STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1865

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIO DOUGLAS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction, and an Order
Denying a Postconviction Motion,
Entered in Milwaukee County Circuit Court,
the Honorable David Borowski, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

At issue in this case is whether a defendant is entitled to *any* relief when the circuit court, the prosecutor, trial counsel, and the defendant *all* incorrectly believed that the defendant could be convicted of two counts if he went to trial when in fact he could only be convicted of a single count.

1. Is Mr. Douglas entitled to an evidentiary hearing and plea withdrawal because the circuit court and trial counsel incorrectly advised him that he could be convicted of two counts if he went to trial?

2. Is Mr. Douglas entitled to an evidentiary hearing and plea withdrawal because his attorney failed to ascertain and advise him that he could not be convicted of two counts?

3. Did the circuit court's inaccurate belief that Mr. Douglas could be convicted of two counts if he went to trial entitle him to a new sentencing hearing?

4. Does the fact that Mr. Douglas can only be convicted of a single count if he went to trial entitle him to sentence modification?

5. Is a blanket no contact order with any children under the age of sixteen overly broad and violate Mr. Douglas's constitutional right to parent his children?

The postconviction court denied all of Mr. Douglas's requests for relief without a hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Court should not grant oral argument or publication as this is a fact-specific case requiring application of established legal principles.

STATEMENT OF THE CASE AND FACTS

Charges

The criminal complaint charged Mario Douglas with two counts:

> (1) second degree sexual assault of O.L.G., a child under 16 years of age, a class C felony with a maximum term of imprisonment of 40 years, contrary to Wis. Stat. § 948.02(2); and
>
> (2) first degree sexual assault of O.L.G., a child under 16 years of age, use of threat of force/violence, a class B felony with a maximum term of imprisonment of 60 years and a mandatory minimum of 25 years of initial confinement, contrary to Wis. Stat. §§ 948.02(1)(c) & 939.616(1r).

(1:1).

According to the complaint, on July 10, 2013, O.L.G. went to Mr. Douglas's house. (1:2).[1] Mr. Douglas told O.L.G. that "his girlfriend was in the basement and she wanted to talk to [O.L.G.]." (*Id.*). O.L.G. went into the basement. (*Id.*). Once in the basement, Mr. Douglas told O.L.G. that his girlfriend was not there. (*Id.*). Mr. Douglas then:

[1] O.L.G. referred to Mr. Douglas as "Rio." (1:2).

> Pushed her onto a bed, got between her legs, and was trying to unbutton her shorts. She began to struggle . . . and she was trying to pull her shorts up. [He] slapped her in the face three times. She then hit him, and [he] then put his hand on her throat and began to squeeze. She had difficulty breathing, but she did not black out. [He] also punched her in the mouth. [He] was then able to pull off her shorts and underwear, and at that point she was tired of fighting so she just gave in. [He] then inserted his penis into her vagina.

(*Id.*).

Motion to Dismiss One of the Counts

At the initial appearance, trial counsel, Anne Jaspers,[2] moved to dismiss count two, or alternatively, count one, because there were insufficient facts to support both counts. (50:7). In response, the prosecutor argued that the charges were proper because "they cite different acts. One is a simple sexual assault of a child. The other is a specific act of violence—intercourse with use of threat of violence." (50:8).[3]

The court commissioner denied the motion to dismiss stating:

> Okay. I believe that in reading the complaint, both counts are supported. I certainly understand counsel may want to, you know, reserve her right to file a motion or have counsel representing Mr. Douglas reserve the right

[2] Anne Jaspers appeared on behalf of Mr. Douglas, but stated that Anne Devitt represented him. (50:2, 6).

[3] Assistant District Attorney William Pipp appeared on behalf of the State at the initial appearance. (50:2). However, Assistant District Attorney Paul Tiffin issued the complaint and handled the plea and sentencing in this case. (1; 55; 56).

> to say file a motion before judge in it matter. But I – as I review the complaint, I see support for both charges. I view them as distinct and separate charges. The first not involving the threat of force and the second involving that. So at this point I'm – I'm agreeing with the state's argument that both are supported to the level of probable cause. I see no need to dismiss either one at this stage, but I will allow counsel to maybe revisit that issue if he wishes before the judge in the future but I'm letting the complaint go forward . . .

(50:7-9).

Incorrect Advice Prior to the Scheduled Jury Trial

After the preliminary hearing,[4] Mr. Douglas retained Kristian Lindo. (*See* 7; 52).

At the final pretrial, the circuit court asked the state to put the offer on the record. (54:4; App. 116). The state explained that if Mr. Douglas entered a plea to count one, the state would recommend an initial term of confinement of six to eight years or recommend incarceration leaving the length to the court's discretion. (*Id.*). The state also would move to dismiss the second count. (*Id.*). The circuit court then, in a lengthy exchange, incorrectly stated that if Mr. Douglas decided to go to trial, "he's facing a 100 years in prison," and could be convicted on both counts:

> THE COURT: . . . You advised your client that he's facing a 100 years in prison?
>
> TRIAL COUNSEL: Yes, Your Honor. We have talked about that.

[4] At the preliminary hearing, different counsel, John Matthew Krejci, represented Mr. Douglas. (51:2).

THE COURT: You advised him that he not only is facing, but will serve at least 25 years of initial confinement on Count 2, and if he's convicted on both, the State may very well ask me to stack sentences for those two, and he may be facing 30, 40 years of initial confinement? You explained that to your client?

