of the Mandatory DNA Surcharges That Were Part of His Sentence.

The Law on Withdrawing a Guilty Plea

In ***Bangert***, this Court established a two-step process to determine whether a defendant knowingly, intelligently, and voluntarily entered a guilty or no contest plea. 131 Wis. 2d 246. To make a prima facie case for plea withdrawal, the defendant must show that the circuit court accepted the pleas without conformance to the requirements of WIS. STAT.

§ 971.08 or performing other mandatory duties necessary to ensuring that the plea was knowing, intelligent, and voluntary. ***Id.*** at 274. The defendant must also allege that he "in fact did not know or understand the information which should have been provided at the plea hearing." ***Bangert***, 131 Wis. 2d at 274. Once the defendant makes a prima facie case, the burden then shifts to the State to prove at an evidentiary hearing, by clear and convincing evidence, that the defendant's pleas were knowingly, voluntarily, and intelligently entered despite the inadequacy of the record at the plea hearing. ***Id.*** If the State fails to meet its burden at the evidentiary ***Bangert*** hearing, the defendant is entitled to withdraw his or her plea as a matter of right. ***State v. Finley***, 2016 WI 63, ¶92, 370 Wis. 2d 402, 882 N.W.2d 761.

Failure to Advise of a Potential Punishment

In ***State v. (James E.) Brown***, this Court enumerated the circuit court's mandatory duties when accepting a defendant's guilty or no contest plea. 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Among other duties, the court must establish that the defendant understands the range of punishments to which he is subject by the entry of his plea. ***Id.*** The general practice in this regard is to advise the defendant of the minimum and maximum penalties associated with a plea. ***State v. Chamblis***, 2015 WI 53, ¶24, 362 Wis. 2d 370, 864 N.W.2d 806.

Thus, a knowing, voluntary, and intelligent plea requires that a defendant be made aware of the potential punishment he or she faces before entering a guilty or no contest plea. Wis. Stat. § 971.08(1)(a); ***State v. Bollig***, 232 Wis. 2d 561, ¶16. In this case, Mr. Odom asserts that the imposition of multiple DNA surcharges constitutes a "potential punishment" under WIS. STAT. § 971.08(1)(a) such that the circuit court's failure to advise Mr. Odom about them before accepting his plea establishes a prima facie showing that his plea was unknowing, involuntary, and unintelligent.

Therefore, Mr. Odom is entitled to a hearing on his plea withdrawal claim.

In its certification, the court of appeals identified the threshold question in this case: what constitutes punishment for plea withdrawal purposes under ***Bangert***? (Certification 2 at p.8; App.108). In addition, the certification grappled with the appropriate test to use to determine whether something is a penalty under ***Bangert***. (Certification 2 at p.1, 14; App.101, 114). In a thorough overview, the court of appeals considered the types of analyses previously applied by this Court, and by other federal and state courts, in determining whether a ramification of conviction constitutes punishment for plea withdrawal purposes. (Certification 2 at p.8-22; App.108-122).

The Intent-Effects Test

A major focus of the court of appeals' certification was the intent-effects test, which was used in ***Radaj*** and ***Scruggs***, and, as the court of appeals noted, is most commonly seen in ex post facto and double jeopardy case law. However, the intent-effects test has been applied, explicitly and implicitly, in other contexts as well.[2] Indeed, it makes sense to apply the same test here.

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[2] *See* ***State v. Ward***, 869 P.2d 1062 (Wash. 1994)(adopting the intent-effects test and concluding the sex offender registry is not punitive, and not a direct consequence of the plea); ***Kaiser v. State***, 641 N.W.2d 900 (Minn. 2002)(using the ***Mendoza-Martinez*** factors to conclude the sex offender registry was a collateral consequence of the plea because it was not punitive); ***Commonwealth v. Leidig***, 850 A.2d 743 (Pa. 2004)(applying intent-effects test and concluding sex offender registration was not punishment); ***Bell v. Wolfish***, 441 U.S. 520 (1979)(considering whether pretrial detention is punishment for purposes of constitutional due process analysis); ***United States v. Ward***, 448 U.S. 242 (1980)(considering whether a penalty was a criminal punishment, implicating Fifth Amendment protection against compulsory self-incrimination).

The intent-effects test evaluates whether a particular alleged punishment is criminal or civil by considering the legislature's intent. If the intent was to impose a civil non-punitive regulatory scheme rather than to punish, then the court determines whether the sanctions imposed by the law are so punitive either in purpose or effect that they transform what was clearly intended as a civil remedy into a criminal penalty. ***Radaj***, ¶¶13-14. The United States Supreme Court, in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144 (1963), delineated seven "nonexhaustive" and "nondispositive" factors to consider when determining whether a law with a punitive effect constitutes punishment. The court looks at whether the law (1) imposes an affirmative disability or restraint, (2) has historically been considered a punishment, (3) has a scienter requirement, (4) serves the traditional aims of punishment, (5) applies to behavior that was already a crime, (6) has an alternative purpose, and (7) is excessive in relation to the alternative purpose.

