No. 15AP2525

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

TYDIS TRINARD ODOM,
DEFENDANT-APPELLANT

On Appeal From The Milwaukee County Circuit Court,
The Honorable Timothy G. Dugan, Presiding,
Case No. 2014CF950

RESPONSE BRIEF OF THE STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

LUKE N. BERG
Deputy Solicitor General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
bergln@doj.state.wi.us
(608) 266-3056

Attorneys for the State of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Cases

Treatises

ISSUES PRESENTED

1. Does the circuit court's omission of $900 in DNA surcharges from a plea colloquy warrant plea withdrawal?

The circuit court answered no, and the Court of Appeals certified this question to this Court.

2. Does the circuit court's qualified statement that Odom "could" be eligible for certain discretionary early-release programs warrant plea withdrawal?

The circuit court answered no, and the Court of Appeals certified this question to this Court.

INTRODUCTION

The State charged Tydis Odom with four counts for beating, sexually abusing, and imprisoning his girlfriend, exposing him to up to 123 years' imprisonment and $310,000 in fines. Odom accepted a plea bargain that reduced his maximum sentence to 11 years' imprisonment and $40,000 in fines. Having had a change of heart almost a year later, Odom asks to withdraw his plea on the basis of two side issues: that the circuit court did not inform him of $900 in DNA surcharges and allegedly misinformed him about his eligibility for two discretionary, early-release programs.

Neither issue entitles Odom to withdraw his plea. DNA surcharges are not "punishment" for purposes of the plea-colloquy statute, Wis. Stat. § 971.08(1)(a), so the circuit court did not need to mention them during a plea colloquy. And the circuit court told Odom only that he "*could*" be eligible for the early-release programs, with the caveat that the court would have to "look at the factors" and that Odom needed "a substance abuse issue" to be eligible, which he does not claim to have. Even if the circuit court erred in either way, the alleged errors would not justify overturning the plea given their insignificance when compared with the potential sentence at stake in the plea.

While the State should prevail under any legal standard, this case presents the opportunity to clarify two important legal points. First, this Court should hold that "punishment" for purposes of Section 971.08(1)(a) refers only

to imprisonment and fines. Second, this Court should hold, consistent with *State v. Reyes Fuerte*, 2017 WI 104, 904 N.W.2d 773, that traditional harmless-error analysis applies to all plea-colloquy defects.

ORAL ARGUMENT AND PUBLICATION

This Court has already scheduled oral argument for March 16, 2018. By granting the Court of Appeals' certification, this Court indicated that the case is appropriate for publication.

STATEMENT OF THE CASE

A. Over the course of two days in 2014, Odom beat, imprisoned, and sexually abused his then-girlfriend, A.F. *See* R.2:3. Odom and A.F. went to see a movie together, but started arguing shortly after they arrived. R.38:5. Odom eventually forced her out of the theater and into his car, drove her to an alley, and repeatedly punched her in the face until she lost consciousness. R.38:5–6. When she regained consciousness, Odom was hitting her in the face with the "butt of a screwdriver." R.38:6. As a result of the abuse, A.F.'s eyes were "swollen nearly shut" and her arms and shoulders were covered with bite marks. R.38:6. Odom then drove A.F. to his uncle's house, where the two spent the night, and Odom forced A.F. through oral and vaginal sex. R.38:6; R.2:2. The following morning, A.F. fled from Odom and alerted the police. R.38:7.

B. The State charged Odom with two counts of second-degree sexual assault, kidnapping, and substantial battery. R.37:6. Together, these charges carried maximum penalties of 123.5 years' imprisonment—76.5 years' initial confinement and 47 years' extended supervision—and $310,000 of fines. R.37:6–7.

On the morning of trial, the State offered to downgrade the sexual-assault counts to fourth-degree sexual assault and to amend the kidnapping count to false imprisonment, leaving the substantial battery count unchanged, in exchange for Odom pleading guilty. R.37:7. In total, these new charges carried maximum penalties of 4.5 years' confinement, 18 months at the House of Corrections, 5 years' extended supervision, and $40,000 in fines. R.37:7–8.

The court explained to Odom that accepting the State's offer meant a "difference between . . . 123 and a half years in prison, [and] $310,000 . . . in fines" versus 11 years' confinement and $40,000 in fines. R.37:8. The court also explained that under the plea bargain, unlike the original charges, Odom would not have to register as a sex offender and could not be committed under chapter 980. R.37:10.

Before accepting the State's offer, Odom asked if "people in sexual assault cases[ ] are [ ] eligible for boot camp or anything like that?" R.37:9. "Boot camp" is the colloquial name for Wisconsin's Challenge Incarceration Program, a 180-day program of "manual labor, personal development counseling, substance abuse treatment and education,

military drill and ceremony, counseling, and strenuous physical exercise." Wis. Stat. § 302.045(1); *State v. Steele*, 2001 WI App 160, ¶ 6, 246 Wis. 2d 744, 632 N.W.2d 112. Participants who successfully complete the program are released early into extended supervision. Wis. Stat. § 302.045(3m). The court responded that Odom "could be eligible for boot camp" and that the court "believe[d]" he could also be eligible for "substance abuse" (the Substance Abuse Program, like the Challenge Incarceration Program, allows for early release, Wis. Stat. § 302.05(3)(c)). R.37:9. But the court also warned Odom that it "would have to look at all the factors" governing his eligibility for these programs. R.37:9. And the court explained that, "for both of those programs," Odom needed "to have a substance abuse issue" to be eligible. R.37:9; *see* Wis. Stat. §§ 302.045(2)(d); 302.05.

Odom then accepted the plea offer, pleading guilty to false imprisonment and substantial battery and no contest to the two counts of fourth-degree sexual assault. R.37:21–22.

The court sentenced Odom to five years and three months of initial confinement and five years of extended supervision, R.38:38–39, and imposed "court costs," "mandatory victim/wit. surcharge[s]," and "other" charges totaling $1,022, R.18, 19. The court also ordered Odom to submit a DNA sample and pay the "mandatory DNA surcharge" on all four counts, an additional $900 ($250 per felony charge and $200 per misdemeanor, Wis. Stat. § 973.046(1r)). R.18, 19, 38:36–37. Finally, the court found

Odom ineligible for the Challenge Incarceration and Substance Abuse Programs. R.38:39. The Court did not give a reason for finding Odom ineligible; however, the chapter 940 offenses Odom pleaded to rendered him statutorily ineligible for either program. *See* Wis. Stat. §§ 302.045(2)(c); 302.05(3)(a)(1); 973.01(3g), (3m).

C. About ten months after sentencing, Odom moved to withdraw his plea, claiming that it was "not knowingly, intelligently, and voluntarily entered" because the court "incorrectly advised him that he would be statutorily eligible for the Substance Abuse and Challenge Incarceration Programs if he pled." R.28:1.

The circuit court denied Odom's motion. R.29. The court carefully reviewed what it told Odom at the plea hearing: that he "could be eligible" for these programs, but that the court "would have to look at all the factors" and that "both . . . programs" require "a substance abuse issue." R.29:2. Because "'[c]*ould*' denotes a *possibility*, not an automatic given," the court concluded that Odom's "claimed reliance on a *possibility* [was] not sufficient to warrant plea withdrawal." R.29:2. The court distinguished a line of cases allowing plea withdrawal when the defendant was misinformed about certain collateral consequences because those cases involved "negative legal repercussions for the defendant," such as the possibility of "being deported, being subjected to chapter 980 commitment proceedings, [or] being required to register as a sex offender," whereas "[t]he

possibility of an early release program" was, "at most, a discretionary determination made by the court" and "does not constitute a negative legal collateral consequence." R.29:2–3.

D. Four months later, after the Court of Appeals in *State v. Radaj*, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, held that imposing multiple DNA surcharges can be "punitive [in effect] for ex post facto purposes," *id.* ¶ 12, Odom filed a supplemental motion to withdraw his plea, R.44, arguing that by failing to discuss the DNA surcharges during the plea colloquy, the circuit court violated its obligation to inform Odom of the "potential punishment." Wis. Stat. § 971.08(1)(a); *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

The circuit court denied this motion as well, holding that DNA surcharges are not "punishment" for purposes of the plea colloquy. R.54. Among other things, DNA surcharges are "mandatory," R.54:3, are "not found within the penalty provisions," R.54:3, are "used to cover the cost of a number of DNA-analysis-related activities," R.54:5, and are similar to other non-punitive surcharges, in particular the mandatory victim/witness surcharge, R.54:6; *see* Wis. Stat. § 973.045.