TRIAL COUNSEL: I did, Your Honor. I will note that we did enter negotiations with the state, and the state's most recent offer was lower than ADA Tiffin – he did extend a lower offer. I explained it to Mr. Douglas, and I let him know the exposure he was facing in taking a plea versus taking this to trial. I think really the issue is just the amount of in-custody time. I did explain–

THE COURT: Well, counsel, hang on. First of all, I'm telling you, or more specifically your client what to do. If he wants a trial, wonderful. We'll bring in a jury, you both can try it, I'll preside over it. But if your client is concerned about six to eight years of initial confinement, he needs to understand if he loses, the earliest date, the earliest date he possibly walks out of prison is the year 2039.

And if he's convicted on both counts, the state, if they ask, or maybe, I, myself, could easily be persuaded to stack time on top of that as there's two offenses, two separate crimes.

So if he's worried about six to eight years of initial confinement, he should do the math and figure out that 25 or 30 years of initial confinement is a lot more than six.

Has he done that math? Is he capable of that?

TRIAL COUNSEL: He is, Your Honor. We've actually gone over that.

THE COURT: Mr. Douglas, do you understand you're facing over a 100 years in prison here?

MR. DOUGLAS: Yes.

THE COURT: Use the microphone, speak up. This is not a whispering contest.

MR. DOUGLAS. Yes.

THE COURT: Do you understand that if you're found guilty in Count 2, you not only can, but will do 25 years at least in prison. That means this is 2014, and the earliest you walk out of prison is 2039 or later; do you understand that?

MR. DOUGLAS: Yes, sir.

THE COURT: And you want to take your chances at a trial?

MR. DOUGLAS: Yes, sir.

THE COURT: Lovely.

* * *

THE COURT: Counsel, you explained all of that to your client? He faces a 100 years in prison. The state has DNA. He's admitted to at least one of these crimes, admitted to it. The state has a victim, the victim had immediate disclosure.

TRIAL COUNSEL: I did, Your Honor. And for the record, I did also explain the state's recommendation is just a recommendation. I could make a significantly more convincing argument, you might go lower, you might go higher.

THE COURT: Mr. Douglas, do you understand that the victim in this case could not consent given her age? That means your DNA on her body, particularly her vaginal

> area or leg area,5 is pretty convincing; secondly, you admitted to this offense, to a police officer you admitted your guilt; thirdly, you're facing a 100 years in prison; do you understand that?
>
> MR. DOUGLAS: Yes, sir.

(54:5-10; App. 117-122). During this exchange, the state did not express any disagreement.

Plea Hearing

Approximately two weeks after the pretrial hearing and several days before the scheduled jury trial, Mr. Douglas entered a guilty plea to count one, second degree sexual assault of O.L.G., contrary to Wis. Stat. § 948.02(2). (55:5; App. 128).

In exchange for Mr. Douglas's plea to count one, the state agreed to leave sentencing to the court and dismiss outright count two, first degree sexual assault of O.L.G., contrary to Wis. Stat. § 948.02(1)(c). (55:3, 12; 15:2; App. 126).

At the conclusion of the plea hearing, the following statements were made regarding the factual basis:

> THE COURT: I've read the complaint. Are both sides stipulating to the facts in the complaint as a factual basis?
>
> PROSECUTOR: Judge, and [trial counsel] can correct me, it's my understanding that Mr. Douglas admits to sexual intercourse, denies that there was force. That's not an element of this crime. It's something the court can consider, if it chooses to at the time of sentencing. So the

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[5] O.L.G's right inner thigh had Mr. Douglas's DNA, not her vagina. (56:7; App. 143). There was no semen found. (*Id.*).

> state offers the complaint in [sic] the extent that there is sexual intercourse penis to vagina, but the part about force, that's my understanding was the sticking point in resolving the case. Is that correct?
>
> TRIAL COUNSEL: That would be correct, Your Honor.
>
> THE COURT: Mr. Douglas, again, you're admitting you had penis to vagina intercourse, sex with the victim whose initial are O.L.G., she was under the age of 16, this occurred on or about July 10th of last year, correct?
>
> MR. DOUGLAS: Yes, sir.

(55:10-11; App. 133-134).

Sentencing

Pursuant to the final plea agreement, the state asserted that "incarceration is appropriate in this case," and left the length of incarceration and the structure of the sentence to the court. (56:9; App. 145). O.L.G. did not attend sentencing. (56:4; App. 140).

Trial counsel indicated that he had spoken to O.L.G's uncle who said that "[O.L.G.] related a different story, that, yes, it was an act of sexual intercourse, but due to not wanting to get in trouble herself, she created this story about being forced . . . " (56:10; App. 146). Trial counsel acknowledged that the state had located a "DNA mixture" from Mr. Douglas on O.L.G.'s inner thigh,[6] but stated that "Mr. Douglas wanted to take responsibility of this. His concern was that having the offense read-in versus just straight-out dismissed . . . He

[6] Mr. Douglas also admitted to officers he had sexual intercourse with O.L.G. (*See* 56:7-8; App. 143-144).

doesn't want to have that association of having forced her." (56:10-11; App. 146-147). Trial counsel explained that Mr. Douglas met O.L.G. on Facebook, and that "I can tell the Court that I looked at her profile. It does list her as being 19." (56:11; App. 147). Given the circumstances of the case, trial counsel requested 3.5 years of initial confinement with extended supervision left to the court. (56:15-17; App. 151-153). Mr. Douglas apologized. (56:17; App. 153).