Previous Use of Intent-Effects Test in Cases Following the 2014 Amendment to the DNA Surcharge Statute

Under prior law, if a court imposed a sentence or placed a person on probation for a felony, the court could, in its discretion, impose a DNA surcharge in the amount of $250, unless an underlying conviction was for a specified sex crime, in which case the surcharge was mandatory.[3] *See* WIS. STAT. § 973.046(1g), (1r) (2011-12). The surcharge amount was $250, regardless of the number or nature of the convictions. *Id.*; *see also* ***Radaj***, 363 Wis. 2d at ¶8 n.3.

Effective January 1, 2014, the legislature amended WIS. STAT. § 973.046(1r) to require a mandatory DNA surcharge in the amount of $250 for each felony conviction

[3] Violations of WIS. STAT. §§ 940.225, 948.02(1) or (2), 948.025, and 948.085 required courts to impose the DNA surcharge. WIS. STAT § 973.046(1r) (2011-12).

and $200 for each misdemeanor conviction. 2013 Wis. Act 20, §§ 2355, 9326, 9426. Under the new law, the amount of the surcharge is thus tied to the number of convictions and severity of offense, which makes it more like a criminal fine than a civil fee or surcharge. *See* ***Radaj***, 363 Wis. 2d at ¶¶5, 29-30, 35.

In ***Radaj***, the court of appeals held that the mandatory DNA surcharge was a punishment that violated the Ex Post Facto Clause where a defendant committed multiple felonies prior to the effective date of the amended statute, but was not sentenced until after the effective date. ***Id.*** at ¶¶1, 14, 35.[4] In that case, the defendant was convicted of four felonies and was thus assessed $1,000 in DNA surcharges (four felonies x $250). ***Id.*** at ¶5. The ***Radaj*** court explained that the "ex post facto question turns on whether the DNA surcharge statute, as applied to Radaj, was a punitive criminal statute or a non-punitive civil statute." ***Id.*** The court assumed without deciding that the legislature's intent was non-punitive, but went on to find that, as applied, it had a punitive effect. ***Id.*** at ¶16.

Specifically, the court of appeals found that there was no non-punitive reason why the costs of DNA-analysis-related activities would increase with the number of convictions. ***Radaj***, 363 Wis. 2d at ¶¶29-30. The court of appeals concluded that the surcharge was excessive and not rationally connected to its intended purpose. ***Id.*** at ¶35. Instead, it served "as an additional criminal fine." ***Id.*** at ¶25. The court therefore held that the per-conviction approach to

[4] Here, Mr. Odom's offenses occurred after the effective date of the amended DNA statute, so there is no ex post facto problem. Rather, Mr. Odom argues that the mandatory multiple DNA surcharges are punitive, and consequently, he is entitled to plea withdrawal because the circuit court failed to advise him that the surcharges were part of his punishment prior to accepting his pleas.

setting the DNA surcharge made the $1,000 surcharges in that case a punishment and, thus, an ex post facto violation. ***Id.*** at ¶¶14, 35.

After ***Radaj*** was decided, this Court accepted review of another case involving the new DNA surcharge statute: ***Scruggs***, 373 Wis. 2d 312. In ***Scruggs***, the question was whether a single mandatory $250 DNA surcharge for a felony committed before the change in the law was an ex post facto violation. ***Id.*** at ¶¶2-3. This Court concluded that Scruggs did not meet her burden to show that the mandatory imposition of the DNA surcharge was punitive in either intent or effect, and therefore, imposition of the surcharge was not an ex post facto violation. ***Id.*** at ¶3.

It is Appropriate to Use the Intent-Effects Test to Determine Whether a Conviction Ramification is a Punishment Under ***Bangert***

In this case, using the same test applied in ***Radaj*** and ***Scruggs*** would avoid the potential problem of punishment having different meanings in different contexts, i.e., in which multiple DNA surcharges are punitive in the ex post facto context under the intent-effects test, but not in the plea withdrawal context under a separate analysis. In addition, the test, which looks to the ***Mendoza-Martinez*** factors, has been described by the United States Supreme Court as a "useful framework" that was "designed to apply in various constitutional contexts." ***Smith v. Doe***, 538 U.S. 84, 97 (2003). Its factors are "neither exhaustive nor dispositive," giving the test great flexibility for application in a variety of contexts. ***Id.*** As the Superior Court of Pennsylvania explained, adopting the intent-effects test in a plea withdrawal context:

> Pennsylvania case law has developed through a succession of cases setting guideposts to determine whether a newly-enacted provision provides civil or penal consequences. These guideposts have been used

> predominantly to determine ex post facto consequences. Determination of ex post facto consequences and constitutionally effective counsel both address due process concerns, and as such, there is no reason why an analysis used in one situation cannot be used in the other. Specifically, a consequence that is punitive in nature implicates ex post facto applications and a punitive consequence is also a determining factor [when considering whether counsel was ineffective for failing to inform a defendant of the consequences of a guilty plea].

Commonwealth v. Abraham, 996 A.2d 1090, ¶11 (Pa. Sup. Ct. 2010), *rev'd on other grounds*, 62 A.3d 343 (Pa. 2012).[5]

Thus, the constitutional due process concerns underlying both ex post facto consequences and ineffective assistance of counsel persuaded the Pennsylvania Superior Court that the intent-effects test was appropriate in the plea withdrawal context. And of course, it is the Due Process clause that requires a defendant's plea to be entered knowingly, voluntarily, and intelligently. *See* ***Boykin v. Alabama***, 395 U.S. 238, 243 (1969). Accordingly, the intent-effects test is appropriate here to determine whether multiple DNA surcharges are punitive for purposes of plea withdrawal.

