STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP2258-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. FUGERE,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF COMMITMENT AND AN ORDER DENYING POST-DISPOSITION PLEA WITHDRAWAL, ENTERED IN THE CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE RODERICK A. CAMERON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Does a defendant found not guilty by reason of mental disease or defect have a cognizable claim for post-disposition plea withdrawal if the court ordered a maximum commitment term consistent with the negotiations of the parties and less than the maximum allowed by law, but the defendant was inaccurately informed of the potential maximum commitment term authorized by statute?

The circuit court did not fully address this issue, but concluded that because the court ordered a commitment term that was agreed upon by the parties, and less than the maximum allowed by law, the defendant received the full benefit of his plea agreement.

This Court should conclude that a defendant does not have a cognizable claim for plea withdrawal if the defendant received the full benefit of his plea agreement and no reversible error or constitutional violation influenced his decision not to contest guilt.

2. When a defendant pleads not guilty by reason of mental disease or defect (NGI) and the State agrees to stipulate that the defendant is not mentally responsible for the crime, is the circuit court mandated to inform the defendant of the potential punishment associated with his admission of guilt or the potential commitment term associated with the stipulation?

The circuit court concluded that it had no duty to inform the defendant of the possible commitment term he faced as a result of his NGI plea.

This Court should conclude that an NGI plea does not require the circuit court to inform the defendant of the potential maximum term of commitment authorized by statute regardless of a stipulation by the parties that the defendant is not mentally responsible for the crimes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

While the State does not request oral argument, it recognizes that oral argument may be helpful to the Court as the issues presented are nuanced. The State does request publication. While it will be rare that a defendant adjudicated not guilty by reason of mental disease or defect will seek plea withdrawal, there is an absence of precedential authority on these issues.

INTRODUCTION

Corey Fugere seeks to withdraw his plea of not guilty by reason of mental disease or defect (NGI). His appeal raises two issues of first impression: whether a person has a cognizable claim to withdraw an NGI plea where the person did not contest guilt and was found NGI; and, if so, whether the circuit court's mandatory plea colloquy obligations change when the State stipulates that the person is NGI and agrees to waive trial on the issue of mental responsibility.

This Court should affirm the order denying Fugere's motion for plea withdrawal because Fugere never contested guilt and thus has no cognizable claim; or if he does, he should be judicially estopped from making it. Furthermore, if this Court does consider the merits of Fugere's claim, it should still affirm the order denying plea withdrawal because a circuit court's mandatory plea colloquy duties are not altered by an NGI plea with a stipulation and waiver of trial on mental responsibility. Plea colloquy duties are

meant to protect the rights a defendant possesses at trial on the issue of guilt, and thus the mandatory colloquy duties are the same whether the defendant pleads NGI or guilty.

STATEMENT OF THE CASE

I. The operation of a plea of not guilty by reason of mental disease or defect in Wisconsin.

This case involves an effort to withdraw an NGI plea. In Wisconsin, a plea of not guilty by reason of mental disease or defect is known as an "NGI defense" or "NGI plea." Wisconsin law provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." Wis. Stat. § 971.15(1).[1] The NGI defense is a unique type of affirmative defense that, if successful, absolves the defendant of criminal responsibility, yet results in noncriminal sanctions in the form of institutional care or conditional release. *See* Wis. Stat. §§ 971.15(3) and 971.17(3); s*ee also State v. Koput*, 142 Wis. 2d 370, 388, 418 N.W.2d 804 (1988).

When a defendant pleads not guilty *and* not guilty by reason of mental disease or defect, the criminal trial is bifurcated into two phases heard by the same jury. *See* Wis. Stat. § 971.165(a). The first phase of the trial considers the defendant's guilt. *State v. Magett*, 2014 WI 67, ¶ 33, 355 Wis. 2d 617, 850 N.W.2d 42. The second phase considers whether the defendant is mentally responsible for the crime. *Id.*

[1] All citations to Wisconsin Statutes are to the 2015–16 version unless otherwise noted.

