STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP740-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEANTHONY K. MULDROW,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR MANITOWOC COUNTY, THE HONORABLE JEROME L. FOX, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

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ISSUE PRESENTED

Is a circuit court required to inform a defendant that the defendant's guilty plea may subject him to lifetime global positioning system (GPS) tracking[1] under Wis. Stat. § 301.48?

The circuit court concluded it was not required to inform a defendant of the possibility of lifetime GPS tracking because it is not punishment.

The court of appeals concluded the same, holding that under either a "fundamental purpose" or "intent-effects" test, lifetime GPS tracking is not punishment.

This Court should conclude that lifetime GPS tracking is not punishment, and further conclude that a circuit court's duty is to inform a defendant of the potential total term of imprisonment and fine.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

INTRODUCTION

DeAnthony Muldrow forcibly had anal sex with a 15-year-old. He committed this crime shortly after entering into a plea agreement in Manitowoc Case No. 2008CF249,[2] which contained a condition of deferred entry of judgment on one

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[1] The State uses the word tracking in lieu of monitoring because tracking is the word used in the statute.

[2] The summary disposition affirming the no-merit appeal in that case has been included in the appendix for context. (R-App. 101–05.)

count and a recommendation of probation on another. In that case, he solicited a minor for oral sex in exchange for money. After the deferred entry of judgment agreement and probation were revoked, he was sentenced to prison—the sentencing court noting that Muldrow was beyond high risk to the community.

Despite that, and because he was incarcerated, Muldrow received the benefit of another favorable plea agreement in this case. He agreed to plead guilty to one count of second-degree sexual assault of a child under the age of 16 and one count of third-degree sexual assault in exchange for a condition of deferred entry of judgment on the charge of second-degree assault of a child.

Years later, Muldrow was released on extended supervision. He violated the terms of supervision and of the deferred entry of judgment agreement. That agreement was revoked, and Muldrow was convicted of second-degree sexual assault of a child. He was placed on probation. That conviction subjected Muldrow to lifetime GPS tracking pursuant to Wis. Stat. § 301.48(2)(a)1m.[3]

Muldrow moved for plea withdrawal, claiming that the court was required to inform him when he entered his plea five years ago that, if convicted of second-degree sexual assault of a child, Muldrow would be subject to lifetime GPS tracking. The circuit court properly denied that motion

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[3] As a point of clarification not relevant to the issue but helpful to the understanding of the case, the circuit court was mistaken when it determined that Muldrow's conviction for third-degree sexual assault subjected him to lifetime tracking. (*See* R. 59:4.) Pursuant to Wis. Stat. § 301.48(1)(cn) a "Level 2 child sex offense" requires a violation of Wis. Stat. §§ 948.02 or 948.025. Third-degree sexual assault is a violation of Wis. Stat. § 940.225(3), and thus, not included in the "Level 2 child sex offense."

without a hearing. Lifetime GPS tracking is not punishment in general, and specifically not the "potential punishment" a court is required to inform a defendant of pursuant to Wis. Stat. § 971.08.

SUPPLEMENTAL STATEMENT OF THE CASE

This case involves lifetime GPS tracking pursuant to Wis. Stat. § 301.48. Under that section, the Department of Corrections (DOC) is required to track a person via GPS tracking if the person committed a Level 1 or Level 2 child sex offense, as defined in Wis. Stat. §§ 301.48(1)(cm) and (cn), and if the requirements of Wis. Stat. § 301.48(2) are met. Once the person completes the "sentence, including any probation, parole, or extended supervision," DOC has the discretion to use "passive positioning" tracking in lieu of GPS tracking. *See* Wis. Stat. §§ 301.48(1)(dm) and (2m).

DOC also has the discretionary authority to track a person via GPS tracking for life if the person committed a Level 1 or Level 2 child sex offense but does not meet the requirements in Wis. Stat. § 301.48(2). DOC may impose lifetime tracking if it determines that GPS tracking is appropriate after assessing the person's risk using standard risk assessment instruments. Wis. Stat. §§ 301.48(2)(a)8. and (2g).

DOC may track the person for life, so long as the individual remains in Wisconsin. *See* Wis. Stat. §§ 301.48(2) and (7m). If the individual leaves the state, tracking is terminated unless and until the person returns to Wisconsin. Wis. Stat. § 301.48(7m).

An individual subject to tracking who has not been committed under Chs. 980 or 975 may petition the court to terminate tracking after 20 years. Wis. Stat. §§ 301.48(2)(b) and (6). The court may grant the petition after a hearing if it

determines that "lifetime tracking is no longer necessary to protect the public." Wis. Stat. § 301.48(6)(h).

DOC may also petition the court to end tracking if the person is permanently physically incapacitated. Wis. Stat. § 301.48(7). The court may grant the petition if it determines that "the person to whom the petition relates is permanently physically incapacitated so that he or she is not a danger to the public." Wis. Stat. § 301.48(7)(e).

Beyond the determination of a petition to terminate tracking, the courts are not involved in deciding whether an individual is subject to GPS or passive tracking.

Muldrow was convicted based on a guilty plea entered years before to one count of second-degree sexual assault of a child under sixteen and one count of third-degree sexual assault. (R. 22; 43.) His conviction and probation for second-degree sexual assault of a 15-year-old, a Level 2 child sex offense, meant that Muldrow was covered under Wis. Stat. § 301.48(2)(a)1m. *See also* Wis. Stat. § 301.48(1)(cn) (defining a Level 2 child sex offense).