E. Odom appealed the denial of both of his motions for plea withdrawal. The Court of Appeals certified the appeal to this Court, noting that Wisconsin caselaw is unclear about the test for "punishment" in the plea-colloquy context. The Court of Appeals also raised whether *Radaj*, 2015 WI App 50, should

be overruled in light of this Court's decision in *State v. Scruggs*, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786. This Court accepted the certification on September 12, 2017.

STANDARD OF REVIEW

This Court reviews "de novo" whether a "plea colloquy [was] deficien[t]," whether "a plea was entered knowingly, intelligently, and voluntarily," *State v. Taylor*, 2013 WI 34, ¶¶ 25–26, 347 Wis. 2d 30, 829 N.W.2d 482, and "whether an evidentiary hearing is required," *Reyes Fuerte*, 2017 WI 104, ¶ 16.

SUMMARY OF ARGUMENT

I.A. A defendant may only withdraw a guilty plea post-sentencing to correct a "manifest injustice." *State v. Finley*, 2016 WI 63, ¶ 58, 370 Wis. 2d 402, 882 N.W.2d 761. A plea is "manifestly unjust," and violates the Due Process Clause of the United States Constitution, if it "was not entered knowingly, intelligently, and voluntarily." *Id.* ¶¶ 12, 58; *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). To be "knowing" and "voluntary," a defendant must be "fully aware of the direct consequences" of the plea. *Brady v. United States*, 397 U.S. 742, 755 (1970) (citation omitted).

To meet these requirements, Wisconsin requires circuit courts to inform defendants during a plea colloquy of the "potential punishment" they face. Wis. Stat. § 971.08(1)(a). If this colloquy was defective in some way, the defendant is normally entitled to a hearing to determine whether the plea

was "voluntary." *Bangert*, 131 Wis. 2d at 261, 272–76. Some errors, however, are so "insubstantial" that they do not even warrant a hearing. *See State v. Cross*, 2010 WI 70, ¶¶ 32, 36–40, 326 Wis. 2d 492, 786 N.W.2d 64; *Taylor*, 2013 WI 34, ¶¶ 32–42, 48–54.

There are two preliminary, unsettled legal questions in this case: what qualifies as "punishment" under Section 971.08(1)(a), and whether the harmless-error doctrine applies to all plea-colloquy defects.

B.1. This Court should hold that "punishment" under Section 971.08(1)(a) includes only the length of the total term of imprisonment and whatever the Legislature has specified as a criminal fine. This rule is consistent with the outcomes of prior Wisconsin cases considering various consequences of a plea, *infra* pp. 17–18, as well as with the language those cases used "synonymously" with the statutory phrase "potential punishment," *Finley*, 2016 WI 63, ¶¶ 4–6 & n.4. It also aligns with the structure of Wisconsin's criminal statutes and provides an easy-to-apply rule in an area where such clarity is vital.

2. In the alternative, this Court should adopt a "fundamental purpose" test that looks exclusively to the Legislature's intent without considering the effects. *See State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995). Doing so accords proper deference to the Legislature, *see State v. Shumate*, 107 Wis. 2d 460, 466, 319 N.W.2d 834 (1982), and

retains most, though not all, of the administrability of the bright-line rule.

3. This Court should not incorporate the "intent-effects" test from ex post facto and double-jeopardy jurisprudence, under which a statute with nonpunitive intent can nevertheless be found punitive based on a seven-factor assessment of the law's effects. *See Scruggs*, 2017 WI 15, ¶ 16. That test applies where the constitutional concern is abuse of power by the State, whereas in the plea context, the constitutional focus is ensuring that the defendant's plea is knowing and voluntary. Adopting the indeterminate intent-effects test could also cause significant confusion given the high number of pleas courts process each year and the numerous ancillary effects of a plea.

C. This Court should hold that the harmless-error doctrine applies to all plea-colloquy defects. This Court previously analyzed "insubstantial" plea-colloquy errors under the "manifest injustice" and "knowing, intelligent, and voluntary" standards while rejecting the harmless-error doctrine. *Taylor*, 2013 WI 34, ¶¶ 32–42 & nn.10–11, ¶¶ 48–54. In *Reyes Fuerte*, 2017 WI 104, however, this Court held that the harmless-error doctrine *does* apply to defects in the immigration warnings required by a different subsection of the very statute at issue here. *See* Wis. Stat. § 971.08(1)(a) ("potential punishment" warnings) & (1)(c) (immigration warnings). The Court's statutory analysis applies equally to both subsections, so this Court should make clear that *Reyes*

Fuerte overruled *Taylor*'s rejection of the harmless-error doctrine. Doing so would align Wisconsin with the federal system, where harmless-error analysis applies to all plea-colloquy defects under Federal Rule of Criminal Procedure 11(h). *E.g.*, *Dansberry v. Pfister*, 801 F.3d 863, 867–69 (7th Cir. 2015).

II. Applying the above-described principles to the present case, Odom is not entitled to withdraw his guilty plea because the circuit court did not inform him of $900 in DNA surcharges.

As a threshold matter, the DNA surcharge statute is not "punishment" under Section 971.08(1)(a), no matter which of the three approaches to "punishment" this Court adopts. First, under the State's proposed bright-line rule, DNA surcharges are not punishment because they do not affect the term of imprisonment and were not designated by the Legislature as a "fine." Second, under the State's alternative "fundamental purpose" test, DNA surcharges are not punishment because this Court already held that the purpose of the DNA surcharge law is "civil [ ], rather than [ ] criminal." *Scruggs*, 2017 WI 15, ¶ 14–38. And even under Odom's preferred intent-effects test, the DNA surcharge statute is not punitive in either intent or effect, as the State explains here and in even more detail in its recently submitted briefing in in *State v. Williams*, No. 16AP883 (Wis.).

In any event, even if the DNA surcharges were "punishment" under Section 971.08(1)(a), any plea-colloquy

error was harmless because there is no "reasonable probability that the error contributed to" Odom's decision to plead guilty. *State v. Thompson*, 2012 WI 90, ¶ 85, 342 Wis. 2d 674, 818 N.W.2d 904. Odom pleaded knowing he could receive 11 years' imprisonment and $40,000 in fines, and avoided up to 123.5 years' imprisonment, $310,000 in fines, and mandatory sex-offender registration. The $900 in surcharges would not have made any difference.

And even if this Court holds that the harmless-error doctrine does not apply here, this Court should still reject Odom's plea-withdrawal claim because any error in failing to mention $900 in surcharges was so "insubstantial" that it could not possibly call into question the "knowing, intelligent, and voluntary" nature of his plea.

III. This Court should also reject Odom's plea-withdrawal argument based on the circuit court's alleged misinformation about his eligibility for certain early-release programs.

The court did not misinform Odom. It told him that he "*could*" be eligible for the programs, depending on the "factors" the court would "look" into. R.37:9 (emphasis added). Even though, as it turned out, Odom was statutorily ineligible, the court's statement was not clear misinformation, given that "'*[c]ould*' denotes a *possibility*, not an automatic given," R.29:2, and the court's caveat that it "would have to look at all the factors," R.37:9.

Even if the circuit court's statement that Odom "could" be eligible were misinformation, it was harmless. By pleading, Odom reduced his potential imprisonment by 112.5 years and his potential fine by $270,000. R.37:7–10. His eligibility for a purely discretionary early-release program could not have made a difference. Moreover, Odom was aware that a "substance abuse" issue was a prerequisite for both programs, R.37:9, and he does not claim to have a "substance abuse" issue, so he should have known he was ineligible for that reason.

If the harmless-error doctrine does not apply, this Court should still reject this claim because any misinformation was too "insubstantial" to call into question the voluntariness of his plea or to suggest a "manifest injustice." *Taylor*, 2013 WI 34, ¶¶ 39–41, 56. Odom should have known that he was disqualified for lack of a substance-abuse issue, he knew his eligibility would depend on the "factors" the court would "look" into, and the early-release programs are, at best, at the discretion of the sentencing court and prison officials.

ARGUMENT

I. Standards For Evaluating Motions To Withdraw A Guilty Plea After Sentencing

A. Established Legal Principles

After sentencing, a defendant may only withdraw a guilty plea by providing "clear and convincing evidence" that withdrawal is necessary to correct a "manifest injustice."