A defendant can waive the first phase of the trial by pleading NGI without also pleading not guilty. A standalone NGI plea "admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged." Wis. Stat. § 971.06(1)(d). Because a standalone NGI plea waives the defendant's right to trial on the guilt phase, the court is required to conduct a plea colloquy that comports with *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *See State v. Shegrud*, 131 Wis. 2d 133, 138, 389 N.W.2d 7 (1986).[2]

II. The facts and procedural history relating to disposition and Fugere's commitment.

Fugere was charged by criminal complaint with four counts of first-degree sexual assault of a child under the age of twelve. (R. 2:1–2.) The charges were filed in April 2015, but the crimes were alleged to have occurred in the summer of 2008. (R. 2.)[3]

At the time the charges were filed, Fugere was already subject to a commitment order in Chippewa County Case No. 2011CF216. (R. 83:2, 5.) In that case, Fugere was found not guilty by reason of mental disease or defect of third-degree sexual assault. (R. 83:5.)

By July 2015, the defense and the State reached an agreement for the resolution of the 2015 case. (R. 83:5.) Fugere was to "plea to one of the counts as an NGI." (R. 83:5.) Fugere was motivated to enter an NGI plea because he

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[2] *Shegrud* was released in conjunction with *Bangert*. *See State v. Duychak*, 133 Wis. 2d 307, 395 N.W.2d 795 (Ct. App. 1986).

[3] The victim did not report the assaults until December 2013. (R. 2:2.)

wanted to petition for conditional release as soon as possible. (R. 83:5.) However, Fugere's trial counsel questioned Fugere's competency to stand trial; entry to any plea was delayed pending a competency evaluation. (R. 83:2–3, 5.) Fugere participated in a competency evaluation, and the evaluator concluded that Fugere was competent to stand trial. (R. 16:5.)

Counsel did not challenge the evaluator's competency determination, and the case proceeded to a plea hearing. (R. 84:2.) Prior to the hearing, the State filed a memorandum outlining the plea agreement:

> Here [are] the steps we need to complete to finalize Mr. Fugere plea according to the terms of the plea proposal and subsequent discussions:
>
> 1. Plead NGI to Count #1 (1st Degree Sexual Assault of a Child). All other charges would be dismissed and read-in.
> 2. Waive his right to a trial on the issue of guilt and admit to a factual basis.
> 3. Both parties will stipulate that based upon the information and findings in Chippewa County Case No. 11 CF 216 that Mr. Fugere as a result of a mental disease or defect lacked substantial capacity to appreciate the wrongfulness of his conduct, or conform his conduct to the requirements of law.
> 4. That Mr. Fugere be committed to the State of Wisconsin Department of Health Services for a period of 30 years.
> 5. Mr. Fugere shall submit [an] DNA sample and pay the surcharge.
> 6 Both parties stipulate that the Court shall order a pre-dispositional investigation be completed to determine if conditional release plan is appropriate.

(R. 22.)

At the plea hearing, Fugere waived his right to a preliminary hearing and entered his plea. (R. 84:3–6.) Defense counsel advised the court that Fugere was pleading "guilty by reason of mental disease or defect." (R. 84:6.) The court explained to Fugere that the effect of his plea was that he admitted that he committed the act, but asserted that he had a mental disease or defect that made him legally not responsible. (R. 84:7.) Fugere responded that he understood. (R. 84:7.)

The court then conducted a fairly traditional guilty plea colloquy. Relevant to the issues presented on appeal, the court explained: "You are not actually going be found guilty of the charge today. You are going to be found [not] guilty by reason of mental disease or defect, which is a bit different, but it means you could be placed on supervision for up to 30 years." (R. 84:12.)

The State then interrupted the court and said: "Sixty years is the maximum." (R. 84:12.) As the result, the court asked Fugere: "Sixty years, but the recommendation is 30 years, do you understand that?" (R. 84:12.) Fugere responded that he understood and also understood about the possibility of conditional release. (R. 84:12.)