Muldrow was, and is, in prison as a result of his conviction in Manitowoc Case No. 2008CF249. The conditions of lifetime GPS tracking have not yet been imposed. Muldrow will be released to extended supervision in July of 2018. At that time, he will still be on probation for the Level 2 child sex offense committed in this case. (*See* R. 43.) DOC will be required to begin GPS tracking once Muldrow is released and will be required to continue GPS tracking until the end of Muldrow's term of probation. *See operation of* Wis. Stat. §§ 301.48(2)(a)1m. *with* (2m).

After sentencing, Muldrow filed a postconviction motion to withdraw his guilty plea. (R. 47.) Muldrow alleged that the plea colloquy was inadequate because the court did not inform him that his plea subjected him to lifetime GPS

tracking. (R. 47:9–11.) Muldrow further alleged that he did not otherwise know of the lifetime tracking consequences. (R. 47:10.) Muldrow requested a *Bangert*[4] hearing at which the State would bear the burden to prove that Muldrow entered a knowing, voluntary and intelligent plea despite the alleged defect in the court's plea colloquy. (R. 47:9–11.)

Muldrow asked the postconviction court to "take judicial notice of the practical conditions of GPS set forth in" *Belleau v. Wall*, 132 F. Supp. 3d 1085 (E.D. Wis. 2015), *rev'd*, 811 F.3d 929 (7th Cir. 2016). (R. 58:11.) The postconviction court did, and ultimately denied the motion without a hearing on the ground that lifetime GPS tracking is not punishment and, hence, was not a mandatory component of the plea colloquy. (R. 57; 59:3–8.) Muldrow appealed. (R. 61.)

On appeal, Muldrow and the State offered different tests to determine if something was "potential punishment" for purposes of Wis. Stat. § 971.08. *State v. Muldrow*, 2017 WI App 47, ¶ 13, 377 Wis. 2d 223, 900 N.W.2d 859. Muldrow asked the court of appeals to employ the "intent-effects" test associated with the ex post facto analysis. *Id.* The State asked the court of appeals to employ the "fundamental purpose" test. *Id.*

The court of appeals declined to decide whether the proper analysis was under the "intent-effects" test or the "fundamental purpose" test. *Id.* ¶ 23. Rather, the court concluded that under either analysis, lifetime GPS tracking is not punishment. *Id.* ¶ 23. Because it is not punishment, there was no duty to inform Muldrow of the possibility of lifetime tracking during the plea colloquy. *Id.* ¶ 42.

Muldrow petitioned, and this Court granted review.

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[4] *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

SUMMARY OF THE ARGUMENT

The circuit court correctly denied Muldrow's motion for plea withdrawal without a hearing. This Court should conclude that the requirement in Wis. Stat. § 971.08 that a circuit court inform a defendant of the "potential punishment if convicted" is limited to the maximum term of imprisonment and fine. Thus, pursuant to Wis. Stat. § 971.08, a circuit court need not determine during the plea colloquy if a defendant understands that he may be subject to lifetime GPS tracking. Such a holding is consistent with this Court's recent decision in *State v. Finley*, 2016 WI 63, 370 Wis. 2d 402, 441–42, 882 N.W.2d 761, and consistent with the distinction between direct and collateral consequences.

Alternatively, this Court should adopt the fundamental purpose test to determine if lifetime GPS tracking is a potential punishment for the purposes of Wis. Stat. § 971.08 and conclude that it is not. GPS tracking functions to protect the public, not as punishment, and thus, GPS tracking is not a mandatory component of a plea colloquy.

The Court should reject Muldrow's argument that the "intent-effects" test is the proper test to assess whether something is punishment for purposes of Wis. Stat. § 971.08. But even if the "intent-effects" test does control, lifetime tracking is not punishment. The Legislature did not intend to punish, but rather intended to regulate. Muldrow has not shown by the clearest proof that lifetime tracking is punishment.

Because lifetime tracking is not punishment, under any analysis, there was no defect in the colloquy. Muldrow was thus not entitled to a hearing on his motion for plea withdrawal.

STANDARD OF REVIEW

"This court determines the sufficiency of the plea colloquy and the necessity of an evidentiary hearing, questions of law, independently of the circuit court and court of appeals but benefiting from their analyses." *State v. Hoppe*, 2009 WI 41, ¶ 17, 317 Wis. 2d 161, 765 N.W.2d 794.

ARGUMENT

A circuit court is not required to inform a defendant during a plea colloquy that the defendant's guilty plea may subject him to lifetime GPS tracking.

A. General principles of plea withdrawal for a *Bangert* violation.

Under the Fourteenth Amendment guarantee of due process, a circuit court may accept a plea of guilty or no contest only when it has been made knowingly, voluntarily and intelligently. *See Brady v. United States*, 397 U.S. 742, 747 n.4 (1970); *State v. Bangert*, 131 Wis. 2d 246, 257–61, 389 N.W.2d 12 (1986). However, once convicted, a defendant carries a "heavy burden" for post-sentencing plea withdrawal even when the claim is that the plea was not knowingly, voluntarily, and intelligently entered. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836. "[O]nce the guilty plea is finalized, the presumption of innocence no longer exists" and the "state's interest in finality of convictions requires a high standard of proof to disturb that plea." *Id.* (citation omitted). As such, plea withdrawal is limited to circumstances where there is "a serious flaw in the fundamental integrity of the plea." *Id.* (citation omitted).

In the *Bangert* context, a serious flaw is established by a prima facie showing that the circuit court violated Wis. Stat. § 971.08 or other mandatory duty set forth by law and the defendant did not know or understand the information that the court should have provided. *State v. Brown*, 2006 WI 100, ¶ 36, 293 Wis. 2d 594, 716 N.W.2d 906. *See also, State v. Cross*, 2010 WI 70, ¶ 19, 326 Wis. 2d 492, 786 N.W.2d 64.