Further, the intent-effects test provides a practical framework for analyzing whether the imposition of multiple mandatory DNA surcharges is punitive. In cases across the country where courts have not applied the intent-effects test or referred to the ***Mendoza-Martinez*** factors, little analysis tends to accompany the ultimate conclusion about whether a conviction ramification is punitive. *See, e.g.,* ***Maygar v. State***,

[5] The Supreme Court of Pennsylvania reversed the superior court's ultimate conclusion that the forfeiture of pension benefits was punitive for purposes of plea withdrawal. But, it also employed the intent-effects test and explicitly considered the ***Mendoza-Martinez*** factors in reaching the opposite conclusion about the punitive nature of the forfeiture of benefits. 62 A.3d 343, 350-51 (Pa. 2012).

18 So.3d 807 (Miss. 2009)(concluding sex offender registration is a collateral consequence without discussing legislative purpose or effects).

By using the non-exclusive ***Mendoza-Martinez*** factors and considering the intent and effects of the law mandating multiple DNA surcharges in multi-count cases, this Court can provide a straightforward test for lower courts to apply when deciding whether a conviction ramification is a punishment.

*Analysis Used in **Bollig** and **Dugan***

The court of appeals' certification also considered whether the analyses used in ***Bollig*** and ***Dugan*** was the same as the intent-effects test. (Certification 2 at p.14-18; App.114-18). Both of those cases considered whether a ramification of conviction—sex offender registration in Bollig, and restitution in Dugan—constituted punishment for plea withdrawal purposes. In Dugan, the court of appeals held that restitution, even if it is "definitive, immediate, and largely automatic," is not a punishment for purposes of Wis. Stat. § 971.08. 193 Wis. 2d 610, 618, n.4, 624, 534 N.W.2d 897 (Ct. App. 1995). The court reasoned that although restitution has some "punitive effects," its primary purpose is to rehabilitate offenders and make victims whole. ***Id***. at 620-22. Similarly, in Bollig, this Court held that sex offender registration was not primarily a punishment: "Simply because registration can work a punitive effect, we are not convinced that such an effect overrides the primary and remedial goal…to protect the public." 232 Wis. 2d at ¶26.

In its certification, the court of appeals noted that Bollig and Dugan considered both intent and effects in determining whether the particular conviction ramification constituted a potential punishment for purposes of a plea. (Certification 2 at p.14; App.114). The certification indicated that aspects of Bollig and Dugan were both similar and different from the intent-effects test. (Certification 2 at p.14; App.114).

Nevertheless, given the fact that both Bollig and Dugan considered the intent and effects of the laws they each examined, those cases appear to have implicitly applied the intent-effects test. Alternatively, the analyses employed in those cases appear to be functionally equivalent to the intent-effects test: emphasizing the purpose of the law, discussing the punitive effects, and "effectively conclud[ing] that the defendant[s] failed to show by 'the clearest proof' that the factors indicating a punitive effect overrode the legislative intent so as to 'transform what has been denominated a civil remedy into a criminal penalty.'" (Certification 2 at p.17-18, citing ***Hudson v. United States***, 522 U.S. 93, 100 (1997); App.117-18).

Therefore, the analyses used by the courts in ***Bollig*** and ***Dugan*** support Mr. Odom's argument that the intent-effects test is the proper analysis to apply in determining whether the imposition of multiple DNA surcharges constitutes potential punishment under WIS. STAT. § 971.08(1)(a), such that the circuit court was required to advise Mr. Odom of them at the time of his plea.

The DNA surcharge is punitive in intent and effect

Turning now to the application of the intent-effects test to the facts of this case, the analysis leads to one conclusion: the mandatory DNA surcharges in this case are punitive, and Mr. Odom is entitled to a ***Bangert*** hearing. In ***Scruggs***, this Court concluded that, "Scruggs has failed to produce evidence that a $250 DNA surcharge imposed against a defendant for a single felony conviction is unrelated to the cost for which it is intended to compensate. There is no evidence that the relatively small $250 surcharge is grossly disproportionate to the cost of collecting, analyzing, and maintaining DNA specimens." 373 Wis. 2d at ¶38.

However, while a single $200 or $250 DNA surcharge perhaps seems nominal, here, Mr. Odom was assessed $900 in mandatory DNA surcharges as a result of his four

convictions. The imposition of $900 in DNA surcharges, in addition to all of the other punishments here, indeed has the effect of punishing criminal behavior. *See* ***Mendoza-Martinez***, 372 U.S. at 168 (fifth factor considers whether the behavior to which the statute applies is already a crime). And, the facts of this case make it more like ***Radaj*** than ***Scruggs***, despite the lack of ex post facto violation. The question here, like in ***Radaj***, is whether mandatory DNA surcharges assessed upon multiple convictions are punitive. As the ***Radaj*** court determined in the context of multiple mandatory surcharges for multiple convictions, there is no non-punitive reason why the costs of DNA-analysis-related activities would increase with the number of convictions. 363 Wis. 2d at ¶¶29-30.