Defense counsel then addressed the court and stated: "this is pretty serious because it exposes Mr. Fugere to some 30 more years of supervision [in addition to his current commitment], could be possibly 60 years. . . . [H]e knows if he violates any rules of supervision, he could end up back at Mendota or Winnebago during the next 60 years." (R. 84:13–14.) Counsel then made a record of a list of possible challenges to the charges, explained that he spoke with Fugere about his right to litigate those issues, and advised that Fugere nonetheless decided to enter an NGI plea. (R. 84:14–18.)

The court accepted the plea and the parties' stipulation, concluding: "I will find he's . . . not . . . legally responsible, instead would be found . . . to have committed [the offense] when he had a mental disease or defect." (R. 84:20.) The State clarified: "technically he still has to be found not guilty by reason of mental disease or defect. He is admitting guilt to the offense, but . . . I don't think there is a guilty by reason of mental disease or defect." (R. 84:20.)

The circuit court ordered initial placement in institutional care. (R. 34.) Fugere petitioned for conditional release in April 2016. (R. 40.) On June 29, 2016, the circuit court concluded that conditional release was appropriate subject to placement in a suitable group home and a community protection plan. (R. 49; 50.) The Department of Health Services responded to the court's order for a community protection plan and detailed Fugere's history with conditional release and revocation. (R. 52.)[4]

On July 5, 2016, the Department of Health Services informed the court that Fugere committed a new violation of conditional release and that Fugere was referred for ch. 980 proceedings. (R. 57.) As such, it "temporarily suspend[ed] planning for the conditional release." (R. 57.)

During this time, Fugere had sought and was granted extensions for filing a post-disposition motion or notice of appeal. (R. 38; 48; 55; 60.) In September 2016, eleven months after his initial placement, Fugere filed a motion for

[4] The State does not cite to any details within the Department of Health Services document because it is unclear if it was admitted during a proceeding and whether it is protected as a confidential record under Wis. Stat. § 51.30.

post-disposition plea withdrawal. (R. 61.)[5] Fugere alleged that he was entitled to plea withdrawal because the court told him that he faced a 60-year maximum commitment term as opposed to a 40-year maximum commitment term, and he did not otherwise know that he faced only 40 years. (R. 61:5.)

The State opposed the motion and argued that the court was obliged to inform Fugere of the "potential punishment" he faced as result of his plea, i.e., the court was required to inform Fugere of the "maximum statutory punishment" for the crime, not the maximum statutory commitment term if found NGI. (R. 66.) The State based its response on *State v. Harr*, 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997), which established that an NGI commitment is not a criminal sentence. (R. 66:1.)

Fugere admitted that the court's traditional mandatory duty during the plea colloquy is to inform the defendant of the maximum potential term of imprisonment:

> In many NGI cases . . . the NGI plea is contested by the state and tried to the court or a jury. Thus, at the time of [the] NGI plea, the defendant . . . [does] not know whether he would be found not guilty by reason of mental disease or defect or guilty as a result of his plea. In such cases, it is imperative that defendants be made aware of the maximum criminal sentence they face if convicted but not found NGI.

(R. 67:2–3 (footnote omitted).)

Fugere also conceded that "[n]o Wisconsin cases directly address whether the court must inform a defendant of the maximum term of commitment in a case involving an

[5] The issued was briefed in some detail by the parties before the hearing, which contained limited argument.

NGI plea." (R. 67:3.) He argued, however, that "it logically follows that defendants pleading NGI must know the consequences of their NGI plea, including the maximum term of commitment." (R. 67:3.) Fugere also raised a new argument that, even if a court is not generally required to inform an defendant of the potential maximum commitment term if found NGI, the court was required to do so in this case because the court knew that the State was stipulating that Fugere was NGI. (R. 67:4–5.) He asserted that even if commitment is not punishment, it is a direct consequence of the plea, and thus, the court was required to inform Fugere of the maximum potential commitment term. (R. 67:5.)