Finley, 2016 WI 63, ¶ 58. This is a "heavy burden," *State v. Sulla*, 2016 WI 46, ¶ 24, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted), because "the state's interest in finality of convictions requires a high standard of proof to disturb [a] plea [post-sentencing]," *State v. Cain*, 2012 WI 68, ¶ 25, 342 Wis. 2d 1, 816 N.W.2d 177 (citation omitted).

As relevant here, a defendant can establish a "manifest injustice" sufficient to withdraw a guilty plea by proving that the plea "was not entered knowingly, intelligently, and voluntarily." *Taylor*, 2013 WI 34, ¶ 49. The knowing-intelligent-and-voluntary standard is the federal constitutional standard for a entering into a valid plea consistent with the Due Process Clause. *See Bradshaw*, 545 U.S. at 183; *United States v. Haslam*, 833 F.3d 840, 844 (7th Cir. 2016); *Finley*, 2016 WI 63, ¶ 12.[1]

For a plea to be "voluntary," the defendant must be "fully aware of the *direct* consequences" of the plea. *Brady*, 397 U.S. at 755 (emphasis added, citation omitted); *State v. Chamblis*, 2015 WI 53, ¶¶ 23–27, 362 Wis. 2d 370, 864 N.W.2d 806; *Virsnieks v. Smith*, 521 F.3d 707, 715 (7th Cir. 2008). A "direct consequence," as opposed to a "collateral consequence," is one that has a "definite, immediate, and largely automatic effect on the range of a defendant's punishment." *State v. Byrge*, 2000 WI 101, ¶¶ 60–61, 237 Wis. 2d 197, 614 N.W.2d

[1] To simplify, this brief from here on will use the word "voluntary" as shorthand for the "knowing, intelligent, and voluntary" standard.

477. Awareness of "collateral consequences" "is not a prerequisite to entering a knowing and intelligent plea," *id.* ¶ 61, but in some circumstances, *misinformation* about a collateral consequence can render a plea involuntary, *State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983).

To ensure that pleas are "voluntary" and based upon awareness of all "direct consequences," Section 971.08(1)(a) requires circuit courts to inform defendants during a plea colloquy of the "potential punishment" they face for the relevant criminal conviction. *State v. Brown*, 2006 WI 100, ¶ 23, 293 Wis. 2d 594, 716 N.W.2d 906; *State v. Bollig*, 2000 WI 6, ¶¶ 16–17, 27, 232 Wis. 2d 561, 605 N.W.2d 199 (equating "punishment" with "direct consequences"). Although following Section 971.08 is the "best way . . . to avoid constitutional problems," *Brown*, 2006 WI 100, ¶ 23, it is not itself "a constitutional requirement," *Bangert*, 131 Wis. 2d at 266, since defendants often "learn of the implications of [their] plea[s] from another source" (e.g., their attorney), *Chamblis*, 2015 WI 53, ¶ 26.

Given that the plea colloquy is only a "statutory imperative," *Bangert*, 131 Wis. 2d at 266, an improper colloquy does not automatically allow a defendant to withdraw a plea. At most, an error entitles the defendant to a hearing (known as a *Bangert* hearing), where the State bears the burden to establish that the plea was nevertheless "voluntary." *Id.* at 272–76; *Brown*, 2006 WI 100, ¶¶ 36–41.

Some errors, however, are such "small deviations" or "insubstantial defects" that they do not even "require[ ] a formal evidentiary hearing." *Cross*, 2010 WI 70, ¶¶ 32–40; *Taylor*, 2013 WI 34, ¶¶ 32–42, 48–54. If the "record makes clear" that the "plea was entered knowingly, intelligently, and voluntarily" and that there is no need "to correct a manifest injustice," *Taylor*, 2013 WI 34, ¶¶ 55–56, courts may "deny[ ] [a] plea withdrawal motion without holding a *Bangert* hearing," *id.* ¶ 42.

This case involves two unsettled questions of how to approach plea withdrawal motions: (1) the meaning of "punishment" for purposes of Section 971.08(1)(a); and (2) whether, under this Court's recent decision in *Reyes Fuerte*, the traditional harmless-error doctrine applies to all plea-colloquy defects.

B. This Court Should Hold That "Punishment" For Section 971.08(1)(a) Plea-Colloquy Purposes Includes Only Imprisonment And Legislatively Identified Criminal Fines

Section 971.08(1)(a) requires circuit courts to inform defendants of the "potential punishment" they face by pleading. This Court should adopt the simple rule that punishment includes only imprisonment and fines, or, in the alternative, a "fundamental purpose" test that looks exclusively to the legislative intent of a provision. This Court should not incorporate the "intent-effects" test from ex post facto and double-jeopardy jurisprudence.

1. This Court Should Adopt The State's Proffered Bright-Line Rule

This Court should adopt a simple, bright-line rule for "potential punishment" under Section 971.08(1)(a) that includes only the length of the total term of imprisonment (maximum, and any mandatory minimums) and whatever the Legislature has specified as a criminal fine. *See* State's Br. at 8–13, *State v. Muldrow*, No. 2016AP740 (Wis. Dec. 18, 2017) (hereafter "Muldrow Br."). As the State explained in its briefing in *Muldrow*, currently pending before this Court, there are multiple reasons to adopt this simple rule.

First, adopting the State's proposed rule would simply formalize the approach that this Court and the Court of Appeals have been developing as part of the common-law method in defining the term "punishment" for purposes of Section 971.08(1)(a). So far as the State has been able to determine, every decision of this Court and the Court of Appeals to have considered a plea consequence unrelated to the length of imprisonment or amount of a criminal fine has held that the consequence is not a required part of the plea colloquy:[2] sex-offender registration, *Bollig*, 2000 WI 6, ¶ 56; potential chapter 980 commitment, *State v. Myers*, 199 Wis. 2d 391, 394–95, 544 N.W.2d 609 (Ct. App. 1996); restitution,

[2] Some of these cases were analyzed under the doctrine of direct versus collateral consequences, rather than applying the statutory definition of "potential punishment." As noted above, however, *Bollig* equated the statutory test for "punishment" with the constitutional test for "direct consequences." 2000 WI 6, ¶¶ 16–17, 27.

Dugan, 193 Wis. 2d 610; a presumptive mandatory release date, *State v. Yates*, 2000 WI App 224, 239 Wis. 2d 17, 619 N.W.2d 132; possible resentencing following probation revocation, *State v. James*, 176 Wis. 2d 230, 241–42, 500 N.W.2d 345 (Ct. App. 1993); mandatory license revocation, *State v. Madison*, 120 Wis. 2d 150, 151, 353 N.W.2d 835 (Ct. App. 1984); federal firearm restrictions, *State v. Kosina*, 226 Wis. 2d 482, 595 N.W.2d 464 (Ct. App. 1999); and federal healthcare restrictions, *State v. Merten*, 2003 WI App 171, 266 Wis. 2d 588, 668 N.W.2d 750. Conversely, every consequence found to be a required part of the plea colloquy either directly affected the term of imprisonment or was a fine. *Byrge*, 2000 WI 101, ¶¶ 62–68 (parole eligibility date when fixed by sentencing court); *Chamblis*, 2015 WI 53, ¶ 24 ("presumptive minimum sentence" (citing *State v. Mohr*, 201 Wis. 2d 693, 700, 549 N.W.2d 497 (Ct. App. 1996)); *Taylor*, 2013 WI 34, ¶ 34 (failure to mention an "additional two-year repeater penalty enhancer" was a "defect," albeit "insubstantial" in the particular circumstances).

Second, this rule is consistent with the language that this Court and the Court of Appeals have used to describe "potential punishment" under Section 971.08(1)(a). In *Finley*, this Court surveyed various phrases that have been "used synonymously" with "potential punishment": "maximum statutory penalty," "maximum sentence," "maximum term of imprisonment," "maximum penalty," "maximum potential sentence," "maximum potential imprisonment," "maximum

initial sentence," "actual allowable sentence," and "precise maximum sentence." 2016 WI 63, ¶¶ 4–6 & n.4. While *Finley* did not set forth a comprehensive definition, it used the phrase "maximum statutory penalty" "interchangeably" with "potential punishment," and then determined the "maximum statutory penalty for felonies" by looking to the terms of imprisonment and fines set forth in Section 939.50(3), and the penalty "enhancements" in Sections 939.63 *et seq*. *Id*. ¶ 5.