Rather, the 2014 amendment tied the amount of the DNA surcharge to the number of convictions, thereby punishing multiple-count offenders, like ***Radaj*** and Mr. Odom, more harshly than others with fewer convictions. The DNA surcharge statute likewise punishes felons more harshly than misdemeanants. However, felons with a higher number of convictions do not inherently incur greater DNA costs than misdemeanants with fewer convictions. ***Id.*** at ¶31.

And, $900 in DNA surcharges is not merely intended to compensate for DNA costs generated in the case due to Mr. Odom; rather, the amount charged in a given case is wholly unrelated to the DNA costs in a particular case. It does not matter whether DNA was collected or tested in the case, or whether a DNA sample was taken from the defendant. Accordingly, like in ***Radaj***, here, $900 in DNA surcharges is excessive and not rationally connected to its intended purpose, but rather, serves as an additional criminal fine on Mr. Odom. See ***Id.***, ¶¶25, 35.

Further, the ***Mendoza-Martinez*** factors support the conclusion that the surcharge has a punitive effect. Given that the ***Mendoza-Martinez*** factors are "nonexhaustive" and "nondispositive," the most relevant factors are the fourth,

sixth, and seventh factors, which the ***Radaj*** court described as "closely related and of particular importance when…a monetary amount intended to fund specified activities under a non-punitive regulatory scheme is at issue." ***Radaj***, 363 Wis. 2d at ¶25. The fourth factor considers whether the DNA surcharge's operation will promote the traditional aims of punishment; the sixth factor is whether the surcharge is rationally connected to some non-punitive purpose; and the seventh factor asks whether the surcharge appears excessive in relation to the non-punitive purpose the legislature assigned to it. ***Id.*** at ¶24, quoting ***Rachel***, 254 Wis. 2d at ¶43.

As illustrated in Paper #408 from the Legislative Fiscal Bureau (LFB) to the Joint Committee on Finance dated May 13, 2017 the DNA surcharge is, in fact, punitive.6 (LFB Paper #408; App.158-64). The LFB Paper explains that the revenue from the DNA surcharges has been comingled with the $13 crime laboratory and drug law enforcement (CLDLE) surcharge into a single fund, referred to as the CLDLE and DNA surcharge fund. (LFB Paper #408 p.1; App.158). Revenue from the two surcharges is pooled together and is not distinguished for the purpose of making expenditures and

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[6]In ***Scruggs***, this Court noted the defendant had presented "no evidence that the surcharge was meaningfully greater than the costs she caused the State to incur to collect, analyze, and curate her DNA." 2017 WI 15, ¶¶28-29, 373 Wis. 2d 312, 891 N.W.2d 786. Ultimately, this Court concluded it had no reason to think that the mandatory DNA surcharge was excessive or lacked a reasonable relationship to the costs of collecting and analyzing the DNA samples, together with maintaining DNA profiles in a statewide databank. ***Id.*** at ¶48.

To the extent that this new information from the Legislative Fiscal Bureau suggests that this Court may want to revisit ***Scruggs***, Mr. Odom believes the contents of the LFB Paper #408 require this Court to reach a different result regarding the punitive nature of the DNA surcharges than it did in ***Scruggs***. The LFB Paper addresses the concerns this Court voiced in ***Scruggs***, which led to the conclusion that Scruggs had not met her burden to show that the amount of the surcharge imposed demonstrated that it was punitive in intent.

transferring funds to other appropriations. (LFB Paper #408 p.2; App.159). The memo explains that the Department of Justice had originally used the fund appropriation in a number of ways: to support the costs of the crime laboratories to provide DNA analysis; to administer the DNA databank; to reimburse local law enforcement agencies, the Department of Corrections, and the Department of Health Services for the costs of submitting biological specimens to the crime laboratories for DNA analysis; to transfer funding to appropriations within DOJ and the District attorney function to support: crime laboratory equipment and supplies; drug law enforcement, crime laboratories, and genetic evidence activities; and a statewide DNA evidence prosecutor position. (LFB Paper #408 p.1, 3; App.158, 160).

As described in the LFB memo, the provision passed with the latest budget increases expenditures from the CLDLE and DNA surcharge fund by providing expenditure authority for, among other things: $500,000 program revenues annually on a one-time basis to support drug law enforcement activities of DOJ's Division of Criminal Investigation, and $750,000 program revenues annually on a one-time basis to support law enforcement activities related to Internet crimes against children (ICAC). (LFB Paper #408 p.1-3; App.158-160). The LFB memo also explained that due to increases in the surcharges, the combined CLDLE and DNA surcharge fund has been operating with a surplus, and is projected to end fiscal year 2016-17 with a balance of $5,160,800. (LFB Paper #408 p.3; App.160).

Accordingly, it is clear that the mandatory DNA surcharge is both excessive and lacks a reasonable relationship to the costs of collecting and analyzing the DNA samples together with maintaining DNA profiles in a statewide databank. By diverting money to activities within the Department of Justice that are not directly tied to DNA analysis and maintenance, such as the internet crimes against children special prosecutor and operations, and drug law

enforcement activities, the DNA surcharge does not bear sufficient relation to the cost for which the fee was ostensibly intended to compensate, and should be reclassified as a fine. "A fine is a fine even if called a fee, and one basis for reclassifying a fee as a fine would be that it bore no relation to the cost for which the fee was ostensibly intended to compensate." ***Mueller v. Raemisch***, 740 F.3d 1128, 1133 (7th Cir. 2014).