As relevant here, a court must inform a defendant of the "potential punishment if convicted" and the direct consequences of the plea. *See Brady*, 397 U.S. at 755; *Bangert*, 131 Wis. 2d at 260, 265–66. "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." *State v. Byrge*, 2000 WI 101, ¶ 60, 237 Wis. 2d 197, 614 N.W.2d 477. If a defendant is not so informed, and did not otherwise know that information, he is entitled to a *Bangert* hearing.

1. "Potential punishment" is the maximum term of imprisonment and fine.

While not defined by statute, "potential punishment" has been understood to mean the actual statutory penalty associated with the crime. *See Finley*, 370 Wis. 2d 402, ¶¶ 3–6. In *Finley*, this Court noted "that circuit courts, the court of appeals, and this court have not used consistent terminology in discussing the duty of circuit courts to advise a defendant of the potential punishment before accepting a plea." *Id.* ¶ 7. The court "appended a glossary of terms to assist the reader and the courts in using and understanding the correct terminology." *Id.*

In the glossary, the court again noted that "potential punishment" is not defined by statute or case law, but "[i]n

analyzing whether a defendant was correctly advised of the potential punishment, our cases have looked to the maximum statutory penalty, that is, the maximum sentence provided for by statute." *Finley*, 370 Wis. 2d at 441. The maximum sentence provided by statute includes the term of imprisonment and fine. *Finley*, 370 Wis. 2d at 441–42 (referencing Wis. Stat. § 939.50(3) and enhancement statutes).

This Court's definition in *Finley* is consistent with the special materials associated with Wisconsin criminal jury instructions. To assist courts in fulfilling the "potential punishment" plea colloquy responsibility, SM-32 advises trial courts to identify the maximum term of imprisonment and the maximum fine and uses this example: "And do you understand that the maximum penalty for burglary is 12 1/2 years of imprisonment, composed of 7 1/2 years of initial confinement and 5 years extended supervision, and a fine of $25,000?" Wis JI—Criminal SM-32 (2007) at 2, 15.

This Court has held that "careful adherence to SM-32 will satisfy the constitutional standard of a voluntary and knowing plea, as well as . . . the procedure of Section 971.08, Stats." *Bangert*, 131 Wis. 2d at 272.

2. A direct consequence is a consequence that affects the maximum term of imprisonment or fine.

"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." *Byrge*, 237 Wis. 2d 197,

¶ 60. Most everything else is collateral.[5] "Collateral consequences are indirect and do not flow from the conviction." *Id.* ¶ 61 (citation omitted). A collateral consequence "may be contingent on a future proceeding in which a defendant's subsequent behavior affects the determination" or may be contingent on the actions of a "different tribunal or government agency." *Id.* ¶ 61. "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." *Id.*

In determining what punishment is for the purpose of distinguishing a direct from a collateral consequence, courts have used differing analyses. However, regardless of the test, when there has been no effect on the total term of imprisonment or fine, courts have concluded that the consequence was not a direct consequence of a plea. For example, a defendant does not need to be specially informed of the initial confinement portion of the total term of imprisonment. *State v. Sutton*, 2006 WI App 118, ¶ 11–15, 294 Wis. 2d 330, 718 N.W.2d 146. The plea requirements in Wis. Stat. § 971.08(1)(a) and *Bangert* are met without notification of the bifurcated sentence structure because the total term of imprisonment is the direct consequence of the plea; bifurcation is a collateral consequence. *Sutton*, 294 Wis. 2d 330, ¶¶ 11–15.

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[5] The State notes that a failure to warn a defendant about deportation consequences has been treated differently and is considered a "sui generis" consequence. *State v. LeMere*, 2016 WI 41, ¶ 33, 368 Wis. 2d 624, 879 N.W.2d 580.

It has also been determined that a circuit court is not required to inform a defendant at a plea hearing of a potential Ch. 980 commitment,[6] sex offender registration requirements,[7] restitution,[8] federal firearm restrictions,[9] or federal healthcare restrictions.[10]

Conversely, in *Byrge* this Court concluded that the possibility of a fixed parole eligibility date that transformed a life sentence to a life sentence without the possibility of parole was a direct consequence of a plea. The court decided that "in the *narrow circumstance* in which a circuit court has statutory authority under Wis. Stat. § 973.014(2) to fix the parole eligibility date, the circuit court is obligated to provide the defendant with parole eligibility information before accepting a plea." *Byrge*, 237 Wis. 2d 197, ¶ 68 (emphasis added). "[T]he parole eligibility date links automatically to the period of incarceration, which in turn has a direct and automatic effect on the range of punishment." *Id.* ¶ 67.

These decisions establish that direct consequences have been limited to those consequences that affect the term of imprisonment (or fine).

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[6] *State v. Meyers*, 199 Wis. 2d 391, 394–95, 544 N.W.2d 609 (1996).

[7] *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199.

[8] *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995).

[9] *State v. Kosina*, 226 Wis. 2d 482, 595 N.W.2d 464 (Ct. App. 1999).

[10] *State v. Merten*, 2003 WI App 171, 266 Wis. 2d 588, 668 N.W.2d 750.

B. Lifetime GPS tracking is neither "potential punishment" nor a direct consequence of a plea because it does not affect the term of imprisonment or fine.

The State asks this Court to conclude that, if the consequence of a plea does not impact the term of imprisonment or fine, then the consequence is not "potential punishment" or a direct consequence of the plea. This is a simple, workable rule directly derived from SM-32 and this Court's recent interpretation of "potential punishment." The State's test is also consistent with the courts' application of the direct and collateral consequence distinction.