Third, limiting "potential punishment" under Section 971.08(1)(a) to the term of imprisonment and criminal fines is consistent with the structure of Wisconsin's criminal statutes. Wisconsin has a separate subchapter entitled, and devoted to, the "Penalties" for crimes, which is limited almost exclusively to imprisonment and fines. Wis. Stat. ch. 939, subch. IV. The subchapter contains the default fines and terms of imprisonment for felonies, Wis. Stat. § 939.50, and misdemeanors, *id*. § 939.51, mandatory minimum sentences for certain categories of crimes, *id*. §§ 939.616–619, and various penalty enhancements that can increase the maximum fine or term of imprisonment, *id*. §§ 939.62–645. The only criminal provision in the "Penalties" subchapter unrelated to a term of imprisonment or fine is one allowing "Lifetime supervision of serious sex offenders." *Id*. § 939.615. However, a separate statutory section requires prosecutors who intend to "seek lifetime supervision under [that section]" to notify defendants "before acceptance of any plea." *Id*. § 973.125(1)(a). Hence, limiting "potential punishment" to

imprisonment or fines would be equivalent to requiring courts to inform defendants only of the criminal "penalties" listed in subchapter 939. *Accord Finley*, 2016 WI 63, ¶ 6.[3]

Fourth, this rule helps achieve Section 971.08(1)(a)'s primary goal: ensuring that criminals enter into guilty pleas "voluntarily." In the vast majority of cases, by far the most significant consequence of a plea is the potential sentence—the term of imprisonment and criminal fine. Since, as in this case, *infra* Parts II.B–C, all ancillary effects will ordinarily be "insubstantial" in comparison, informing the defendant of the maximum and minimum term of imprisonment and fine will sufficiently ensure that the plea was "entered knowingly, intelligently, and voluntarily." *See Taylor*, 2013 WI 34, ¶ 8.

A number of federal cases have adopted a similar rule for "direct" versus "collateral" consequences (this Court has equated "direct" consequences with "punishment" under Section 971.08(1)(a), *see Bollig*, 2000 WI 6, ¶¶ 16–17, 27), demonstrating that a simple rule is sufficient to protect the underlying constitutional concerns. The Third Circuit, for example, expressly held that "the only consequences considered direct are the maximum prison term and fine for

[3] Chapter 939 also contains the penalties for "forfeitures," Wis. Stat. § 939.52, but "a forfeiture is not a crime," *id.* § 939.12, so the "[c]riminal [p]rocedure" statutes, Wis. Stat. chs. 967–980, including the plea-colloquy requirements under Section 971.08, do not apply. *See State v. Bausch*, 2014 WI App 12, ¶ 12, 352 Wis. 2d 500, 842 N.W.2d 654.

the offense charge." *United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir. 1991), *abrogated on other grounds by United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) (en banc). The Third Circuit later found a "mandatory minimum" sentence to be a "direct" consequence, *Jamison v. Klem*, 544 F.3d 266, 278 (3d Cir. 2008) (citation omitted), but has not otherwise expanded the list. The Tenth Circuit held that consequences "unrelated to the length and nature of the federal sentence are not direct consequences." *United States v. Muhammad*, 747 F.3d 1234, 1240 (10th Cir. 2014) (citation omitted). The Fifth Circuit, too, has held that "the direct consequences of a defendant's plea are the immediate and automatic consequences of that plea such as the *maximum sentence length or fine*," and do not include any "consequences no matter how unpalatable which are not related to the length or nature of the federal sentence." *Duke v. Cockrell*, 292 F.3d 414, 417 & n.7 (5th Cir. 2002) (citation omitted, emphasis added).[4]

Finally, limiting "potential punishment" to the length of imprisonment and any specified fine is a clear, simple, and workable rule. Bright-line rules are generally "helpful," *In re*

[4] At least one state supreme court has adopted a similar rule, holding that "[i]n general, . . . a defendant must be informed of those consequences which affect the range of possible sentences or periods of incarceration for each charge and the amount of any fine to be imposed as a part of a sentence." *Nebraska v. Schneider*, 640 N.W.2d 8, 13 (Neb. 2002). A survey of other state cases is not particularly helpful, for, as the Court of Appeals found, the "analyses [ ] run the gamut." App. 119–22 (surveying cases).

Matthew D., 2016 WI 35, ¶ 25, 368 Wis. 2d 170, 880 N.W.2d 107, and especially so when they need to be applied repeatedly and quickly. Circuit courts process an enormous number of pleas each year. In 2016 alone, of the 107,772 criminal cases "[d]isposed," 79,713 (74%) were "[p]led [b]efore [t]rial." Wisconsin Court System, *Disposition Summary by Disposing Court Official, Statewide Report 11* (2016), https://goo.gl/HCUgJi. Of the 39,171 felony cases, 27,383 (70%) were pled before trial. Wisconsin Court System, *Felony Disposition Summary by Disposing Court Official, Statewide Report 12A* (2016), https://goo.gl/hy6hSX. To process this volume of pleas effectively, circuit courts need to know exactly what to include in the plea colloquy without having to apply an ad hoc, seven-factor test, as Odom urges. *See* Opening Br. 11–12, 14–16. To give just one category of examples, Wisconsin imposes various surcharges in addition to the DNA surcharge, including the "Crime victim and witness assistance surcharge," Wis. Stat. § 973.045, the "Child pornography surcharge," *id.* § 973.042, the "Drug offender diversion surcharge," *id.* § 973.043, the "Crime prevention funding board surcharge," *id.* § 973.0455, and "Domestic abuse surcharges," *id.* § 973.055. By adopting a bright-line rule for "potential punishment," this Court would "eliminate [any] confusion" from having to apply an indeterminate test to each of these, with potential differing outcomes depending on the surcharge or facts of the case. *See Blum v. 1st Auto &*

Cas. Ins. Co., 2010 WI 78, ¶ 53, 326 Wis. 2d 729, 786 N.W.2d 78.

2. Alternatively, This Court Should Adopt A "Fundamental Purpose" Test

If this Court were to reject the bright-line rule proposed above, it should adopt a "fundamental purpose" test to determine whether an ancillary effect is "potential punishment" for plea purposes. *See* App. 108–10; Muldrow Br. 14–20; *accord Trop v. Dulles*, 356 U.S. 86, 96 (1958) ("In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.").

Under this test, a "sentencing provision" is not "potential punishment" if the "*fundamental* purpose" of the provision (that is, the *Legislature's intent*) is nonpunitive, even if the provision has secondary punitive purposes or punitive effects. *Dugan*, 193 Wis. 2d at 620 (emphasis added); *Trop*, 356 U.S. at 96. The "fundamental purpose" of a sentencing provision is a question of "legislative intent," *Dugan*, 193 Wis. 2d at 621, which courts determine primarily by examining the "plain meaning" and statutory context of the sentencing provision at issue, *id.* at 620–21; *accord State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

Applying this test in *Dugan*, the Court of Appeals concluded that restitution was not punishment because its "fundamental purpose" was "rehabilitation of the offender."

193 Wis. 2d at 620–21. The court reached this conclusion after noting that the Legislature did not include the restitution statute in the "Penalties" subchapter of chapter 939, and that the "plain meaning" of "restitution" did "not have a punitive ring." *Id.* at 621. The court was unconcerned that the restitution statute used the word "penalty" in its text, since this simply showed that restitution "can," secondarily, "work a punitive effect." *Id.* at 620; *see also Bollig*, 2000 WI 6, ¶¶ 20–26 (considering primarily the intent of sex-offender registration and mentioning its effects only briefly).

Adopting a "fundamental purpose" test accords proper deference to the Legislature. The power of delineating punishment for criminal activity belongs to the Legislature, *see Shumate*, 107 Wis. 2d at 466, thus the question of "what is punishment"—and therefore what is "potential punishment" for plea purposes—must ultimately be a question of the "legislative intent" behind a statute. *Dugan*, 193 Wis. 2d at 620. And to "ascertain[ ]" that intent, this Court looks primarily to "the statutory language" and statutory structure. *Kalal*, 2004 WI 58, ¶ 43–44, 46; *see Dugan*, 193 Wis. 2d at 620.