The State argued that if a defendant need not be made aware of the maximum confinement time in non-NGI cases, a defendant in a NGI case need not be aware of the maximum commitment time. (R. 68:2 (The maximum commitment term of a defendant found NGI is the maximum confinement terms of a total term of imprisonment).) The State also argued that if the court determined that there was a requirement that Fugere be told the maximum commitment period, there was no manifest injustice warranting plea withdrawal pursuant to *State v. Cross*, 2010 WI 70, ¶ 38, 326 Wis. 2d 492, 786 N.W.2d 64 ("[A] defendant can be said to understand the range of punishments as required by [Wis. Stat.] § 971.08 and *Bangert* when the maximum sentence communicated to the defendant is higher, but not substantially higher, than the actual allowable sentence."). (R. 68:2.)

The State also urged the court to "not overlook the fact that the 'maximum punishment' whether it be 60 years or 40 years, had no actual impact upon the Defendant." (R. 68:2.) Fugere "was aware of the maximum potential sentence, negotiated a resolution that reduced his commitment period, and received the full benefits of his negotiations." (R. 68:2.)

At the motion hearing, the parties stipulated that Fugere was aware that the maximum statutory penalty was 60 years of imprisonment and that he believed that the maximum commitment time was also 60 years. (R. 86:4.) There was no factual dispute concerning Fugere's knowledge, so the motion hearing was limited to argument. (R. 86:4.) At the conclusion of argument, the circuit court advised the parties that "[t]here's a lot of semantic issues here and I suspect whoever's on the losing end will probably appeal this so I'm not too concerned . . . about that." (R. 86:7.) The court then concluded: "there's no requirement to provide a defendant the maximum amount of time for . . . commitment . . . because [commitment] is not a sentence," and Fugere got "exactly what he expected to get regardless of how much more time he could have gotten." (R. 86:9.) The court denied the motion. (R. 86:9.)

The court then digressed: "I wouldn't mind it being appealed so we could get it fixed for precedence for the rest of the state." (R. 86:9.) This appeal followed.

SUMMARY OF THE ARGUMENT

A cognizable claim for withdrawal of a successful NGI plea should be limited to a plea colloquy defect on the defendant's admission of guilt, or a fundamental error or constitutional violation that led the defendant to enter an NGI plea. Fugere claims that an error occurred in the plea colloquy, but the error he complains of was not part and parcel of Fugere's waiver of trial on issue of guilt. Instead, it was specific to the waiver of trial on the issue of mental reasonability. There is no authority, statutory or otherwise, that permits plea withdrawal under these circumstances. If this Court disagrees and concludes that Fugere has a cognizable claim, the State asks this Court to exercise its

discretion and judicially estop Fugere from seeking plea withdrawal.

If this Court reaches the merits of Fugere's claim, this Court should conclude that he is not entitled to plea withdrawal. The circuit court had no duty to inform Fugere of the possible maximum commitment term if he was found not guilty by reason of mental disease or defect. Wisconsin law imparts no extra plea colloquy duties upon the circuit court when a defendant pleads NGI. Fugere was accurately informed of the consequences of his admission of guilt, i.e., the potential punishment he faced if found guilty. The law requires no more, and this Court should affirm the circuit court's order denying relief.

STANDARD OF REVIEW

Whether Fugere has a cognizable claim for post-disposition plea withdrawal is an issue requiring the interpretation of Wisconsin case law, which this Court reviews de novo. *See, e.g., Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 42, 362 Wis. 2d 577, 866 N.W.2d 563.

Whether Fugere has "pointed to a plea colloquy deficiency that establishes a violation of Wis. Stat. § 971.08 or other mandatory duty" is also a question of law reviewed de novo. *See State v. Taylor*, 2013 WI 34, ¶ 26, 347 Wis. 2d 30, 829 N.W.2d 482.

ARGUMENT

I. Fugere does not have a cognizable claim for plea withdrawal or, alternately, Fugere should be judicially estopped from seeking plea withdrawal.

A. A cognizable claim for plea withdrawal is limited to a plea colloquy defect concerning the defendant's admission of guilt, or a fundamental error or constitutional violation that led the defendant to admit guilt.