Under the State's test, lifetime tracking is not punishment because it does not impact the term of imprisonment or fine. In fact, it does not impact a sentence at all, or in Muldrow's case, the term of probation.[11]

Muldrow apparently concedes that the court did not have to inform him of GPS tracking at the plea hearing if the tracking was limited to his supervision. (Muldrow's Br. 15.) Thus, Muldrow's position appears to be that, although GPS tracking is not punishment when it is a condition of supervision, it becomes punishment once supervision ends. Muldrow fails to explain why that is so. The State is left to guess that he is arguing that GPS tracking extends his sentence. That is simply incorrect.

Muldrow's term of probation, and the consequences thereof, are in no way affected by the lifetime tracking statute. Once Muldrow is discharged from probation, he cannot be imprisoned for second-degree sexual assault of a

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[11] "[P]robation is an alternative to sentencing." *State v. Horn*, 226 Wis. 2d 637, 647, 594 N.W.2d 772 (1999).

child even if he fails to comply with lifetime tracking. This is significant.[12] Lifetime tracking is a completely separate, collateral consequence of his conviction. Thus, it cannot be said that lifetime tracking affected the potential punishment for the crime for which he pled.

The State admits that its simple test may seem too simple at first blush. And the State admits that its test is prone to hyperbolic "what-ifs" like, what if the Legislature enacted a law that required DOC to tattoo "pervert" on a sex offender's forehead? Under the State's test for plea withdrawal, that would not be considered punishment, but that type of "what-if" is a red herring. Defendants are supposed to carry a heavy burden for post-sentencing plea withdrawal. A test need not be over-engineered to lessen that burden simply because someone can think of an unrealistic example.

This Court should adopt the State's simple, workable test that, if the consequence at issue does not affect the term of imprisonment or fine, then the court has no duty to inform the defendant of that consequence during the plea hearing. Lifetime GPS tracking does not affect the term of imprisonment or fine, and thus, the circuit court had no duty to inform Muldrow that, if convicted of second-degree sexual assault of a child, he would be subject to lifetime tracking.

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[12] It is also significant to other collateral consequences. Muldrow is currently incarcerated for solicitation of a minor. That is not a qualifying offense for purposes of Ch. 980, but second-degree sexual assault of a child is. *See* Wis. Stat. § 980.01(6).

C. If this Court rejects the State's proposed test, it should conclude that lifetime tracking is not punishment because its fundamental purpose is not punitive.

As noted previously, courts have differed in their approach of what constitutes punishment for the purpose of a plea colloquy. Most relevant here, in *State v. Dugan*, 193 Wis. 2d 610, 534 N.W.2d 897 (Ct. App. 1995), the court of appeals considered the "fundamental purpose" to determine if the consequence of restitution was punishment. And in *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199, the court borrowed from ex post facto principles and applied a very limited intent-effects analysis to determine if the consequence of sex offender registration was punishment. If this Court rejects the State's proposed test, it should reconcile *Dugan* and *Bollig* and adopt a fundamental purpose test.

1. The *Dugan* fundamental purpose test.

The *Dugan* court was tasked with determining if restitution was punishment. Restitution, the court concluded, "is commonly considered as a rehabilitative tool to the offender and as a compensatory tool to the victim." *Dugan,* 193 Wis. 2d at 620. "However, by appropriating the offender's money or property to pay the victim, restitution can also be said to work a punitive effect." *Id*.

The court of appeals considered whether restitution amounted to punishment for plea withdrawal purposes by looking at "the fundamental purpose" of restitution. *Dugan*, 193 Wis. 2d at 620. The court rejected the "notion that the consequences of a sentencing proceeding (whether they be incarceration, a fine, restitution, probation, or conditions of probation) can or should be exclusively catalogued as either punishment or rehabilitation." *Dugan*, 193 Wis. 2d at 619.

"Instead," the court said, "such consequences represent a blend of both concepts." *Id*. The court determined that "simply saying a sentencing provision works a punitive or rehabilitative effect begs the question before us as to what warnings must be included in a valid plea colloquy." *Id*. at 620. The proper inquiry, rather, was to "decide the fundamental purpose of the sentencing provision." *Id*.

To determine the fundamental purpose of restitution, the court first looked to the legislative scheme for both imprisonment (and fines) and restitution. The court observed that the potential Class C penalties for Dugan's crime of aggravated battery were "a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both." *Id*. at 621 (quoting Wis. Stat. §§ 939.50(1), (3)(c)). The court noted that "[t]hese potential punishments were set out in the ch. 939, STATS., 1991–92, subchapter entitled 'Penalties'" and that "[n]owhere in this subchapter is restitution enumerated as a potential penalty or punishment for any classification of crime or forfeiture." *Dugan*, 193 Wis. 2d at 621.

The court reasoned that "[i]f the legislature had truly intended restitution to constitute 'potential punishment' for purposes of the plea colloquy statute, § 971.08, STATS., it would have formally included such among the 'Penalties' in the sections of the criminal code devoted to that specific topic." *Id*.

Regarding the restitution statute, the court began by noting that "[b]efore the statute was enacted, our supreme court observed that restitution is an important element of the offender's rehabilitation because it may serve to strengthen his or her sense of responsibility and teach the offender to consider more carefully the consequences of his or her actions." *Id*. at 621–22. The court concluded that the statute reflected that "equitable public policy." *Id.* at 622.

Again, the court rejected the notion that the punitive effect of restitution played any role in determining whether restitution was punishment for the purposes of a plea colloquy.