Adopting the "fundamental purpose" test here retains much of the administrability and predictability of the bright-line rule proposed above, since courts regularly determine legislative intent according to the approach explained in *Kalal* and mirrored in *Dugan*. But the test does not retain *all* the advantages of the bright-line rule, since it still requires

courts to engage in this inquiry rather than simply looking to whether the sentencing provision at issue affects the length of imprisonment or has been identified by the Legislature as a criminal fine. *See supra* pp. 21–22.

3. This Court Should Not Import The Intent-Effects Test Into This Context

The Ex Post Facto Clauses of the Federal and Wisconsin Constitutions prohibit the State from increasing the "punishment for a crime after its commission." *Scruggs*, 2017 WI 15, ¶ 14 (citation omitted); U.S. Const. art. I, § 9, cl. 3; Wis. Const. art. I, § 12. To "determine whether a statute is punitive for ex post facto purposes," this Court applies the two-part "'intent-effects' test" from *Hudson v. United States*, 522 U.S. 93 (1997). *Scruggs*, 2017 WI 15, ¶ 16. This test also answers a "threshold question" for the Double Jeopardy Clause. *In re Commitment of Rachel*, 2002 WI 81, ¶¶ 22, 38, 254 Wis. 2d 215, 647 N.W.2d 762; *see Smith v. Doe*, 538 U.S. 84, 97 (2003). Under the "intent-effects" test, this Court first considers whether the "legislative intent of [a statute] was to impose punishment"; if so, the "law is considered punitive and [the] inquiry ends." *Scruggs*, 2017 WI 15, ¶ 16. If a law does not have a punitive intent, the Court then considers "whether [the] statute is [nevertheless] punitive in effect," "guided by the seven factors [ ] set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)." *Id.* ¶¶ 40–41 (listing factors).

Odom argues that this Court should apply the ex post facto "intent-effects" test to decide what is "punishment" for purposes of the plea-colloquy warnings required by Section 971.08(1)(a). He is wrong for multiple reasons.

First, there are very different constitutional concerns at stake, suggesting that the tests should be different. *See* App. 118. Both the Ex Post Facto and Double Jeopardy Clauses operate as checks against the State, preventing it from imposing punishment retroactively, *see Scruggs*, 2017 WI 15, ¶ 14, or imposing "multiple punishments for the same offense," *State v. Steinhardt*, 2017 WI 62, ¶ 13, 375 Wis. 2d 712, 896 N.W.2d 700 (citation omitted). In the plea context, however, the constitutional concern is not focused on the State's misuse of its authority, but on the *defendant* and whether his plea is "knowing, intelligent, and voluntary." *Bradshaw*, 545 U.S. at 183; *Haslam*, 833 F.3d at 844. So while the intent-effects test may be "flexib[le]" and "designed to apply in various constitutional contexts," Opening Br. 14 (quoting *Smith*, 538 U.S. at 97), it does not make sense in *this* context.

Second, applying the indeterminate intent-effects test "has the potential to cause [significant] confusion." App. 143. This case is a prime example. Prior to this Court's decision in *Scruggs*, the Court of Appeals had held that, under the intent-effects test, a single DNA surcharge is nonpunitive, while multiple DNA surcharges are punitive. If these holdings were incorporated into the plea-colloquy context, courts would have

to explain DNA surcharges to defendants who "plead[ ] to multiple counts," but not to defendants who "plead[ ] only to one count." App. 143. And this is just one example of the unpredictable outcomes that can result from the seven-factor intent-effects test. Oddities like this may be manageable in ex post facto and double-jeopardy doctrine, where relatively few cases arise (given that a defendant must specifically raise a constitutional argument under those provisions, as well as the "threshold question" of punishment, *In re Commitment of Rachel*, 2002 WI 81, ¶ 22), but would be challenging for defining plea-colloquy requirements, given that circuit courts process almost 80,000 pleas each year. *Supra* p. 22.

Finally, it appears that no federal court has applied the "intent-effects" test when deciding whether a plea was made "voluntarily" in awareness of all "direct consequences." Odom does not cite any such federal case, Opening Br. 11–22, the Court of Appeals' survey of "other jurisdictions" did not find any, App. 119–22, and the State has not been able to locate any in an independent search. Odom and the Court of Appeals identify a few state cases that do apply the intent-effects test in the plea-colloquy context, *see* Opening Br. 11 n.2; App. 119–20 & nn. 8–9, but the Court of Appeals also found contrary examples that "explicitly rejected" the test, App. 121–22; *supra* p. 21 n.4, and noted a "hodgepodge of [other] analyses that run the gamut," App. 119.

C. This Court Should Hold That Traditional Harmless-Error Analysis Applies To Plea-Colloquy Errors

This Court on multiple occasions has rejected plea-withdrawal claims—without holding a *Bangert* hearing—for "small deviations" or "insubstantial defects" in the plea colloquy. *Cross*, 2010 WI 70, ¶¶ 30–40; *Taylor*, 2013 WI 34, ¶¶ 27–54; *Reyes Fuerte*, 2017 WI 104, ¶¶ 37–41. In *Taylor*, 2013 WI 34, this Court held that such "insubstantial" errors are to be measured against the "manifest injustice" and "knowing, intelligent, and voluntary" standards, rather than the traditional harmless-error doctrine. *Id.* ¶¶ 39–41, 44–47, & n.11. Where the "record makes clear" that, despite an error in the colloquy, a plea "was entered knowingly, intelligently, and voluntarily" and there is no "manifest injustice" to correct, a plea can be upheld without holding a *Bangert* hearing. *Id.* ¶¶ 42–43, 55. Based on a concession from the State, this Court also held that the traditional "harmless error doctrine [does] not apply" to "alleged violation[s] of Wis. Stat. § 971.08 or other court-mandated dut[ies] during the plea colloquy." *Taylor*, 2013 WI 34, ¶¶ 40–41 & nn.10–11; *see also* App. 142 n.5.

This Court's recent decision in *State v. Reyes Fuerte*, 2017 WI 104, implicitly overruled *Taylor*'s rejection of traditional harmless-error analysis for plea-colloquy defects. *Reyes Fuerte* held that Wisconsin's harmless-error statute, Wis. Stat. § 971.26, *does* "apply to" any defects in the plea-

colloquy warning required by Section 971.08(1)(c) (related to the immigration consequences of pleading guilty). 2017 WI 104, ¶ 4. Although *Reyes Fuerte* specifically addressed errors in the immigration warnings required by Subsection (1)(c), the Court's textual analysis of Section 971.26's scope applies equally to all subsections of Section 971.08. After all, this Court concluded as a matter of "statutory interpretation" that "sections 971.08 and 971.26" "must be construed together" because they are "closely related" and appear "in the same chapter." *Id.* ¶¶ 26–28. And Section 971.26 provides, without any exceptions, that "[n]o indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Wis. Stat. § 971.26. Given that the "mandatory . . . command[ ]" of Section 971.26 "appl[ies] to" Section 971.08, *see Reyes Fuerte*, 2017 WI 104, ¶¶ 4, 23, then it applies to Subsections (1)(a) ("potential punishment" warnings) and (1)(c) (immigration warnings) alike.

If anything, there is an even stronger textual case for applying traditional harmless-error doctrine to defects in the "potential punishment" warnings under Subsection (1)(a). Section 971.08 contains a specific remedy provision for defects in the immigration warnings under Subsection (1)(c), instructing that the court "shall . . . permit the defendant to withdraw the plea." Wis. Stat. § 971.08(2). This Court held that the harmless-error statute nevertheless applies because

"both statutes use mandatory language with seemingly contradictory commands," and the two "must be construed together." *Reyes Fuerte*, 2017 WI 104, ¶¶ 23, 28. There is no similar remedy provision for defects in the "potential punishment" warnings under Subsection (1)(a), so there is no inherent "conflict" to resolve. *Id.* ¶ 29.