In addition, given the $5.2 million surplus, it is clear that the surcharge is not simply intended to offset the costs of DNA testing, but instead imposes a penalty on more serious offenders by tying the surcharge amount to the number and severity level of convictions. This is clear indication that the cost of the surcharge is wholly disproportionate to the causes it was expected to fund. Thus, the structure of the mandatory DNA surcharge bears no relation to the costs the State incurs in collecting, analyzing, and curating DNA. *See* ***Id.*** at 1133 (one basis for reclassifying a surcharge as a fine would be that it bore no relation to the cost for which the fee was ostensibly intended to compensate).

Moreover, the plain text of the amended DNA surcharge statute plainly shows that the legislature intended to impose a criminal penalty through the mandatory DNA surcharge. Whether the legislature intended the statute to be punitive is a question of statutory construction, and this Court asks "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." ***Rachel***, 254 Wis. 2d at ¶40; *see also* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Notably, the legislature placed the DNA surcharge statute within Chapter 973, the criminal sentencing chapter, rather than in Chapter 814, which contains court costs and other non-punitive surcharges.

And, despite calling it a surcharge, that denomination does not square with its purpose. A fine is a punishment for an unlawful act that is a "substitute deterrent for prison time" and "a signal of social disapproval of unlawful behavior," while a fee or surcharge is "compensation for a service provided to, or alternatively compensation for a cost incurred by, the person charged the fee." ***Scruggs***, 373 Wis. 2d at ¶21, quoting ***Mueller***, 740 F.3d at 1133. Here, the mandatory DNA surcharge is not compensation for a cost incurred by the person charged a fee: the LFB Paper demonstrates that the surcharges are yielding revenue far beyond the costs incurred for DNA collection, analysis, and maintenance of the DNA databank.

All in all, the placement of the DNA surcharge statute within the criminal sentencing chapter, the per-conviction and type-of-conviction approaches to setting the surcharge amount,[7] and the use of the surcharge fund for activities unrelated to DNA costs conclusively demonstrate that the mandatory DNA surcharges assessed against Mr. Odom are punitive in both intent and effects.

[7] Importantly, Wisconsin's current DNA surcharge scheme is far more stringent than other jurisdictions. *See, e.g.*, ***In re DNA Ex Post Facto Issues***, 561 F.3d 194, 297 (4th Cir. 2009) (in South Carolina, a defendant pays a single DNA surcharge at the time of providing a DNA sample); ***People v. Marshall***, 950 N.E.2d 668, 679 (Ill. 2011)(in Illinois, a defendant provides one DNA sample and pays one surcharge); ***State v. Stoddard***, 366 P.3d 474 (Wash. Ct. App. 2016)(in Washington, a DNA surcharge may be assessed even when a defendant does not provide a DNA sample, yet, defendant only required to pay one $100 DNA surcharge despite multiple convictions that qualified for the imposition of the DNA surcharge).

*A **Bangert** Hearing is Warranted Because Mr. Odom Was Not Advised That Mandatory DNA Surcharges Would Be Part of His Punishment*

It is worth noting that, recently, the Iowa Supreme Court determined fine surcharges are a form of punishment that must be disclosed during plea proceedings. ***State v. Fisher***, 877 N.W.2d 676 (Iowa 2016). The Iowa Supreme Court observed that the surcharges were distinguishable from compensatory items like court costs, restitution, and reimbursement for the cost of court-appointed counsel, which it considered non-punitive. ***Id.*** at 686. In contrast, the surcharges at issue in Fisher did not serve as compensation and were deposited into a general fund which supported "various state priorities including medical assistance and education." ***Id.*** Subsequently, the Iowa Court of Appeals applied Fisher's holding and concluded a defendant's plea was not knowing and voluntary because he was not fully informed as to the mandatory surcharge attached to the minimum and maximum possible fine that could be imposed following his guilty plea. ***State v. Goodwin***, --N.W.2d --, 2017 WL3283293 (Iowa Ct. App. 2017)(App.208-10).

The Iowa Supreme Court noted other states also require fines to be disclosed as part of the guilty plea colloquy, citing as examples ***Carter v. State***, 812 So.2d 391, 394-95 (Ala. Crim. App. 2001)(reversing guilty plea where the defendant was not advised of "all the mandatory fines that were due to be imposed upon entry of his guilty plea"); ***Kaiser v. State***, 641 N.W.2d 900, 904 (Minn. 2002)("direct consequences are those which flow definitely, immediately, and automatically from the guilty plea—the maximum sentence and any fine to be imposed"); ***People v. Harnett***, 16 N.Y.3d 200, 945 N.E.2d 439, 441-42 (N.Y. 2011)("The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of post-release

supervision, a fine."). Cf. ***Hermann v. State***, 548 S.E.2d 666, 667–68 (Ga. Ct. App. 2001) (defendant not entitled to withdraw his plea where court did not advise him of surcharges and fees because they are mandatory, they did not lengthen or alter the pronounced sentence but merely had a collateral effect); ***People v. Guerrero***, 904 N.E.2d 823, 824 (N.Y. 2009) (holding that mandatory surcharge and crime victim assistance fee did not constitute part of defendant's sentence; therefore, surcharge and fee did not need to be pronounced in his presence during sentencing, and defendant was not entitled to be resentenced).