2. The *Bollig* limited intent-effects test.

The *Bollig* court was tasked with determining if the sex offender registration requirement was punishment. *Bollig,* 232 Wis. 2d 561, ¶¶ 1, 16. The court noted that the "genesis" of the sex offender registration requirements around the county was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and Megan's Law. *Bollig,* 232 Wis. 2d 561, ¶¶ 18–19 & n.4.

The court also noted that many other states had concluded that the intent of sex offender registration requirements is public protection and safety, not punishment. *Id.* ¶ 20. And other states had concluded that the "remedial goal of protecting the public outweighs any punitive effect of registration, including any infringement on the rights of the offender." *Id.* ¶ 20.

This Court then concluded that the same was true for Wisconsin's sex offender registration scheme. *Id.* ¶¶ 21–27. This Court looked to the underlying non-punitive intent of sex offender registration and acknowledged that sex offenders suffer a variety of adverse effects as a result of registration. *Id.* ¶¶ 21–26. The court did not do a traditional ex post facto analysis, but held that "the punitive or deterrent effects resulting from registration and the subsequent dissemination of information do not obviate the remedial and protective intent underlying those requirements." *Id*. ¶ 26.

This Court ultimately concluded that "[b]ecause the duty to register is not punishment, it does not represent a direct consequence of Bollig's no contest plea. Rather, it is a

collateral consequence, and Bollig does not have a due process right to be informed of collateral consequences prior to entering his plea." *Id.* ¶ 27.

3. The fundamental purpose test is the appropriate test and the fundamental purpose of lifetime GPS tracking is not punitive.

While the court in *Bollig* used language reminiscent of the intent-effects test, the State finds significant the lack of an intent-effects analysis. The lack of an intent-effects analysis in *Bollig* suggests that *Bollig* and *Dugan* are not that dissimilar and can be reconciled.

Both *Dugan* and *Bollig* looked objectively at the application of the legislative scheme at issue, and not just to the subjective intent of the Legislature. In *Bollig*, the court recognized that the subjective intent of the statute was supported by its objective application. *Bollig*, 232 Wis. 2d 561, ¶¶ 23–24. The non-punitive application in relation to the subjective intent led the court to reject Bollig's punitive effect argument. *Bollig*, 232 Wis. 2d 561, ¶¶ 23–25. Similarly, in *Dugan*, the court concluded that the restitution statute reflected the "equitable public policy" that restitution is "an important element of the offender's rehabilitation." *Dugan*, 193 Wis. 2d at 621–22.

Thus, if this Court wishes to consider intent, i.e. purpose, in determining whether a consequence is "potential punishment" for purposes of the plea colloquy, it should reconcile *Dugan* and *Bollig* and conclude that the dispositive question for plea withdrawal purposes is whether the fundamental purpose of the consequence is objectively non-punitive. If it is, the test ends there without consideration of the punitive effects of that consequence.

This Court should conclude that this is the appropriate test because a punitive effect for ex post facto purposes does not mean that the consequence is punishment for purposes of a plea.

The intent-effects test is the wrong test because a claim alleging a *Bangert* violation is inherently different than an ex post facto claim. A *Bangert* violation carries a weighty remedy. When there is a fundamental defect in the plea colloquy, a defendant may be permitted to withdraw a guilty plea *even though* the defendant's decision to plead guilty was not affected by that defect. If Muldrow's claim for plea withdrawal is successful, his conviction will be vacated.

A successful ex post facto claim, on the other hand, offers a different remedy. If Muldrow's claim were an ex post facto claim, where lifetime tracking was not in effect at the time of the conviction, his relief would likely not be plea withdrawal. Rather, the remedy would likely be to exempt him from lifetime tracking. *See Weaver v. Graham*, 450 U.S. 24, 36 n.22 (1981) ("The proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred.").

The ex post facto remedy does not necessarily affect the finality of the conviction. Plea withdrawal does. As such, the test for punishment for plea withdrawal purposes should impose a higher burden than the ex post facto test.

Restitution provides a good illustration of that difference. Many federal and state courts have held that restitution is punishment under an ex post facto analysis.[13]

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[13] *See, e.g., United States v. Schulte*, 264 F.3d 656, 661–62 (6th Cir. 2001) (collecting cases).

Yet restitution is not punishment for the purpose of the court's mandatory plea colloquy duties. *Dugan*, 193 Wis. 2d at 624.

Like the restitution statute in *Dugan*, the manner of codification of Wis. Stat. § 301.48 reflects a non-punitive intent. The lifetime GPS tracking statute is codified not only outside the "penalties" subchapter, but outside Chapter 939 altogether and lifetime tracking *is not* a part of Muldrow's sentence.

The statute's non-punitive intent is also reflected in the legislative history. Correspondence to Wisconsin legislative staff during the drafting process reflects that expressed benefits of GPS tracking included: its potential to reduce recidivism, i.e., community protection and deterrence; faster law enforcement response times, i.e., community protection; and the ability to eliminate tracked individuals from the suspect pool, i.e., a law enforcement resource benefit.[14] *See* excerpts from the Legislative Reference Bureau's drafting file, 2005 Wis. Act 431, ASA1-AB591, 05s0194df, pg. 34.[15]

Lifetime GPS tracking has the primary non-punitive goal of protecting Wisconsin citizens. That goal is objectively reflected in the operation of the statute itself. For example, unlike criminal punishment, there is no restriction on moving out-of-state and tracking terminates if the offender chooses to move out-of-state. Wis. Stat. § 301.48(7m). It is too plain for argument that serious child sex offenders living

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[14] The State notes that this can also work to protect against false claims; providing prior sex-offenders with concrete evidence for the often proffered defense of "it wasn't me."