Subsequently, the Honorable David Borowski imposed 18 years in prison (12 years initial confinement and 6 years extended supervision) consecutive to any other sentence. (56:28; App. 164). The court also ordered that Mr. Douglas have no contact "with children under the age of 16." (56:29-30; 22; 24; App. 101; App. 164-165).

Denial of Request for Postconviction Relief

Mr. Douglas filed a postconviction motion seeking sentencing modification, resentencing, or plea withdrawal on the grounds that the circuit court, the prosecutor, trial counsel, and Mr. Douglas all incorrectly believed that Mr. Douglas could be convicted of both charged counts resulting in a maximum prison term of 100 years. (34; 46).[7] Mr. Douglas requested a hearing on the plea withdrawal claims. (*See, e.g.*, 34:20).

Briefing was ordered. (35). In its response, the State conceded that all of the parties, including the court, incorrectly believed that Mr. Douglas could be convicted of both charged counts. (41:1). However, the State argued that:

[7] Mr. Douglas also moved to vacate the single, mandatory DNA surcharge imposed in this case as an ex post facto violation. He does not renew this request on appeal.

(1) Mr. Douglas "got exactly what he wanted," thus was not entitled to plea withdrawal (41:4); (2) Mr. Douglas failed to prove ineffective assistance of counsel (41:13); and (3) disputed that the court believed Mr. Douglas could be convicted of two counts (41:7, 8, 10-12).

Undersigned counsel subsequently filed a supplemental postconviction motion requesting that the judgment of conviction be modified to grant Mr. Douglas contact with his own children under the age of 16. (45).[8]

The Honorable David Borowski agreed that Mr. Douglas could not have been convicted of both charges, resulting in a maximum prison term of 100 years. (47:4; App. 106). Nonetheless, the court denied Mr. Douglas's request for postconviction relief on all grounds. (47:1-10; App. 103-112)

The court denied the request for an evidentiary hearing and plea withdrawal because the plea agreement "put [Mr. Douglas] in the same position he would have been at the conclusion of a trial under the best case scenario and in a far better position than a conviction for the more serious sexual assault charge." (47:6; App. 108). Additionally, Mr. Douglas failed to established that he was prejudiced because "he does not offer any facts to support his assertion that he would have proceeded to trial but for counsel's advice and risked a conviction that would have put him in prison for at least 25 years." (47:6-7; App. 108-109) (emphasis omitted).

The court also denied sentence modification and resentencing because:

> At the sentencing hearing on July 17, 2014, the court considered the first-degree sexual assault of a child

[8] Mr. Douglas also asked for contact with family members under the age of 16. He does not renew this request on appeal.

> charge only to the extent that the 25-year minimum mandatory confinement term it carried likely motivated the defendant's decision to enter a guilty plea to the lesser offense. But at no time did the court state that it believed that the defendant could have been convicted of both counts or that he could have been sentenced to 100 years in prison. The court understood what the defendant's maximum exposure was at the time he entered a guilty plea and did not consider the 100 years at sentencing. . . . The court did not believe that the defendant was facing 100 years at sentencing and anything the court said to suggest otherwise had absolutely no impact on the ultimate sentencing decision in this case and was most assuredly harmless.

(47:8; App. 110).

Lastly, the court denied the request to modify the no contact order because there was no evidence that Mr. Douglas's sex offender treatment needs are limited to underage children who are not related to him. (47:9; App. 111). The court noted that Mr. Douglas is on a waiting list for sex offender treatment, so his needs are unknown. (*Id.*).

Additional relevant facts will be referenced below.

ARGUMENT

I. Mr. Douglas Is Entitled to An Evidentiary Hearing and Plea Withdrawal Because the Circuit Court and Trial Counsel Incorrectly Advised Him That He Could Be Convicted of Two Counts with a Maximum Prison Term of 100 years If He Went to Trial.

A. Legal principles.

A plea not entered knowingly, voluntarily, and intelligently violates fundamental due process, and a defendant therefore may withdraw the plea as a matter of right. ***State v. Cross***, 2010 WI 70, ¶ 14, 326 Wis. 2d 492, 786 N.W.2d 64.

A defendant who seeks to withdraw a plea after sentencing has the burden to prove by clear and convincing evidence that a manifest injustice would result if withdrawal was not permitted. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). "A manifest injustice occurs when there are serious questions affecting the fundamental integrity of the plea which renders it unknowing, involuntary, and unintelligently entered." ***State v. Dawson***, 2004 WI App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12. The defendant has the burden to establish a manifest injustice. ***State v. Dillard***, 2014 WI 123, ¶ 60, 358 Wis. 2d 543, 859 N.W.2d 44.

The determination of whether a plea was entered knowingly, voluntarily, and intelligently presents a question of constitutional fact that is reviewed independently. ***Dawson***, 2004 WI App 173, ¶ 7. A circuit court's finding of historical, evidentiary facts are not disturbed unless clearly erroneous. ***Id.***

B. The circuit court and trial counsel incorrectly advised Mr. Douglas that he could be convicted of two counts with a maximum prison term of 100 years.

The criminal complaint charged Mr. Douglas with two counts:

> (1) second degree sexual assault of O.L.G., with a maximum term of imprisonment of 40 years, contrary to Wis. Stat. § 948.02(2); and
>
> (2) first degree sexual assault of O.L.G., with a maximum term of imprisonment of 60 years and a mandatory minimum of 25 years, contrary to Wis. Stat. § 948.02(1)(c).

(1:1).

In this case, the pretrial transcript unequivocally reflects that the circuit court, trial counsel,[9] Mr. Douglas, and the prosecutor *all* incorrectly believed that Mr. Douglas could be convicted of both counts resulting in a total maximum prison term of 100 years (40 years on count one and 60 years on count two). (54:5-10; App. 117-122).