Courts have recognized cognizable claims for plea withdrawal for a colloquy defect in the limited context of a defendant who pled NGI but who was found guilty. *See, e.g., Shegrud*, 131 Wis. 2d at 138. Courts have also recognized a cognizable a claim of error for a defendant adjudged NGI who seeks to challenge a motion to suppress. *See, e.g., State v. Smith*, 113 Wis. 2d 497, 511, 335 N.W.2d 376 (1983). Fugere's claim fits within neither category.

A defendant can only be found not guilty by reason of mental disease or defect *after* either admitting to the criminal conduct or being found guilty. *State v. Langenbach*, 2001 WI App 222, ¶ 19, 247 Wis. 2d 933, 634 N.W.2d 916.[6] Because of the need to find guilt before determining mental responsibility, the courts discuss the single plea of not guilty by reason of mental disease or defect as two pleas, a plea admitting the act occurred, i.e., guilty or no contest, and a plea disclaiming mental responsibly. *See, e.g., State v. Lagrone*, 2016 WI 26, ¶¶ 10, 30, 33 n.18, 368 Wis. 2d 1, 878

[6] The State is aware of one case in which the court construed the defendant's plea as an Alford plea, which does not admit guilt, coupled with a NGI plea. *See State v. Anderson*, 2014 WI 93, ¶ 8, 357 Wis. 2d 337, 851 N.W.2d 760.

N.W.2d 636, *cert. denied*, 137 S. Ct. 224 (2016); *State v. Wilinski*, 2008 WI App 170, ¶ 4, 314 Wis. 2d 643, 762 N.W.2d 399; *Langenbach*, 247 Wis. 2d 933, ¶ 3; *State v. Murdock*, 2000 WI App 170, ¶ 1, 238 Wis. 2d 301, 617 N.W.2d 175; *State v. Duychak,* 133 Wis. 2d 307, 310, 395 N.W.2d 795 (Ct. App. 1986).

While the courts have discussed a standalone NGI plea as two pleas, it is one plea that "admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged." Wis. Stat. § 971.06(1)(d); *see also State v. Burton*, 2013 WI 61, ¶ 43, 349 Wis. 2d 1, 832 N.W.2d 611; *State v. Vander Linden*, 141 Wis. 2d 155, 159–60, 414 N.W.2d 72 (Ct. App. 1987). Because it is one plea that admits all elements of the crime except mental responsibility, the supreme court concluded that "[a] plea of not guilty by reason of mental disease or defect closely parallels a plea of no contest." *Shegrud*, 131 Wis. 2d at 137.

A standalone NGI plea waives trial on the issue of guilt and because this waiver involves the relinquishment of constitutional rights, circuit courts are required to conduct a plea colloquy before accepting the plea. *Shegrud*, 131 Wis. 2d at 138. The court must personally address a defendant who enters an NGI plea to determine whether the defendant is entering the plea voluntarily with an understanding of the nature of the charge. *Id.* And the court must comply with the procedures delineated in *Bangert*. *Shegrud*, 131 Wis. 2d at 138. Prior to this case, plea withdrawal for a colloquy defect has been addressed only in the context of a defendant found guilty and sentenced to prison. *See id.* at 136*; see also Duychak,* 133 Wis. 2d at 310.

Wisconsin courts have yet to recognize a right to plea withdrawal based on a plea colloquy defect for a defendant adjudged NGI. In that context, our supreme court has concluded that the defendant has "the same rights of

appellate review of an order denying a motion to suppress evidence or a motion challenging the admissibility of a statement who appeals from a judgment of conviction." *Smith*, 113 Wis. 2d at 511. The court reached this conclusion because if a guilty plea would not waive review, then neither should a NGI plea which subsumes an admission of guilt. *Id.*

Implicit in the ability to seek appellate review of an order denying a motion to suppress evidence or a motion challenging the admissibility of a statement is the ability to then seek plea withdrawal for a manifest injustice if appellate review resulted in the conclusion that the circuit court erred. The basis for plea withdrawal in that context is: if not for the court's error, the defendant would not have pled NGI and would have contested guilt.