[15] The portion of the drafting file on which the State relies can be found in Supplemental Appendix to this brief. (R-App. 106–11.)

out-of-state pose less risk to Wisconsin citizens, thus the statute itself underscores the legislation's goal of protecting Wisconsin citizens from crime.

Furthermore, after twenty years of tracking, the court may terminate tracking "if it determines after a hearing under par. (g) that lifetime tracking is no longer necessary to protect the public." Wis. Stat. § 301.48(6)(h). Tracking also may cease based on an offender's permanent physical incapacitation. *See* Wis. Stat. §§ 301.48(7)(d) and (e). Both provisions underscore that the statute's core concern is not punishment because tracking may terminate when it is no longer necessary to protect the public. It is clear that the fundamental purpose of this scheme is public safety.

Because the fundamental purpose of lifetime GPS tracking is not punishment, it is not "potential punishment" for purposes of the plea colloquy mandate in Wis. Stat. § 971.08.

D. This Court should reject Muldrow's assumption that the traditional ex post facto intent-effects test controls.

Muldrow assumes that the intent-effects test controls (Muldrow's Br. 11), and relies on *People v. Cole*, 817 N.W.2d 497 (Mich. 2012), for support of that position (Muldrow's Br. 15). The court in *Cole* purported to apply an intent-effects test, but concluded that only the intent or purpose of Michigan's tracking scheme was punitive. *Id.* at 502–03. The court's analysis ended there. *Id.* at 502–03.

Muldrow's reliance on *Cole* is misplaced. *Cole* neither controls the test for determining what punishment is nor provides persuasive authority for the proposition that Wisconsin's lifetime tracking statute constitutes punishment.

The defendant in *Cole* pled to offenses, for which the Michigan Penal Code provided that "the court shall sentence the defendant to lifetime electronic monitoring" if the defendant was sentenced to prison. *Id.* at 499. At Cole's sentencing, the court ordered that Cole be placed on lifetime electronic monitoring following his release from prison. *Id.*

The Supreme Court of Michigan adopted the ex post facto test from *Smith v. Doe*, 538 U.S. 84 (2003), to determine whether its lifetime electronic monitoring was punishment for the purpose of the plea colloquy. *Cole*, 817 N.W.2d at 502. It did not explain why. Nor does Muldrow explain why the intent-effects test should apply in this context. As discussed above, it should not.

Furthermore, even under the intent-effects test, *Cole* is not persuasive authority for the proposition that Wisconsin's lifetime tracking statute constitutes punishment. *Cole* held that mandatory lifetime electronic monitoring was a direct consequence of a plea because the Michigan legislature intended electronic monitoring to be "an additional punishment" and "part of the sentence itself." *Id.* at 502–03. In Michigan, the mandatory lifetime monitoring statute is included in the penal code in the penalty sections. *Id.* And the trial court is required to *sentence* the defendant to lifetime monitoring "in addition to" other penalties. *Id.* at 502–03.

Michigan's statute is more perfunctory than Wisconsin's, which suggests it is not tied to rehabilitation or protection of the community. In Michigan, there does not appear to be any mechanism for either the department of correction or the individual to petition for termination of tracking. *See* Mich. Comp. Laws Ann. § 791.285 (West). Additionally, unlike Wisconsin's scheme, an individual sentenced to lifetime tracking in Michigan must repay the Michigan Department of Corrections for the costs of

monitoring absent a determination of ability to pay. *Compare* Wis. Stat. § 301.48(4)(a)2. *with* Mich. Comp. Laws Ann. § 791.285 (West).

Unlike Michigan's tracking program, Wisconsin's lifetime tracking is not a component of the defendant's sentence. It exists outside of the criminal code and outside of the penalty sections. A court has no authority to order tracking. It is not a fine, and it is not imprisonment. It does not lengthen the term of confinement, nor the term of supervision, and specific to Muldrow, it does not lengthen his term of probation. It is not punishment.

E. Even if the intent-effects test applies, Wisconsin's lifetime GPS tracking scheme is not punishment.

Even if the intent-effects test applies, this Court should conclude that lifetime GPS tracking is not punishment. The Seventh Circuit has concluded that Wisconsin's lifetime tracking statute is not punishment for ex post facto purposes. *Belleau v. Wall*, 811 F.3d 929, 937–38 (7th Cir. 2016). For the reasons explained in *Belleau*, Muldrow cannot win under an intent-effects test.

When analyzing a claim under the intent-effects test, the threshold question is whether the challenged action is a form of punishment or a non-punitive, regulatory scheme. *See In re Commitment of Rachel*, 2002 WI 81, ¶ 18, 254 Wis. 2d 215, 647 N.W.2d 762. The analysis involves two steps. First, the court looks to whether the express or implicit "intention of the legislature was to impose punishment." *Smith,* 538 U.S. at 92. If the Legislature intended to impose punishment, the inquiry ends. *Id.* However, if the Legislature did not intent to impose punishment, the second inquiry is whether the law should be nonetheless deemed

punishment. *Id.* This showing requires the "clearest proof" that the law is not what it purports to be. *Id.*

The second inquiry involves the consideration of seven factors:

> (1) whether [lifetime tracking] involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which ch. 980 applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Rachel, 254 Wis. 2d 215, ¶ 43.

Lifetime tracking under Wis. Stat. § 301.48 does not constitute punishment under the intent-effects test. As addressed above, the intent of Legislature in enacting Wis. Stat. § 301.48 was clearly non-punitive. *See also*, *Belleau*, 811 F.3d at 937 ("The monitoring law is not punishment; it is prevention."). And Muldrow cannot meet the burden to overturn legislative intent by the clearest proof.