Contrary to the Court of Appeals' suggestion in its first certification order, *see* App. 142 n.5, nothing in this Court's decision in *State v. Cross*, 2010 WI 70, forecloses adopting harmless-error analysis in the plea context. *Cross* simply "withdr[e]w [ ] language" from a Court of Appeals opinion "which requires *the defendant* to show that he would have pled differently had he known the correct [information]." 2010 WI 70, ¶ 40 (emphasis added). Under traditional harmless-error doctrine, "*the State would bear the burden*," *State v. Lepsch*, 2017 WI 27, ¶ 46, 374 Wis. 2d 98, 892 N.W.2d 682 (emphasis added), of establishing that there is no "reasonable probability that the error contributed to the outcome," *Thompson*, 2012 WI 90, ¶ 85. Applied to plea-colloquy errors, the harmless-error standard "naturally should focus on whether" the State has proven that "the defendant's knowledge and comprehension of the full and correct information would [not] have been likely to affect his willingness to plead guilty." *United States v. Stoller*, 827 F.3d 591, 597–98 (7th Cir. 2016) (citation omitted).

Finally, by holding that traditional harmless-error analysis applies to plea-colloquy defects, this Court would

align itself with the federal courts. As this Court noted in *Reyes Fuerte*, "[i]mperfect plea colloquies in federal courts are subject to harmless error analysis" under Federal Rule of Criminal Procedure 11(h). 2017 WI 104, ¶ 35. Federal courts apply harmless-error analysis even to plea-colloquy defects relating to the potential penalties. *E.g.*, *Dansberry*, 801 F.3d at 867–69 (misinforming the defendant that the mandatory minimum sentence was 20 years, rather than 26 years, was harmless); *United States v. Westcott*, 159 F.3d 107, 111–14 (2d Cir. 1998) (court overstating the maximum possible sentence); *see United States v. Davila*, 569 U.S. 597, 598 (2013) ("Rule 11(h) . . . calls for across-the-board application of the harmless-error prescription").

II. The Circuit Court's Omission Of DNA Surcharges From The Plea Colloquy Does Not Warrant Withdrawal Of Odom's Plea

Odom argues that DNA surcharges are "punishment" under Section 971.08(1)(a), and because the circuit court did not mention them during the plea colloquy, he is entitled to a *Bangert* hearing where the State will have the burden to prove that his plea was nevertheless "voluntary." Opening Br. 9–24. This argument fails because DNA surcharges are not "punishment" under Section 971.08(1)(a), and therefore a court does not need to mention them during the plea colloquy. But even if DNA surcharges are "punishment," the failure to mention them was harmless or otherwise too insubstantial to warrant plea withdrawal.

A. In *State v. Scruggs*, this Court held that a single DNA surcharge is "[not] punitive in either intent or effect" for purposes of the Ex Post Facto Clause. 2017 WI 15, ¶ 50. Prior to *Scruggs,* the Court of Appeals had held that imposing *multiple* DNA surcharges (one per conviction, as required by statute), *is* "punitive for ex post facto purposes." *Radaj*, 2015 WI App 50, ¶¶ 12, 35. Odom now argues that the test for "punishment" under Section 971.08(1)(a) is the same as the "intent-effects" test applied in *Scruggs* and *Radaj*, Opening Br. 11–17, and because the circuit court imposed multiple DNA surcharges, *Radaj* controls and the surcharges were "punishment," requiring his awareness of them for his plea to be "voluntary," Opening Br. 17–19. As discussed above, there are three different approaches for defining the term "punishment" for purposes of Section 971.08(1)(a). The DNA surcharge is not "punishment" no matter which of those approaches this Court selects, meaning that the circuit court's failure to inform Odom about these surcharges does not warrant a *Bangert* hearing.

1. If this Court adopts the bright-line test for "punishment" under Section 971.08(1)(a) that the State proposes, *supra* Part I.B.1, the answer here is straightforward: DNA surcharges are not "punishment" because they do not affect the length of the term of imprisonment and have not been specifically designated by the Legislature as a criminal fine. The law "uses the term 'surcharge' rather than 'fine,'" *Scruggs*, 2017 WI 15, ¶ 21, and

is not included in the "Penalties" subchapter, *see* Wis. Stat. ch. 939, subch. IV; *Dugan*, 193 Wis. 2d at 621. Under the approach the State urges, that is the end of the inquiry.

2. If this Court adopts the State's alternative test, focusing exclusively on the Legislature's intent (or "fundamental purpose" of a law), *supra* Part I.B.2, the result is the same because this Court has *already* held in *Scruggs* that the purpose of the DNA surcharge law is "civil [ ], rather than [ ] criminal." 2017 WI 15, ¶¶ 14–38. The law "uses the term 'surcharge' rather than 'fine,' reveal[ing] that the legislature intended the statute to be a civil remedy, rather than criminal penalty." *Id.* ¶ 21. And the statutory "context" also "evidences a nonpunitive [ ] intent," given that the collected DNA surcharges are "specifically dedicated" to "offset[ting] the [ ] burden on the [DOJ] in collecting, analyzing, and maintaining [ ] DNA samples," *id.* ¶ 26 (citations omitted); *id.* ¶¶ 25–26 (citing Wis. Stat. § 973.046(3)).

In a footnote in his brief, Odom asks this Court to reconsider *Scruggs*' intent holding in light of a recent paper from the Legislative Fiscal Bureau showing that the fund into which DNA surcharges are deposited has a surplus. *See* Opening Br. 19 n.6. This paper is irrelevant to the Legislature's purpose in adopting the surcharge law because, as *Scruggs* explained, "[d]etermining . . . legislat[ive] inten[t] . . . is primarily a matter of statutory construction." 2017 WI 15, ¶ 17 (citation omitted). In any event, the argument fails

for other reasons described below, *infra* pp. 37–39. Odom does not attempt to provide any other "compelling reason[ ]" to reconsider *Scruggs*' intent holding, *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 119, 264 Wis. 2d 60, 665 N.W.2d 257, so *Scruggs* controls the outcome here if this Court adopts a fundamental purpose test for Section 971.08(1)(a) purposes.

3. Even if this Court adopts the intent-effects test from ex post facto jurisprudence to define "punishment" under Section 971.08(1)(a), *but see supra* Part I.B.3, this Court should overrule *Radaj* and hold that a per-conviction DNA surcharge is never punitive. This is the primary issue presented in *State v. Williams*, No. 16AP883 (Wis.). The State thoroughly briefed this issue there, *see* State's Opening Br. 12–34, *State v. Williams*, No. 16AP883 (Wis. Dec. 11, 2017) ("Williams Br."), and so will only briefly reprise that argument here.

The intent-effects test involves two steps. *See Scruggs*, 2017 WI 15, ¶ 16. This Court first considers "legislative intent": if the purpose "was to impose punishment," the "inquiry ends." *Id.* If a law does not have a punitive intent, the Court then considers "whether [the] statute is punitive in effect," "guided by the seven factors [ ] set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)." *Id.* ¶¶ 40–41 (listing factors).

Scruggs already held that the DNA surcharge statute is "[not] intended . . . to be a criminal penalty," *id.* ¶ 39,

Williams Br. 13–15, and Odom does not provide any good reason to reconsider that holding here, *supra* pp. 33–34; *see Johnson Controls*, 2003 WI 108, ¶ 94.

Scruggs also held that a *single* DNA surcharge is not punitive in effect. 2017 WI 15, ¶¶ 39–49. The only question then is whether DNA surcharges become punitive when multiple are imposed. *Radaj* held as much, but the Court of Appeals certified the question of whether *Radaj* survives *Scruggs*. It does not. *See* App. 123 ("[W]e believe the logic of *Scruggs* supports overruling *Radaj*.").

Most of the *Mendoza-Martinez* factors "have now been conclusively decided [by *Scruggs*]," given that they apply equally regardless of whether one or multiple DNA surcharges are imposed. *See* App. 124. *Scruggs* held that the first three factors "cut in favor of . . . [a] nonpunitive [ ] effect": DNA surcharges "do[ ] not impose an affirmative disability or restraint" (factor 1), have not "historically been considered a punishment" (factor 2), and "do[ ] not have a scienter requirement" (factor 3). *Scruggs*, 2017 WI 15, ¶ 42; Williams Br. 16–19. The fifth factor—whether the "behavior to which [DNA surcharges] appl[y] is already a crime"—"cuts in favor" of a punitive effect, but "is insufficient to render a monetary penalty criminally punitive." *Scruggs*, 2017 WI 15, ¶¶ 41, 43; Williams Br. 26–28. None of this analysis depends on whether one or multiple DNA surcharges apply.