However, as postconviction decision concluded, Mr. Douglas could *not* have been convicted of both counts for two reasons: (1) count one (second degree sexual assault) is a "lesser-included" of count two (first degree sexual assault); and (2) the counts are "multiplicitous" and violate double jeopardy. (*See* 47:4; App. 106).

[9] Unless otherwise noted, "trial counsel" refers to the attorney who represented Mr. Douglas at his plea and sentencing.

1. Count one is a "lesser-included" of count two.

Wis. Stat. § 939.66 provides that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both."

Wis. Stat. § 939.66(2p) further provides that "an included crime" is a crime which is a less serious or equally serious type of violation under the sexual assault of a child statute, Wis. Stat. § 948.02.

The sexual assault of a child statute, Wis. Stat. § 948.02, provides:

> **948.02 Sexual assault of a child.**
>
> (1) FIRST DEGREE SEXUAL ASSAULT.
>
> (c) Whoever has sexual intercourse with a person who has not attained the age of 16 years by use or threat of force or violence is guilty of a Class B felony.
>
> * * *
>
> (2) SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

Thus, count one, second degree sexual assault, pursuant to Wis. Stat. § 948.02(2), is lesser-included of count two, first degree sexual assault, pursuant to Wis. Stat. § 948.02(1)(c). Consequently, Mr. Douglas could not have been convicted of both counts.

2. The counts are "multiplicitous."

Multiplicity arises where the defendant is convicted with more than one count for a single offense. *See* ***State v. Davison***, 2003 WI 89, ¶ 38, 263 Wis. 2d 145, 666 N.W.2d 1. Multiplicitous convictions are impermissible because they violate the double jeopardy provisions of the Wisconsin and United States Constitutions. U.S. Const. amend. V; Wis. Const. art. I, sec. 8; ***State v. Grayson***, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992).

Wisconsin has traditionally analyzed multiplicity claims using a two-prong test: (1) whether the charged offenses are identical in fact and law; and (2) if the offenses are not identical in fact and law, whether the legislature intended the multiple offenses to be brought as a single count, rather than as multiple counts. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998).

Here, count one and count two are multiplicitous as they are identical in fact and law. First, the same act or transaction—sexual intercourse with O.L.G.—constitutes a violation of both counts. Second, given that count one is a lesser included of count two, *each* count does *not* require proof of a fact which the other does not. *See* ***Blockburger v. United States***, 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of a fact which the other does not*.") (emphasis altered). Rather, *only* count two, which alleges a violation of first degree sexual assault of a child pursuant to Wis. Stat. § 948.02(1)(c), requires proof of a fact that the other count does not—the use of force.

Therefore, Mr. Douglas could not have been convicted of both counts resulting in a maximum prison term of 100 years.

C. Mr. Douglas's plea was not entered knowingly, intelligently, and voluntarily.

In Wisconsin, numerous cases have held that affirmative misinformation about the law given to the defendant requires plea withdrawal. *See*, *e.g.*, ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) (holding that when the defendant pled guilty incorrectly believing that he could seek appellate review of an evidentiary order, he misunderstood the effects of his plea and the plea was therefore not knowing and voluntary); ***Dawson***, 276 Wis. 2d 418, 427 (holding that the legally unenforceable reopen-and-amend provision of the defendant's plea deal rendered the plea unknowingly and involuntary); ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992) (holding that a guilty plea entered at least in part based on inaccurate legal information about sentencing was neither knowing or voluntary); ***State v. Brown***, 2004 WI App 179, ¶ 10, 276 Wis. 2d 559, 687 N.W.2d 543 (holding that when the State promised to drop, but did not drop, all charges requiring the defendant to register as a sex offender or subjecting the defendant to a Chapter 980 civil confinement, the defendant's plea was involuntary).

Significantly, case law does not require that the decision to plead be based exclusively on the misinformation the defendant received. ***Dillard***, 2014 WI 123, ¶ 60. Rather, a guilty or no-contest plea is not voluntary unless the defendant is "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel . . ." ***Id.***

In this case, Mr. Douglas's plea was not made with full knowledge of information relevant to a decision regarding whether to plead or proceed to trial. The record unequivocally reflects that both the circuit court and trial counsel incorrectly advised Mr. Douglas that he could be convicted of both counts resulting in a total maximum prison term of 100 years. (*See* 50:7-9; 54:5-10; App. 117-122). For example, at the final pretrial, trial counsel confirmed on the record that he had advised Mr. Douglas that he was "facing a 100 years in prison" and "could be convicted of both counts." (*See, e.g.*, 54:5; App. 117). The court also stated on the record that Mr. Douglas could be convicted of both counts and was "facing over a 100 years in prison." (*See, e.g.*, 54:6; App. 118). At an evidentiary hearing, undersigned counsel anticipates that Mr. Douglas would testify that at the time of his plea, he did not know that he could only have been convicted of one count of sexual assault of a child and that a conviction on both counts would be unlawful. (*See* 34:15).

As a result of the incorrect advice he received from the circuit court and trial counsel, Mr. Douglas was prevented from making a reasoned decision whether to proceed to trial or plead. Mr. Douglas was not aware of the direct consequences of his plea. He did not know the actual value of the commitments made to him by the prosecutor in the plea offer. Thus, the misinformation regarding the number of counts he could be convicted of and the maximum sentence he faced, undermined Mr. Douglas's capacity to knowingly, intelligently, and voluntarily choose between accepting the state's plea offer and proceeding to trial.