1. Lifetime tracking does not impose a legally sufficient disability or restraint.

Under ex post facto cases, the restraint must be more than "minor and indirect." *Smith*, 538 U.S. at 100. The paradigmatic instance of a legally significant physical restraint is imprisonment. *Id.* And in the context of upholding sex offender registry burdens, the U.S. Supreme Court explained that a registry is not an ex post facto restraint because, unlike prison, it merely requires reporting and updating where the person lives and works; it does not

force someone to be in a certain location. *Id.* at 101–02. In applying *Smith* to the context of lifetime tracking, the *Bredesen* court concluded that Tennessee's GPS law similarly did not impose punitive restraints. *Doe v. Bredesen*, 507 F.3d 998, 1001, 1005 (6th Cir. 2007).

Lifetime tracking does not increase the length of incarceration for serious child sex offenders, nor does it "prevent them from changing jobs or residences or traveling to the extent otherwise permitted by their conditions of parole or probation." *Id.* The *Bredesen* court found significant that the Supreme Court sustained Alaska's Sex Offender Registration Act, concluding "that lifetime registration and monitoring of sexual offenders is 'less harsh' than other sanctions that the Court has historically considered non-punitive, such as revocation of a medical license, preclusion from work as a banker, and preclusion from work as a union official." *Id.* (citing *Smith*, 538 U.S. at 100 (collecting cases)).

Here, Muldrow will be required to wear a tracking device, which comes with some burdens. However, it will not physically prevent him from leaving his house or otherwise force him to be in a certain location. Muldrow may be subject to an "exclusion" or "inclusion" "zone," but the word "exclusion" is a misnomer. Zones only relay information; they do not prevent movement, and there is no associated penalty for lingering within an exclusion zone or outside of an inclusion zone. *See* Wis. Stat. § 301.48(3).

The lifetime tracking statute neither forbids a person's movement from one place to another, including out of Wisconsin altogether, nor requires him to affirmatively enter certain places at designated times. It is a burden, but not a legally significant restraint.

2. Lifetime tracking is not a traditional or historic form of punishment.

Traditional punishments are incarceration or, in the past, a person being "held . . . up before his fellow citizens for face-to-face shaming or [being] expelled . . . from the community." *Smith*, 538 U.S. at 98. That is not the case here. "The aim of the anklet monitor statute is the same [as civil commitment], and the difference between having to wear the monitor and being civilly committed is that the former measure is less likely to be perceived as punishment than is being imprisoned in an asylum for the criminally insane." *Belleau*, 811 F.3d at 937. "[I]f civil commitment is not punishment, as the Supreme Court has ruled, then *a fortiori* neither is having to wear an anklet monitor." *Id.*

Lifetime tracking of serious child sex offenders is not traditional punishment. *Belleau*, 811 F.3d at 937. That is the majority view, even in States with more burdensome tracking regulations than Wisconsin's. *See State v. Trosclair*, 89 So. 3d 340, 355 & n.7 (La. 2012) (noting the majority view); *State v. Bowditch*, 700 S.E.2d 1, 4–5 (N.C. 2010) (North Carolina's law has greater burdens such as: automatic 90-day maintenance visits; six hours of recharging every day; restrictions on submerging the ankle bracelet in water of three feet or more); *Bredesen*, 507 F.3d at 1004–07 (Tennessee's more burdensome tracking technology did not resemble a punishment even though its tracking device came with greater inconveniences including needing to step outside occasionally and wearing the device outside of clothing).

The New Jersey Supreme Court concluded otherwise, but that case is off point. In New Jersey, the tracking program was seemingly modeled on probation. *See Riley v. N.J. State Parole Bd.*, 98 A.3d 544, 546–48 (N.J. 2014). Unlike Wisconsin's law, the New Jersey law came with "a

monitoring parole officer," "restrictions on [the registrant's] freedom to travel," and had characteristics equivalent to "parole supervision for life by another name," such as being required to report to the monitoring officer and allow the officer into the home for various reasons. *Id.*

Wisconsin's tracking statute does not place Muldrow under supervision and it is not like probation or parole. It does not require Muldrow: to report to anyone; to refrain from certain activities (such as consuming alcohol); or to complete certain lifestyle-related activities (such as maintaining employment or providing urine samples). And it does not come with the powers of revocation. Rather, the required tracking device will indicate where Muldrow is on a map. Muldrow will be required to wear the device at all times and must charge it. These things are burdens, but do not equate to supervision or probation in a substantial way.

Regarding any potential embarrassment or shaming as a result of wearing the tracking device, these consequences are not punishment when it is merely a "collateral consequence" of a regulation designed for another purpose. *Smith*, 538 U.S. at 99. That is true even if it leads to "social ostracism." *Id.*

The New Jersey court found that tracking program to be a scarlet letter. The Seventh Circuit, however, disagreed and found that claim to be hyperbolic. *Belleau*, 811 F.3d at 938. "[T]he aim of requiring a person who has psychiatric compulsion to abuse children sexually to wear a GPS monitor is not to shame him, but to discourage him from yielding to his sexual compulsion, by increasing the likelihood that if he does he'll be arrested because the Department of Corrections will have incontestable evidence that he was at the place where and at the time when a sexual offense was reported to have occurred." *Id.*

There is no evidence that the tracking device is meant to shame; it is meant to reduce recidivism and, potentially, help sort out future crimes. Any potential embarrassment is collateral. Moreover, a tracking device does not mark someone as a sex offender since similar devices might be worn in a number of contexts or for other offenses. *Bredesen*, 507 F.3d at 1005.

Lastly, the potential passing of costs for tracking is not in effect a fine. *See Mueller v. Raemisch*, 740 F.3d 1128, 1135 (7th Cir. 2014) ("As they are responsible for the expense, there is nothing punitive about requiring them to defray it.").