The remaining three factors are whether the DNA surcharge statute "promote[s] the traditional aims of

punishment—retribution and deterrence" (factor 4), whether it is "rationally [ ] connected" to "an alternative [i.e., nonpunitive] purpose" (factor 6), and whether the surcharges "appear[ ] excessive in relation to the alternative purpose" (factor 7). *Scruggs*, 2017 WI 15, ¶ 41. Together, these three "closely related" factors weigh the "connection between the surcharge and the costs it is intended to offset." *Id.* ¶ 45; *Radaj*, 2015 WI App 50, ¶ 25; *see generally Mueller v. Raemisch*, 740 F.3d 1128, 1133–35 (7th Cir. 2014). *Scruggs* held that, for a single DNA surcharge, all three factors cut in favor of a nonpunitive effect because the surcharge is "relatively small [in] size" and meant "to offset the increased burden on the DOJ in collecting, analyzing, and maintaining . . . DNA samples," and because "nothing [ ] suggest[s] that the single $250 surcharge is excessive or that it bears no relation to the costs it is intended to compensate." 2017 WI 15, ¶¶ 45–48.

None of these factors change when multiple surcharges are imposed. The $900 surcharge here, for example, is "relatively small [in] size" compared to the $40,000 in fines Odom was exposed to, R.37:7–8, "indicat[ing] that [the surcharge] does not serve the traditional aims of punishment," *Scruggs*, 2017 WI 15, ¶ 45; *see also In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir. 2009); Williams Br. 19–20. And "[a]ll [surcharges] collected" must be "utilized under s[ection] 165.77" (covering DNA-related activities), Wis. Stat. § 973.046(3), so the statute is "rationally

[ ] connected" to the nonpunitive purpose of "offset[ting]" DNA-related costs, *Scruggs*, 2017 WI 15, ¶¶ 44, 47; Williams Br. 20–24.

Finally, imposing DNA surcharges on a per-conviction basis "bear[s] [ ] an approximate relation to the cost[s] [they are] meant to offset." *Id.* ¶¶ 44, 46 (citation omitted); Williams Br. 20–24. Contrary to the Court of Appeals' reasoning in *Radaj* (on which Odom relies almost exclusively), the Legislature quite reasonably believed that "[DNA-related] costs would generally increase in proportion to the number of convictions." *Radaj*, 2015 WI App, ¶¶ 29–32; Opening Br. 18. Collecting and processing the convicted defendant's DNA sample—which admittedly, happens only once—is not the only DNA-related cost associated with a conviction. *Contra Radaj*, 2015 WI App 50, ¶ 31. The State also processes DNA samples found on *evidence* while investigating crimes as well as those taken from potential suspects, so it is entirely "rational" to assume that, in general, more convictions mean more underlying crimes, evidence, and suspects, which in turn imposes "a greater demand [on] the DNA databank's many functions." *See* Williams Br. 23–24.

Nor is there any evidence that DNA surcharges are "excessive" in relation to the State's DNA-related costs in the aggregate. *Scruggs*, 2017 WI 15, ¶ 48; *See* Williams Br. 25–26. Aside from invoking *Radaj*, Odom focuses the remainder of his argument on a Legislative Fiscal Bureau paper showing a $5 million surplus in the fund supplied by DNA surcharges

(in part). App. 158–64; Opening Br. 19–22. But that paper does not come close to establishing that the surcharges exceed DNA-related costs. *See* State's Reply Br. 10–12, *State v. Williams*, No. 16AP883 (filed January 19, 2018). The fund discussed in the paper contains revenue from two different surcharges, and the other surcharge produces more revenue than the DNA surcharge, so the surplus may be attributable to that. App. 159–60. The surplus also accumulated over a number of years and is expected to decline in future years. *See* App. 161. The total annual expenditures from the fund ($14 million projected for 2016–17, App. 161) greatly exceed the revenue from the DNA surcharge alone ($5 million for 2015–16, App. 160), and the paper does not show what fraction of expenditures is attributable to DNA-related costs, *see* App. 161.

Another Legislative Fiscal Bureau paper, however, suggests that DNA-related costs are over the $5 million in annual DNA-surcharge revenues. Legislative Fiscal Bureau, *Paper #409*, *Crime Laboratory DNA Analysis Kits (Justice)* (2017), https://goo.gl/7hzwG1 (discussing the costs of "Crime Laboratory DNA Analysis Kits"). This paper explains that DOJ needs to purchase "180 [DNA Analysis] kits" annually, at a cost of "approximately $13,000" per kit, for a total annual cost of approximately $2.3 million. *Id.* at 4–5. Thus, the costs of kits *alone* account for almost *half* of the $5 million revenue from the DNA surcharge. The State must also pay the salaries of "almost sixty [DNA] analyst[s] and technician[s],"

see Wis. Dep't of Justice, DNA Analysis, https://goo.gl/q7HpaJ, and the "fourteen analyst[s] and technician[s]" who maintain the DNA databank, *see* Wis. Dep't of Justice, DNA Databank, https://goo.gl/2Mn3Bo, as well as the miscellaneous costs associated with maintaining "facilities," "software," *id.*, and the "statewide databank," *Scruggs*, 2017 WI 15, ¶ 48.

So, given that *Scruggs*' intent holding controls, *supra* pp. 33–34, that four out of seven effect factors were "conclusively decided [by *Scruggs*]," *see* App. 124, and that the remaining three factors are unchanged even when multiple DNA surcharges are imposed, *supra* pp. 35–37, this Court, if it adopts the intent-effects test in the plea-colloquy context, should overrule *Radaj* and hold that multiple DNA surcharges are nonpunitive under that test.

B. Even if this Court holds that the DNA surcharges in this case are "punishment" under Section 971.08(1)(a), Odom still has no right to withdraw his guilty plea because any plea-colloquy error was harmless. An error is harmless if there is no "reasonable probability that the error contributed to the outcome." *Thompson*, 2012 WI 90, ¶ 85. Applied to plea-colloquy errors, the harmless-error standard—which should now be the law in light of *Reyes Fuerte*, *see supra* pp. 28–29—"naturally should focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." *Stoller*, 827 F.3d at 597–98 (citation omitted).

In the present case, there is no "reasonable probability," *Thompson*, 2012 WI 90, ¶ 85, that information about the DNA surcharges would have altered Odom's decision to plead guilty. Odom pleaded after being informed that he could receive 11 years' imprisonment and $40,000 in fines in order to avoid exposure to 123.5 years' imprisonment, $310,000 in fines, and mandatory sex-offender registration. R.37:7–10. There is simply no "reasonable probability" that being informed about an additional $900 surcharge would have impacted his plea calculus. Federal courts have found similar errors harmless. *See United States v. Hughes*, 726 F.3d 656, 662 (5th Cir. 2013) ("a defendant informed of the possibility of fines larger than any potential special assessment suffers no prejudice"); *United States v. Tanner*, 340 F. App'x 346, 347–48 (7th Cir. 2009) (unpublished) (failure to inform defendant of a "$100 special assessment per count" was "necessarily harmless" because "the court informed [defendant] that he could face fines up to $4,250,000").

C. If this Court both holds that the DNA surcharges in this case are "punishment" under Section 971.08(1)(a), and that the traditional harmlessness inquiry does not apply here, Odom is still not entitled to withdraw his plea because under this Court's pre–*Reyes Fuerte* caselaw, any error here was so "insubstantial" that it did not "prevent [Odom's] plea from being knowing, intelligent, and voluntary," or cause a "manifest injustice." *Taylor*, 2013 WI 34, ¶¶ 39–41, 56. After all, Odom pleaded guilty with full awareness that he faced 11

years' imprisonment and $40,000 in fines, and, by pleading, avoided 123.5 years' imprisonment, $310,000 in fines, and registration as a sex offender. R.38:7–10. The $900 surcharge was trivial in comparison. The "record" therefore "reflects that [Odom] indeed pled knowingly, intelligently, and voluntarily." *Taylor*, 2013 WI 34, ¶ 39. And the "small deviation" of failing to mention the $900 surcharges (if it was a deviation) does not come close to a "serious flaw in the fundamental integrity of the plea." *Id.* ¶¶ 31, 52 (citations omitted).

III. The Circuit Court's Statement That Odom "Could" Be Eligible For Certain Early-Release Programs Does Not Warrant Plea Withdrawal

Odom also argues that the court misinformed him about a "collateral consequence" of his plea, namely, his ineligibility for two discretionary early-release programs, and therefore he is entitled either to a *Bangert* hearing or to automatic withdrawal of his plea. Opening Br. 24–33. This argument fails because the circuit court committed no error and because if an error did occur, it was harmless or otherwise too insubstantial to warrant withdrawal of the plea.