Here, because the circuit court did not warn Mr. Odom of the mandatory DNA surcharges during the plea colloquy, Mr. Odom is entitled to a ***Bangert*** hearing to determine whether he should be allowed to withdraw his plea because it was not knowingly, voluntarily, and intelligently entered.

II. Mr. Odom is Entitled to Plea Withdrawal for a Second Reason—Because the Circuit Court Misadvised Him About His Eligibility for the Substance Abuse and Challenge Incarceration Programs.

In this case, in the context of providing Mr. Odom with answers to help him decide whether to plead guilty, the circuit court informed Mr. Odom that it could, in its discretion, find him eligible for the Substance Abuse and Challenge Incarceration Programs. That information was incorrect. Mr. Odom's convictions are all for offenses under Chapter 940, making him statutorily ineligible for both early release programs. WIS. STAT. § 973.01(3g), (3m). As a result of the court's affirmative misadvice, Mr. Odom pled guilty with an incorrect understanding of this collateral consequence of his plea. Mr. Odom was led to believe by the court that the court could make him eligible for these early release programs if he pled guilty. To the contrary, however, that possibility was foreclosed by statute. Mr. Odom's pleas were therefore unknowing and involuntary.

General Legal Principles and Standard of Review

A defendant who seeks to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid a manifest injustice. ***State v. Thomas***, 2001 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The Constitution requires that a plea be knowingly, voluntarily, and intelligently entered, and a manifest injustice occurs when it is not. ***Boykin***, 395 U.S. at 242; Rodriguez, 221 Wis. 2d at 492. A defendant who is denied a constitutional right may withdraw a guilty or no contest plea as a matter of right. Bangert, 131 Wis. 2d at 283.

In deciding whether a guilty or no contest plea was voluntarily and knowingly entered, this Court accepts the circuit court's findings of evidentiary and historical fact unless they are clearly erroneous. Rodriguez, 221 Wis. 2d at 492. However, whether a plea was knowingly and voluntarily entered is a question of constitutional fact that this Court reviews de novo. ***State v. Taylor***, 2013 WI 34, ¶25, 347 Wis. 2d 30, 829 N.W.2d 482; ***State v. Cross***, 2010 WI 70, ¶14, 326 Wis. 2d 492, 786 N.W.2d 64; ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891; Brown, 276 Wis. 2d 559, ¶¶4-5.

The Circuit Court's Affirmative Misadvice Regarding Mr. Odom's Eligibility for Early-Release Prison Programming Rendered His Pleas Unknowing and Involuntary

Inaccurate legal information provided by lawyers or a judge can render a plea unknowing and involuntary. ***State v. Woods***, 173 Wis. 2d 129, 140, 469 N.W.2d 144 (Ct. App. 1992). This is true even where the misadvice concerns collateral consequences of the plea.8

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[8] A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment. ***Brown***, 2004 WI App 179, ¶7, 276 Wis. 2d 559, 687 (continued)

If a circuit court fails to disclose a direct consequence of a plea, the plea is not knowing and voluntary, and a defendant may withdraw the plea as a matter of right. Brown, 276 Wis. 2d 559, ¶7 (citing State v. Merten, 2003 WI App 171, ¶7, 266 Wis. 2d 588, 668 N.W.2d 750). In contrast, if the court does not disclose a collateral consequence of a plea, a defendant may not withdraw his plea on the basis of that lack of information. Id.

However, where a defendant was affirmatively misinformed about a collateral consequence of his plea, Wisconsin courts have permitted plea withdrawal. Id. at ¶8. In other words, although a court is not required to disclose a collateral consequence during a plea colloquy, a manifest injustice may occur when a court misinforms a defendant about a collateral consequence or acquiesces to a defendant's misunderstanding of that consequence. See Kohlhoff, No. 2012AP1144-CR, unpublished slip op. ¶6 (federal firearm prohibition for conviction of crime involving domestic violence is a collateral consequence) (App. 166); see also Riekkoff, 112 Wis. 2d at 128 (same for waiver of right to appellate review).

For example, in Brown, the defendant sought plea withdrawal because his lawyer told him that his pleas would not require him to register as a sex offender, and that the offenses did not subject him to subsequent commitment under Chapter 980. 276 Wis. 2d 559, ¶2. At the plea hearing, defense counsel explained that the plea agreement was specifically crafted to avoid potential Chapter 980 consequences. Id., ¶¶2, 13. In fact, however, the defendant unknowingly pled guilty to two felonies that required sex

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N.W.2d 543. A collateral consequence, on the other hand, is indirect, does not necessarily flow automatically from a conviction, and may depend on the subsequent conduct of a defendant. ***Id.*** Mr. Odom acknowledges that his eligibility for early release prison programming was a collateral consequence of his pleas in this case.

offender registration and another that exposed him to the possibility of Chapter 980 commitment. Id. at ¶3. The court of appeals identified both of these consequences as collateral. Id. at ¶13. The court noted that the defendant's misunderstanding was "not the product of 'his own inaccurate interpretation,' but was based on affirmative, incorrect statements on the record by [his attorney] and the prosecutor. The court did not correct the statements." Id. The court of appeals held that under these circumstances, the defendant's pleas were not knowingly and voluntarily entered as matter of law. Id. at ¶14.