This case is similar to ***Dillard***, 2014 WI 123. In ***Dillard***, the defendant was charged with two counts: (1) armed robbery with a persistent repeater enhancer; and (2) false imprisonment with a habitual criminal penalty enhancer.

Id. ¶ 16. The persistent repeater enhancer carried a mandatory sentence of life in prison without the possibility of extended supervision. ***Id.*** ¶ 17. The State offered a plea agreement in which a "persistent repeater enhancer was dropped, as was the false imprisonment charge." ***Id.*** ¶ 19. The defendant agreed to plead to the charge of armed robbery without the persistent repeater enhancer. ***Id.***

As in this case, in ***Dillard***, the court and the defendant's trial attorney incorrectly advised the defendant that he was subject to the persistent repeater enhancer. ***Id.*** ¶ 25. Subsequently, the defendant filed a postconviction motion seeking to withdraw his plea and an evidentiary hearing was held. ***Id.*** ¶¶ 34, 41, 44-51. Ultimately, the Wisconsin Supreme Court determined that the "[t]he misinformation undermined the defendant's capacity to knowingly, intelligently, and voluntarily choose between accepting the State's plea offer and proceeding to trial." ***Id.*** ¶ 69. Thus, the defendant did not knowingly, intelligently, and voluntarily enter a plea. ***Id.***

The Court in ***Dillard*** distinguished the facts in the case from a previous Wisconsin Supreme Court case, ***State v. Denk***, 2008 WI 130, 315 Wis. 2d 5, 758 N.W.2d 775.

In ***Denk***, the defendant was charged with several counts, including possession of methamphetamine paraphernalia. ***Id.*** ¶¶ 17, 19. The methamphetamine paraphernalia count and two other counts were dismissed as part of the plea agreement. ***Id.*** ¶ 21. On appeal, the defendant argued that there was not a basis for the methamphetamine charge, thus, the prosecutor's offer to drop the charge provided an illusory benefit. ***Id.*** ¶¶ 23, 65-69. ***Denk*** held that the defendant was not entitled to withdraw his plea. ***Id.*** ¶ 75.

Dillard distinguished the facts of ***Denk*** explaining:

> In short, in ***Denk*** the charge that was dismissed pursuant to Denk's plea agreement did not pose a legal or factual impossibility. The ***Denk*** court did not decide (and the record did not demonstrate) that there was no factual or legal basis for that charge.
>
> In ***Denk***, there was a factual and legal dispute about what Denk was doing with the methamphetamine paraphernalia, about whether the State could have proved the dismissed charge beyond a reasonable doubt, and about the proper scope of the statute applicable to the dismissed felony. The ***Denk*** court recognized that it was uncertain whether the State would have prevailed on the dismissed charge. At that stage in the proceeding, however, Denk had not demonstrated that the dismissed charge was a factual or legal impossibility. Denk thus benefitted when the felony drug paraphernalia charge was dropped pursuant to the plea agreement.

Dillard, 2014 WI 123, ¶¶ 76-77. In contrast, in ***Dillard***, the persistent repeater enhancer charge "could not, as a matter of law, have been applied to the defendant." ***Id.*** ¶ 78. The State's offer in ***Dillard*** to drop the persistent repeater enhancer provided no benefit to the defendant.

As in ***Dillard***, but unlike in ***Denk***, here, the law required one of the counts of sexual assault of a child to be dismissed. Thus, the prosecutor's offer in this case to drop one of the counts was illusory rendering Mr. Douglas's plea unknowing and involuntary.

The postconviction decision denied relief because the plea agreement "put [Mr. Douglas] in the same position he would have been at the conclusion of a trial under the best case scenario and in a far better position than a conviction for the more serious sexual assault charge." (47:6; App. 108).

However, the outcome of a trial is speculation. Moreover, had the prosecutor, trial counsel, and Mr. Douglas been aware that he could not have been convicted of two counts, a more favorable plea agreement may have been reached.

Therefore, Mr. Douglas's plea was not entered knowingly, intelligently, and voluntarily and this Court should remand for an evidentiary hearing and plea withdrawal. *See* ***State v. Allen,*** 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

II. Mr. Douglas Is Entitled to an Evidentiary Hearing and Plea Withdrawal Because He Received Ineffective Assistance of Counsel.

A. Legal principles.

Another way to demonstrate a manifest injustice requiring plea withdrawal is to establish that the defendant received ineffective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). The two-part test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984) applies to challenges to guilty pleas based on ineffective assistance of counsel. ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985). To establish a deprivation of effective representation, a defendant must demonstrate both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***Id.***

When a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court *must* hold an evidentiary hearing. ***Bentley***, 201 Wis. 2d at 310; ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). Whether a postconviction motion meets this standard is a question of law which this Court reviews independently. ***Bentley***, 201 Wis. 2d at 310.

A circuit court may, in its discretion, deny a motion without a hearing if the motion does not raise a question of fact, presents only conclusory allegations, or if a review of the record conclusively demonstrates that the defendant is not entitled to relief. ***Allen***, 2004 WI 106, ¶¶ 9, 12. This discretionary decision is subject to deferential review under the erroneous exercise of discretion standard. ***Id.*** ¶ 9.

B. Trial counsel's performance was deficient.

The performance prong of ***Strickland*** requires a defendant to show that counsel's representation "fell below an objective standard of reasonableness." 446 U.S. at 688.