A. Courts are not constitutionally required to inform defendants of the collateral consequences of their pleas. *See Bollig*, 2000 WI 6, ¶ 16. Thus, a defendant may not withdraw his plea on the basis of a *lack of information* about collateral consequences. *Merten*, 2003 WI App 171, ¶ 7. In some circumstances, however, courts have permitted defendants to

withdraw pleas based on *misinformation* about significant, negative collateral consequences. *See Riekkoff*, 112 Wis. 2d 119, 128; *State v. Brown*, 2004 WI App 179, ¶¶ 10–11, 13, 276 Wis. 2d 559, 687 N.W.2d 543 (defendant could withdraw his plea because he was misinformed that he would not be subject to sex-offender registration or chapter 980 commitment proceedings, when, as a matter of law, he would). However, where a defendant's misunderstanding about collateral consequences is based on "his own inaccurate interpretation," the plea is not involuntary. *See State v. Rodriguez*, 221 Wis. 2d 487, 499, 585 N.W.2d 701 (Ct. App. 1998).

Odom argues that he is entitled to withdraw his plea because the court told him he "could" be eligible for two early-release programs, the Challenge Incarceration Program ("boot camp") and the Substance Abuse Program, Wis. Stat. §§ 302.045; 302.05, even though, by pleading guilty to offenses under chapter 940, he was ineligible for either program, *see* Wis. Stat. §§ 302.045(2)(c); 302.05(3)(a)(1); 973.01(3g), (3m). Opening Br. 24–32. Odom concedes that his ineligibility for both programs is a collateral consequence of his guilty plea, such that the trial court was not required to discuss it with him at the plea colloquy, Opening Br. 25–26 n.8, but argues that the court's "misinformation" rendered his plea involuntary, *see* Opening Br. 28.

When Odom asked if he would be "eligible for boot camp or anything like that," the court responded that he "could" be eligible, but that the court "would have to look at all the

factors." R.37:9. The court also explained to Odom that "both . . . programs" require "a substance abuse issue." R.37:9. Eligibility to participate in both the Challenge Incarceration and Substance Abuse programs depends on many factors. To even get past the gate, an inmate must have a "substance abuse issue." *See* Wis. Stat. §§ 302.045(2)(d) (requiring that an inmate has "a substance abuse problem"); 302.05(1)(am) (requiring that an inmate be participating "for the treatment of substance abuse"). And there are a number of other eligibility criteria. Wis. Stat. §§ 302.045(2); 302.05(3)(a). Even for those who meet the basic criteria, eligibility depends on the trial court's "exercise of sentencing discretion," and "successful[ ] complet[ion]" depends on the discretion of prison authorities. *See* Wis. Stat. § 973.01(3m), (3g); *see also id.* §§ 302.045(3m)(a)–(e); 302.05(3)(c).

The circuit court's general statement that Odom "could" be eligible for these programs, R.37:9, did not misinform Odom, even if it did not give him full context. As the trial court later explained, the word "'could' denotes a possibility, not an automatic given." R.29:2. The court also warned Odom that it "would have to look at all the factors," R.37:9—further indicating that eligibility was not a guarantee. One of the "factors" the court would "look at" was Odom's statutory eligibility for the program. Finally, the circuit court correctly informed Odom that a substance-abuse issue is a prerequisite for participation: "And I also have to have a substance abuse issue need to be addressed for both of those programs."

R.37:9. Therefore, nothing the court said was incorrect, as eligibility for both programs is highly discretionary and dependent on a substance-abuse issue. To the extent Odom believed that "could be eligible" meant "would be eligible," it was the result of "his own inaccurate interpretation." *Rodriguez*, 221 Wis. 2d at 499.

B. Even if this Court concludes that the circuit court committed error in its "could" statement regarding the early-release programs, any error would be harmless because there is no "reasonable probability" Odom would not have pleaded guilty had he known he was ineligible for the programs. *See Thompson*, 2012 WI 90, ¶ 85; *Stoller*, 827 F.3d at 597–98. By pleading guilty, Odom reduced his potential sentencing exposure from 123.5 years' imprisonment and $310,000 in fines down to 11 years' imprisonment and $40,000 in fines, R.37:7–10, a reduction of 112.5 years' imprisonment and $270,000 in fines. He also avoided mandatory registration as a sex offender. R.37:10. As with the DNA surcharges, it "defies common sense," App. 142 n.5, to suggest that Odom would not have pleaded guilty had he been told that he was ineligible for the early-release programs.

The circuit court's "could" comment was also harmless because the circuit court explicitly warned Odom that he needed "to have a substance abuse issue" to be eligible, and Odom did not claim to have such an issue. Odom did not argue that he had a substance abuse problem at sentencing, other than briefly mentioning that he "smoked marijuana a

lot as a teenager," R.38:11–19, 25–27, nor did he mention it in his plea withdrawal motion, R.28:7–13. Even before this Court, Odom has not argued that he has a substance-abuse issue, Opening Br. 24–32, other than another passing reference to his teenage marijuana use, Opening Br. 30–31 n.11. Therefore, when Odom pleaded guilty, he knew, or should have known, that he did not satisfy a mandatory prerequisite for the early-release programs.

C. If this Court both holds that the circuit court's "could" statement was in error and does not apply a traditional harmlessness inquiry, Odom would still not be entitled to withdraw his plea because, under this Court's pre–*Reyes Fuerte* caselaw, any error here was so "insubstantial" that it did not "prevent [Odom's] plea from being knowing, intelligent, and voluntary," or cause a "manifest injustice." *Taylor*, 2013 WI 34, ¶¶ 39–41, 56. As in *Taylor*, the "record [here] makes clear" that Odom's plea "was entered knowingly, intelligently, and voluntarily." 2013 WI 34, ¶¶ 43, 55.

The court explicitly warned Odom that he needed "to have a substance abuse issue" to be eligible, and Odom has not claimed to have a substance abuse issue, so when Odom pleaded guilty, he knew (or should have known) that he was ineligible as a matter of *fact*, even if he did not know that he was also ineligible as a matter of *law*. Odom also knew—because the circuit court explicitly warned him—that his eligibility was not guaranteed, but that some "factor[ ]" might disqualify him. R.37:9. The fact that the crimes he pleaded

to turned out to be one disqualifying "factor[ ]" (in addition to the lack of a substance-abuse issue) does not render his plea unknowing. Furthermore, any misinformation about these programs was insubstantial, given the programs' "uncertain and collateral nature," App. 128. Even if a defendant meets the criteria for eligibility, a circuit court can disqualify him as a matter of "sentencing discretion." Wis. Stat. § 973.01(3m), (3g). And prison officials must then make an independent determination that the inmate has "successfully completed" the program. Wis. Stat. §§ 302.045(3m)(a); 302.05(3)(c). So the "possibility of an early release" is "at most, a discretionary determination," R.29:3, and "reliance on a *possibility* is not sufficient to warrant plea withdrawal," R.29:2; *see* App. 127.

The cases Odom cites where misinformation warranted plea withdrawal are distinguishable because the misinformation involved significant "negative legal repercussions . . . that flowed from the conviction." R.29:2–3. In *Brown*, for example, the defendant was misinformed that he would not be required "to register as a sex offender or be subject to post-incarceration commitment under [chapter] 980," 2004 WI App 179, ¶¶ 10–11, 13, and in *Riekkoff*, the defendant was told he had the right to appellate review of an issue when he did not, 112 Wis. 2d at 128. Here, by contrast, the early-release programs could only *benefit* Odom, so any misinformation about his eligibility is not significant enough to create "a *serious* flaw in the fundamental integrity of the plea." App. 127 (citation omitted); *Taylor*, 2013 WI 34, ¶ 52.

CONCLUSION

The decision of the circuit court should be affirmed.

Dated: January 19, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

LUKE N. BERG
Deputy Solicitor General
State Bar #1095644
Counsel of Record

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3056
bergln@doj.state.wi.us

Attorneys for the State of Wisconsin

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,979 words.

Dated: January 19, 2018.

_____

LUKE N. BERG
Deputy Solicitor General

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

I hereby certify that:

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

I further certify that:

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

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

Dated: January 19, 2018.

_____

LUKE N. BERG
Deputy Solicitor General