In sum, lifetime tracking is not a traditional punishment, and this factor favors concluding that lifetime tracking is non-punitive in effect.

3. The imposition of lifetime tracking is not predicated on a finding of scienter.

Wisconsin Stat. § 301.48 does not have an independent scienter element. Eligibility is based on a qualifying offense that may have scienter element; however, like Ch. 980, the absence of a mental state requirement in the tracking statute is evidence that the statute is not intended to be retributive. *See Rachel*, 254 Wis. 2d 215, ¶ 51 (citing *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997)). The absence of a scienter requirement indicates that lifetime tracking is non-punitive in effect. *Id.*

4. Lifetime tracking does not promote traditional aims of punishment-retribution.

Lifetime tracking is not retributive. The Supreme Court has concluded that categorically imposing

requirements on sex offenders is not retributive where, as here, the goal is regulatory and related to the danger of recidivism. *Smith*, 538 U.S. at 102. "Any number of governmental programs might deter crime without imposing punishment." *Id.* Here, deterrence is a regulatory aim, not a punitive one, meaning this factor does not support Muldrow's claim that tracking is punitive in effect. *See id.*; *see also Bredesen*, 507 F.3d at 1005 (stating the same as to Tennessee's law).

5. The behavior to which lifetime tracking applies is not criminal.

Lifetime tracking may involve inclusion and exclusion zones, but it does not create or define any criminal behavior. *See* Wis. Stat. § 301.48(3). As the Seventh Circuit analogized, "no one thinks that a posted speed limit is a form of punishment." *Belleau*, 811 F.3d at 938. The sign itself is not punishment; it puts you on notice that you will be punished if you actually violate the law. *Id.* "The anklet monitor law is the same: it tells the plaintiff—if you commit another sex offense, you'll be caught and punished, because we know exactly where you are at every minute of every day." *Id.*

There is a potential punishment associated with tampering with the tracking device. *See* Wis. Stat. § 946.465. However, that does not substantially change the analysis. To continue with the speed limit sign analogy, one may be punished for destroying a sign, but that does not make the sign itself punishment.

Thus, this factor also favors concluding that lifetime tracking is non-punitive in effect.

6. The lifetime tracking law has a rational connection to its non-punitive purpose.

The most significant factor is whether the tracking law has a "rational connection to a non[-]punitive purpose." *Smith*, 538 U.S. at 102 (citation omitted). It does. The law's purpose is to protect the public, not to punish serious child sex offenders. *Belleau*, 811 F.3d at 937. Given the rational connection to its non-punitive aim, there is no good reason to believe that lifetime tracking is retribution in disguise.

Like sex offender registries, the tracking law has the non-punitive purpose of promoting public safety. *See Smith*, 538 U.S. at 102–03. It has the goal of reducing recidivism. It has the secondary aim of helping figure out future crimes, if any. That, too, is not aimed at punishing offenders.

The Supreme Court in *Smith* noted "the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Smith*, 538 U.S. at 103. The Court also noted that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'" *Id.*

In the face of a frighteningly high risk, it is rational to take steps to mitigate that risk. And it is rational to think that lifetime tracking has a potential to deter some crimes that would otherwise occur. In fact, "the National Institute of Justice finds that GPS monitoring of sex criminals has a greater effect in reducing recidivism than traditional parole supervision does." *Belleau*, 811 F.3d at 938 (citing Stephen V. Gies et al., *Monitoring High-Risk Sex Offenders with GPS*

Technology: An Evaluation of the California Supervision Program, Final Report, pp. vii, 3–11, 3–13 (March 2012)).[16]

Because there is a clear and rational connection between the lifetime tracking law and the need to reduce recidivism, the statute does not have a punitive effect.

7. Lifetime tracking is not excessive in relation to its purpose.

Lifetime tracking is not excessive with respect to its non-punitive purpose. *Belleau*, 811 F.3d at 937. For tracking to serve its intended purpose of reducing recidivism, it is necessary that the tracking occur continuously. Otherwise, a serious child sex offender would know he or she could reoffend at some time or place without detection, removing the potential to reduce recidivism.

The lifetime tracking program is constructed to serve that purpose. It will not restrict where Muldrow may choose to travel or reveal what Muldrow is doing in particular. Rather, it will require him to wear an anklet so that an electronic map reveals where he is, in a general sense. No doubt the anklet and mapping is undesirable from Muldrow's perspective, but it must be viewed in light of the circumstances and purpose of the law.

Of course, no one can know for certain if a particular person will reoffend. But "[t]he State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Smith*, 538 U.S. at 104.

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[16] Available at https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf. (Last accessed Dec. 11, 2017).

In sum, even under the intent-effects test, Muldrow has not shown by the clearest proof that the lifetime tracking provisions of Wis. Stat. § 301.48 evince punitive effect or otherwise constitute criminal punishment. The lifetime tracking statute undoubtedly burdens Muldrow, but it is not punishment. Consequently, the circuit court was not required to inform Muldrow that he would be subject to lifetime GPS tracking prior to accepting Muldrow's guilty plea.

CONCLUSION

This Court should conclude that lifetime GPS tracking is not punishment, and further conclude that a circuit court's duty pursuant to Wis. Stat. § 971.08 is to inform a defendant of the potential total term of imprisonment and fine.

Dated this 18th day of December 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8102 words.

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TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 18th day of December, 2017.

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TIFFANY M. WINTER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. DeAnthony L. Muldrow
Case No. 2016AP740-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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.

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TIFFANY M. WINTER
Assistant Attorney General

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TIFFANY M. WINTER
Assistant Attorney General