Here, the attorney who represented Mr. Douglas at his plea and sentencing was deficient for failing to ascertain the relevant law and incorrectly advising Mr. Douglas that he could be convicted of both counts resulting in a maximum term of prison of 100 years. There can be no reasonable strategic reason for trial counsel's failure to know the relevant law and properly advise Mr. Douglas. "A defendant's decision whether to go to trial or plead is generally the most important decision to be made in a criminal case" and "[a] defendant should have the benefit of an attorney's advice on this crucial decision." ***Dillard***, 2014 WI 123, ¶ 90; *see also*, ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161

(1983) (stating that an attorney must be "skilled and versed" in criminal law).

C. Trial counsel's deficient performance prejudiced Mr. Douglas.

To establish prejudice, a defendant seeking to withdraw his or her plea must allege facts to show "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59-60 (1985); *see also*, ***Bentley***, 201 Wis. 2d at 311.[10]

In this case, Mr. Douglas was prejudiced because he entered a plea based on incorrect advice from his trial attorney that he could be convicted of two counts of sexual assault of a child. The postconviction motion alleged that had Mr. Douglas known that he could *not* be convicted of both counts with a maximum prison term of 100 years, he would not have entered a plea and he would have gone to trial. (34:16-17; App. 170-171). The motion further alleged that 100 years in prison scared him. (*Id.*). Thus, Mr. Douglas was not "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel . . ." ***Dillard***, 2014 WI 123, ¶ 60.

[10] More recently, however, the United States Supreme Court has stated that "***Hill*** does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations." ***Missouri v. Frye***, 566 U.S. 133, 148 (2012) (holding that "where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, ***Strickland*** . . . requires looking not at whether the defendant would have proceeded to trial . . . but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.").

The postconviction decision states that Mr. Douglas failed to establish that he was prejudiced because "he does not offer any facts to support his assertion that he would have proceeded to trial but for counsel's advice and risked a conviction that would have put him in prison for at least 25 years." (47:6-7; App. 108-109) (emphasis omitted).

However, contrary to the postconviction court's decision, Mr. Douglas's motion alleged sufficient facts entitling him to an evidentiary hearing and plea withdrawal. The motion contained the name of the trial attorney providing the inaccurate advice (Kristian Lindo); what the advice was (that Mr. Douglas could be convicted of two counts); when the advice was given (prior to the plea); and why the advice mattered (Mr. Douglas was scared of 100 years in prison and had he known he could not be convicted of both counts, he would have gone to trial). (34:16-17; App. 170-171; *contrast with* ***Bentley***, 201 Wis. 2d at 315-16 (finding that a defendant's motion essentially alleging "he would have pled differently" was insufficient). Any credibility determinations would be best resolved at an evidentiary hearing. A hearing would allow the circuit court the opportunity to assess Mr. Douglas's conduct, appearance, demeanor, recollection, reasonableness, and intelligence. *See* Wis JI—Criminal 300 ("Credibility of Witnesses"); ***State v. Love***, 2005 WI 116, ¶ 42, 284 Wis. 2d 111, 700 N.W.2d 62 ("The general rule is that credibility determinations are resolved by live testimony.").

Therefore, this Court should remand for an evidentiary hearing and plea withdrawal.

III. The Circuit Court Sentenced Mr. Douglas Based on Inaccurate Information and He Is Entitled to a New Sentencing Hearing.

A. Legal principles.

"A defendant has a constitutionally protected due process right to be sentenced based on accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. When a circuit court relies on inaccurate information, "we are dealing 'not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude.'" ***State v. Travis***, 2013 WI 38, ¶ 17, 347 Wis. 2d 142, 832 N.W.2d 491 (citation omitted). "A criminal sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand." ***Id.***

A defendant who requests resentencing due to a court's use of inaccurate information at the sentencing hearing must show that: (1) the information was inaccurate; and (2) that the court relied on the inaccurate information in the sentencing. ***Tiepelman***, 2006 WI 66, ¶ 26. "Once actual reliance on inaccurate information is shown, the burden shifts to the state to prove the error was harmless." ***Id.*** ¶¶ 2, 9. In order to prove an error is harmless, the state must demonstrate that "there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." ***Travis***, 2013 WI 38, ¶ 26.

A reviewing court must independently review the record of the sentencing hearing to determine the existence of any actual reliance on inaccurate information. ***Id.*** ¶ 48. A circuit court's after-the-fact assertion of non-reliance on

allegedly inaccurate information is not dispositive of the issue of actual reliance. ***Id.***

B. The circuit court sentenced Mr. Douglas based on inaccurate information.

As discussed in detail in Part I, the pretrial transcript reflects that the court, trial counsel, Mr. Douglas, and apparently the prosecutor, all believed that Mr. Douglas could be convicted of both counts of sexual assault of a child resulting in a maximum prison term of 100 years. This was inaccurate.

After the pretrial proceeding, there is no indication on the record that the court, trial counsel, Mr. Douglas, or the prosecutor realized that Mr. Douglas could only be convicted of one count. At the beginning of the sentencing hearing, the prosecutor represented that "[t]he State *agreed* and the Court *allowed* Count 1, first degree sexual assault of a child, use of force, to be dismissed." (56:3; App. 139) (emphases added). The words "agreed" and "allowed" reflect that the parties continued to believe that Mr. Douglas could be convicted of both counts, not one. The prosecutor did not state that the count was being dismissed as a matter of law or because Mr. Douglas could not be convicted of both counts.