The court in Brown explained its holding by distinguishing Rodriguez, 221 Wis. 2d 487. In Rodriguez, the defendant alone misunderstood a collateral consequence of his plea—that a conviction could result in deportation. Brown, 276 Wis. 2d 559, ¶12. Without any contribution by other parties to the defendant's misunderstanding, the trial court's denial of plea withdrawal was thus affirmed. Id.

By contrast, in both Brown and Riekkoff, other individuals (the defense attorney, prosecutor, and/or judge) contributed to the defendants' misunderstanding. In Riekkoff, this Court succinctly explained:

> One thing, however, clearly stands out from the record, and that is that Riekkoff pleaded guilty believing that he was entitled to an appellate review of the reserved issue. Both the prosecutor and the trial judge acquiesced in this view and permitted Riekkoff to believe that, despite his plea, appellate review could be had of the evidentiary order. Because Riekkoff thought he could, with the acquiescence of the trial court and the prosecutor, stipulate to the right of appellate review, it is clear that Riekkoff was under a misapprehension with respect to the effect of his plea. He thought he had preserved his right of review, when as a matter of law he could not. Under these circumstances, as a matter of law his plea was neither knowing nor voluntary. While that plea waived his appellate rights in respect to the antecedent

> evidentiary motion, we conclude that if Riekkoff desires to move to withdraw his plea he may do so.

112 Wis. 2d at 128. Accordingly, the underlying principle of these cases is that a misunderstanding regarding a collateral consequence is grounds for plea withdrawal if the misunderstanding is based on "affirmative incorrect statements" by the court or lawyers, and not the product of the defendant's "own inaccurate interpretation." ***Brown***, 276 Wis. 2d 559, ¶¶12-13; ***Riekkoff***, 112 Wis. 2d at 128; ***Kohlhoff***, No. 2012AP1144-CR, unpublished slip op. ¶¶6, 9 (App. 166).[9] Like the defendants in ***Brown*** and ***Riekkoff***, Mr. Odom's pleas in this case were based on affirmative misinformation, here provided to him by the court, regarding a collateral consequence of his plea.

Here, the circuit court affirmatively misinformed Mr. Odom that it could make him eligible for the Substance Abuse and Challenge Incarceration Programs, a collateral consequence that, as evidenced by Mr. Odom's specific question to the court, clearly mattered to him. In direct response to a question Mr. Odom asked when weighing whether to go to trial or accept the revised plea bargain, the circuit court advised Mr. Odom that it could, in its discretion, find him eligible for these programs: "You could be eligible for boot camp and I believe for substance abuse. That again, would determine—Court would have to look at all the factors." (37:9; App.178).

In denying Mr. Odom's original postconviction motion for plea withdrawal, the postconviction court misconstrued the law regarding collateral consequences in several respects. First, the postconviction court indicated that eligibility for the

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9 In ***State v. Kohlhoff***, the court of appeals determined that the federal firearm prohibition was a collateral consequence of a plea; it held that the circuit court did not actually misinform the defendant about this consequence. No. 2012AP1144-CR, unpublished slip op. (WI App Feb. 14, 2013)(App.165-69).

Substance Abuse and Challenge Incarceration Programs was not a collateral consequence because it was simply a "possibility." (29:2; App.156). But a collateral consequence, by its very nature, is not required to be certain. It is a consequence that is indirect, which usually does not flow automatically from a conviction. It may also depend on subsequent events, even those that rest with an agency other than the sentencing court. *See* ***State v. Byrge***, 2000 WI 101, ¶61, 237 Wis. 2d 197, 614 N.W.2d 477. Thus, contrary to the postconviction court's belief, a collateral consequence can in fact be merely a "possibility." For example, the following possible consequences of pleas have been found to be collateral consequences: the possibility of Chapter 980 commitment, ***Brown***, 276 Wis. 2d 559; the possibility of deportation, ***Rodriguez***, 221 Wis. 2d 487; and the possibility of having a restitution order imposed. ***Dugan***, 193 Wis. 2d at 618 n.4, 624.[10]

Moreover, the collateral consequence in this case—Mr. Odom's ineligibility for earned-release prison programming—was not even a possibility at all, which the circuit court erroneously led Mr. Odom to believe. Mr. Odom's eligibility for these programs was prohibited by statute, given the nature of his convictions in this case. Thus, the circuit court erred in its determination that Mr. Odom's ineligibility for the prison programming was not a collateral consequence because it was a mere "possibility."