Additionally, during trial counsel's argument, he noted that Mr. Douglas's "concern was . . . having the offense read-in versus straight-out dismissed." (56:11; App. 147). Suggesting that a count could potentially be "read-in" reflects that trial counsel and Mr. Douglas continued to believe he could be convicted of both counts.

Subsequently, the circuit court "specifically considered" the inaccurate information that Mr. Douglas could be convicted of both counts. *See* ***Travis***, 2013 WI 38,

¶ 46. During its sentencing remarks, the court stated Mr. Douglas "was faced with DNA and faced with the fact that *if he goes to trial on these two counts*, Count 2 is a 25-year initial confinement as part of the bifurcated sentence." (56:19-20; App. 155-156). While the court does not use the word "convicted," the phrase "if he goes to trial on these two counts," conveys that he could be convicted of both counts. The court did not state, for example, that Mr. Douglas could have been found guilty at trial of the greater count or the count carrying a higher penalty.

The postconviction decision states:

> At the sentencing hearing on July 17, 2014, the court considered the first-degree sexual assault of a child charge only to the extent that the 25-year minimum mandatory confinement term it carried likely motivated the defendant's decision to enter a guilty plea to the lesser offense. But at no time did the court state that it believed that the defendant could have been convicted of both counts or that he could have been sentenced to 100 years in prison. The court understood what the defendant's maximum exposure was at the time he entered a guilty plea and did not consider the 100 years at sentencing. . . . The court did not believe that the defendant was facing 100 years at sentencing and anything the court said to suggest otherwise had absolutely no impact on the ultimate sentencing decision in this case and was most assuredly harmless.

(47:8; App. 110).

Noticeably, the decision does *not* appear to claim that the circuit court actually knew that Mr. Douglas could only be convicted of one count, not two, or that had he gone to trial, he would not have been facing a maximum prison term of 100 years. The decision simply states that the circuit court

understood the maximum for the count to which Mr. Douglas entered a plea and was being sentenced on.

Moreover, contrary to the court's suggestion, its inaccurate belief was not harmless. A sentencing court cannot properly exercise its discretion if it has an incorrect understanding of the facts and the law. *See* ***Travis***, 2013 WI 38, ¶ 26. And, because the parties appeared to believe that Mr. Douglas could have been convicted of both counts, the circuit court was deprived of the benefit of recommendations or discussions based on accurate information. ***Id.*** ¶¶ 81-83. If the prosecutor and trial counsel had known that Mr. Douglas could have only been convicted of one count, a different plea agreement or recommendation may have been reached.

Lastly, to the extent the order suggests that the court did not rely on its inaccurate belief that Mr. Douglas could have been convicted of both counts with a maximum prison term of 100 years, a circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance. ***Travis***, 2013 WI 38, ¶ 48.

Therefore, this Court should remand for a new sentencing hearing. The circuit court in this case violated Mr. Douglas's constitutional due process right to be sentenced based on accurate information.

C. Mr. Douglas received ineffective assistance of counsel.

Assuming for the sake of argument that Mr. Douglas waived any inaccurate information claim, he received ineffective assistance of counsel.

As discussed in Part II.A, to establish a deprivation of effective representation, a defendant must demonstrate both that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

Here, trial counsel was deficient for failing to ascertain that Mr. Douglas could not have been convicted of both counts and failing to correct the circuit court's inaccurate belief prior to the plea or at sentencing. There can be no reasonable strategic reason for allowing the court to believe that Mr. Douglas could have been convicted of both counts resulting in a maximum possible sentence of 100 years. ***Strickland***, 466 U.S. at 687-88 (to establish deficient performance, the defendant must show that counsel's representation fell below the objective standard of "reasonably effective assistance").

Additionally, trial counsel's failure to correct the court's inaccurate belief prejudiced Mr. Douglas. The court did not know the correct number of counts or time Mr. Douglas was facing if he went to trial. The number of counts and the amount of time is directly related to the seriousness of the offense and the protection of the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Consequently, the fact that the circuit court did not have accurate information undermines the confidence in the sentence imposed in this case.

Therefore, this Court should remand for a new sentencing hearing, and if necessary, an evidentiary ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 797, 285 N.W.2d 905 (Ct. App. 1979).

IV. This Court Should Remand for Sentence Modification.

A circuit court has inherent authority to modify a sentence based upon a "new factor." ***State v. Crochiere***, 2004 WI 78, ¶¶ 11-12, 273 Wis. 2d 57, 681 N.W.2d 524. In ***Rosado v. State***, the Wisconsin Supreme Court defined a new factor as:

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado, 70 Wis. 2d 280, 288, 234 Wis. 2d 69 (1975).

In 2011, the Wisconsin Supreme Court reaffirmed the ***Rosado*** definition of a new factor and withdrew any language from cases that suggested a new factor must also "frustrate the purpose of the original sentence." ***State v. Harbor***, 2011 WI 28, ¶ 52, 333 Wis. 2d 53, 797 N.W.2d 828.

"The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.*** ¶ 36. Whether the defendant has satisfied this burden is a question of law reviewed independently. ***Id.*** Whether a new factor warrants a modification of the defendant's sentence is within the circuit court's discretion. ***Id.*** ¶ 37.

Here, all of the parties incorrectly believed that Mr. Douglas could be convicted of two counts of sexual assault of a child resulting in a maximum term of prison of 100 years. The parties "unknowingly overlooked" that Mr. Douglas could only have been convicted of one count. As discussed above in Part III.B., nothing in the record or in the order

denying the postconviction motion reflects that the court knew this at the time of sentencing.