The circuit court also incorrectly determined that a collateral consequence must be a "negative" consequence of a plea. (29:2-3; App.156-57). The circuit court cited no authority to support that conclusion, and case law suggests otherwise. See, e.g., Byrge, 237 Wis. 2d at ¶66 (parole

[10] Certain collateral consequences are also automatic, such as the requirement to register as a sex offender and the federal firearm prohibition. *See* ***Brown***, 276 Wis. 2d 559, ¶13; ***State v. Kosina***, 226 Wis. 2d 482, 486-89, 595 N.W.2d 464 (Ct. App. 1999).

eligibility determined by an agency other than the court is a collateral consequence); ***State v. Plank***, 2005 WI App 109, ¶17, 282 Wis. 2d 522, 699 N.W.2d 235 (indicating that lack of parole and good-time credit under truth-in-sentencing is collateral consequence). Moreover, even if the circuit court were correct in this regard, Mr. Odom's statutory ineligibility for the Substance Abuse and Challenge Incarceration Programs was, in fact, a negative collateral consequence of his pleas. By virtue of his pleas to offenses specified in Chapter 940, he was statutorily barred from participating in programs which could provide for his early release from prison. Such a prohibition from these early-release programs is certainly not a positive consequence.

Due to the circuit court's misadvice regarding his eligibility for the Substance Abuse and Challenge Incarceration Programs, Mr. Odom mistakenly believed that the court could find him eligible for these early release programs if he pled guilty/no contest. His misunderstanding was not based on his own inaccurate interpretation, but was based on affirmative, inaccurate information provided by the court. Under these circumstances, Mr. Odom's pleas were unknowing and involuntary as a matter of law. See Brown, 276 Wis. 2d at ¶14. He is therefore entitled to plea withdrawal.

At a minimum, Odom is entitled to a hearing on whether his pleas were, in fact, unknowing and involuntary. In his original postconviction motion, Mr. Odom alleged that he did not know whether he was eligible for the Challenge Incarceration or Substance Abuse Programs before asking the court at the plea hearing. He also alleged that when the court informed him that it could, in its discretion, find him eligible, he believed this to be the case.11 (28:10). He therefore made

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[11] Mr. Odom's attorney explained at sentencing that Mr. Odom had a substance abuse need. As his attorney explained, Mr. Odom, who was eighteen at the time, had been exposed to a significant amount of (continued)

a prima facie case for plea withdrawal on the grounds that his pleas were unknowing and involuntary. *See* ***Bangert***, 131 Wis. 2d at 274.[12]

Importantly, it was the trial court—not Mr. Odom's attorney—that gave Mr. Odom the materially inaccurate information about the early release programs. The court of appeals has recognized that a manifest injustice may occur when a circuit court affirmatively misinforms a defendant about a collateral consequence of a plea. ***Kohlhoff***, No. 2012AP1144-CR, unpublished slip op. ¶6. (App.166). Accordingly, Mr. Odom was not required to raise an ineffective assistance of counsel claim. Rather, he properly

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drug abuse by his family while growing up. His attorney also stated that Mr. Odom used marijuana a lot as a teenager. (38:15-16).

[12] ***Bangert*** does not require a showing that the defendant would not have pled guilty but for misadvice, but even if it were otherwise, in his original postconviction motion, Mr. Odom specifically alleged that he would not have pled, and would have insisted on going to trial, had the trial court correctly advised him that he was statutorily ineligible for the Substance Abuse and Challenge Incarceration Programs. (28:10-12). In support of this claim, Mr. Odom made the following detailed allegations:

- He maintains that he is innocent of charges in the criminal complaint. Thus, prior to the new plea offer, he had wanted to take the case to trial.
- He also believed he had a reasonable chance of prevailing at trial, because the evidence against him on a number of key issues consisted of A.F.'s word against his.
- In deciding whether to accept the State's new plea offer, he considered that the plea deal would reduce the total maximum possible sentence he faced.
- However, he also considered that under the new plea deal, he would still face the possibility of a substantial amount of prison time.
- Thus, he did not want to accept the State's offer unless he could be found eligible for the Substance Abuse and/or Challenge Incarceration Programs. He understood that if was eligible for (and successfully completed) one of these program, he would be able to earn early release.

(28:10-12).

asserted that his pleas were unknowing and involuntary because the trial court misadvised him about a collateral consequence of his pleas.

Ultimately, like in ***Riekkoff*** and ***Brown***, where the plea deals were purposefully crafted around collateral consequences, here, Mr. Odom sought specific information from the court about earned-release programs when deciding whether to go to trial or plead guilty. *See* ***Riekkoff***, 112 Wis. 2d at 128; ***Brown***, 276 Wis. 2d at ¶¶13-14. The circuit court's misadvice about these programs unfairly induced Mr. Odom to enter his pleas, as it is clear from the record that eligibility for the early-release programs mattered to him, just as the collateral consequences at issue in ***Riekkoff*** and ***Brown*** mattered to those defendants.

Mr. Odom's misunderstanding about his eligibility for early-release programming, which factored into his decision to plead guilty, was based on affirmative, inaccurate information provided by the circuit court. As a result, Mr. Odom's pleas were unknowing and involuntary, and he is entitled to plea withdrawal. *See* ***Brown***, 276 Wis. 2d at ¶14.

CONCLUSION

For the foregoing reasons, Tydis Odom respectfully asks this court to reverse the judgment and orders denying postconviction relief, and remand the case to the circuit court for a ***Bangert*** hearing on both of his claims for plea withdrawal.

Dated this 13th day of November, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this 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 of body text. The length of the brief is 7,267 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 13th day of November, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of November, 2017.

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A P P E N D I X

I N D E X
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A P P E N D I X