The fact that Mr. Douglas could have only been convicted of one count and could not have received a maximum term of prison of 100 years if he went to trial is "highly relevant to the imposition of sentence." A circuit court should have accurate information regarding the number of counts a defendant could have been convicted of and how much time a defendant is facing. This information directly relates to the seriousness or gravity of the offense and to protection of the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623,s 350 N.W.2d 633 (1984). Moreover, here, the court seems to have viewed the dismissal of one of the counts as a benefit to Mr. Douglas, when in fact he could not have legally been convicted of both counts. (*See* 56:19-20; App. 155-156 (". . . *if he goes to trial on these two counts*, Count 2 is a 25-year initial confinement as part of the bifurcated sentence.")). Therefore, this Court should remand for sentence modification based on the fact that Mr. Douglas could have only been convicted of one count and was not facing a maximum term of initial confinement of 100 years.

V. The Circuit Court's Blanket Order Prohibiting Mr. Douglas From Having Contact With Any Children Under the Age of Sixteen Is Overly Broad and Violates Mr. Douglas's Constitutional Right to Parent.

A circuit court has the authority to impose general no contact restrictions on a defendant while that defendant serves the extended supervision component of a sentence. Section 973.01(5) of the Wisconsin Statutes provides that "[w]henever the court imposes a bifurcated sentence under sub. (1), the court may impose conditions upon the term of extended supervision." Though this statute provides the

circuit court "broad, undefined discretion" in imposing conditions of extended supervision, the conditions must nevertheless be "reasonable and appropriate." ***State v. Larson***, 2003 WI App 235, ¶ 6, 268 Wis. 2d 162, 672 N.W.2d 322; ***State v. Koenig***, 2003 WI App 12, ¶ 7, 259 Wis. 2d 833, 656 N.W.2d 499. In determining what conditions are reasonable and appropriate, judges must consider both the rehabilitative needs of the defendant, as well as the protection of the public. ***Koenig***, 2003 WI App 12, ¶ 7.

Because convicted felons "do not enjoy the same degree of liberty as those individuals who have not been convicted of a crime," Wisconsin appellate courts do not apply a strict scrutiny analysis to conditions of extended supervision that impinge upon constitutional rights. ***State v. Oakley***, 2001 WI 103, ¶¶ 16-21 (standard of review for conditions of probation); ***Koenig***, 2003 WI App 12, ¶ 7, n.3 (applying authority applicable to probation conditions to conditions of extended supervision). Instead, conditions of supervision that impinge upon constitutional rights must be "reasonably related to the person's rehabilitation" and cannot be "overly broad." ***State v. Nienhardt***, 196 Wis. 2d 161, 168, 537 N.W.2d 123 (Ct. App. 1995).

A condition is overly broad "when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms." ***State v. Lo***, 228 Wis. 2d 531, 538, 599 N.W.2d 659, 663 (Ct. App. 1999) (applying the standard to determine whether a statute is overbroad to conditions of probation). Whether a condition of extended supervision

violates a defendant's constitutional rights is a question of law reviewed independently. ***Id.*** at 534.

In this case, the court's order that Mr. Douglas have no contact with *any* children under sixteen is overboard because it prevents contact with his own children.[11] This case did not involve Mr. Douglas's own children. His children were not the victims or present during the alleged offense. Thus, preventing Mr. Douglas from having contact with his children under the age of sixteen is not reasonably related to his rehabilitative needs.

Moreover, the no contact order violates his constitutional right to parent. Both the United States Supreme Court and the Wisconsin Supreme Court "have recognized that the relationship between a parent and a child is a constitutionally protected right." ***Barstad v. Frazier***, 118 Wis. 2d 549, 556, 348 N.W.2d 479, 483 (1984) (citing ***Stanley v. Illinois***, 405 U.S. 645 (1972)). "There is no doubt but that members of our society have a constitutional right to associate with family and friends without undue restriction." ***City of Milwaukee v. Burnette***, 2001 WI App 258, ¶ 17, 248 Wis. 2d 820, 637 N.W.2d 447; U.S. Const. amends. I, XIV. Thus, this condition unjustly impinges on Mr. Douglas's constitutionally protected relationships.

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[11] At the time of sentencing, Mr. Douglas's two daughters were ages nine and four. (56:17). Mr. Douglas's mandatory release date is November 6, 2026. *See* http://offender.doc.state.wi.us/lop/detail.do (last visited March 14, 2017). When he is released, his children will be over the age of sixteen. However, Mr. Douglas seeks to modify this condition of supervision to the extent it influences the Department of Correction's decision to allow Mr. Douglas contact or visitation with his children during incarceration.

The postconviction decision noted that Mr. Douglas is on the waiting list for sex offender treatment, so his needs are unknown. (47:9; App. 111). However, in the absence of a history or previous allegations of abuse of his own children, the fact that his treatments needs are "unknown" should not be enough to prohibit contact. *See generally*, ***United States v. Quinn***, 698 F.3d 651, 652 (7th Cir. 2012) (stating that "[r]ules that allow public officials to regulate family life likewise call for special justification . . ."); *see also*, ***United States v. Kappes***, 782 F.3d 828, 859 (7th Cir. 2015) (finding that a no contact condition prohibiting contact with males and females was overbroad where there was no evidence that the defendants were bisexual).

Therefore, this Court should order the circuit court to modify the no contact order to allow Mr. Douglas to have contact with his children.

CONCLUSION

For the reasons state above, Mr. Douglas is entitled to postconviction relief.

Dated this 16th day of March, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,588 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated this 16th day of March, 2017.

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CERTIFICATION AS TO APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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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