Thus, in the context of an alleged colloquy defect, this Court should conclude that a defendant adjudged NGI can seek plea withdrawal only if the court failed to comply with the mandatory duties during the plea colloquy *and*, if not for the court's error, the defendant would have contested guilt. In other words, a defendant adjudged NGI can seek plea withdrawal if his plea was induced by a defect that rendered his decision to waive the guilt phase involuntary.

Fugere's claim does not fit within that category. And the right to plea withdrawal based on an alleged colloquy defect should not extend to defendants adjudged NGI who would have pled NGI regardless of the alleged defect. Those defendants, like Fugere, have obtained the result they sought from the trial court: they are found not guilty by reason of mental disease or defect and will not be subject to a criminal punishment.

Fugere made the decision to plead NGI without litigating pretrial motions because he believed it advantageous for him to do so. (R. 83:5; 84:14–18.) And he is

not claiming that a colloquy defect rendered his decision to waive the guilt phase involuntary. Because there was no litigation, no adverse pretrial ruling, no allegation that he would not had pled NGI if not for "X," there is no authority that allows Fugere to return to pretrial posture in which he has yet to admit guilt.

B. If this Court concludes that Fugere has a cognizable claim for plea withdrawal, the Court should exercise its discretion to estop Fugere from seeking plea withdrawal.

"Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings." *State v. English-Lancaster*, 2002 WI App 74, ¶ 18, 252 Wis. 2d 388, 642 N.W.2d 627. It "is intended to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions" in different legal proceedings. *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (citation omitted). Even if Fugere has a cognizable claim, this Court should hold him estopped from seeking plea withdrawal.

While judicial estoppel is rarely used to bar a claim rising from a criminal action, it is appropriate here because "[t]he civil hues of the responsibility phase, coupled with the fact that bifurcation and the NGI plea are statutory in nature, not constitutional, remove the proceeding from the exacting demands of criminal proceedings and leave it in a category of its own." *Magett*, 355 Wis. 2d 617, ¶ 40. *Cf. State v. Mendez,* 157 Wis. 2d 289, 294, 459 N.W.2d 578 (Ct. App. 1990).

Judicial estoppel has three requirements. "[T]he later position must be clearly inconsistent [to] the earlier position." *Petty,* 201 Wis. 2d at 348. The facts at issue are

the same. *Id.* And the court must have adopted the position of the party to be estopped. *Id.* Here, Fugere asked the court to accept a NGI plea and stipulation. Now he is asking the court to reject it. Those positons are clearly inconsistent. The relevant facts, the terms of the negotiated deal and stipulation, have not changed. And the circuit court accepted, completely, Fugere's position that he should be found NGI and committed for a term not to exceed 30 years.

Judicial estoppel is not used to bind parties to past mistakes. *Id.* But Fugere's plea was not a mistake. It was strategic decision based on Fugere's desire to ask for conditional release as soon as possible. And it was not until after Fugere was denied conditional release and the State's petition for a ch. 980 commitment that he sought plea withdrawal. Judicial estoppel is appropriate because this is a case of "cold manipulation and not unthinking or confused blunder." *Id.* at 347.

Because Fugere should not be permitted to seek plea withdrawal, this Court should affirm the circuit court's order denying relief.

II. A plea of not guilty by reason of mental disease or defect does not impose any greater plea colloquy burdens on the circuit courts, and the colloquy in this case was sufficient to conclude that Fugere's plea was knowing, voluntary, and intelligent.

If a circuit court fails to comply with *mandatory* duties at a plea colloquy and the defendant does not knowingly, intelligently, and voluntarily enter his or her plea, the remedy is plea withdrawal. *See State v. Finley*, 2016 WI 63, ¶ 2, 370 Wis. 2d 402, 882 N.W.2d 761. If Fugere does have a cognizable claim that he is not estopped from raising, this Court should conclude that he is not entitled to plea

withdrawal because the circuit court had no *mandatory* duty to inform Fugere of the possible maximum commitment term if he was found not guilty by reason of mental disease or defect.

"A plea of not guilty by reason of mental disease or defect closely parallels a plea of no contest." *Shegrud*, 131 Wis. 2d at 137. "As with a plea of no contest, a defendant entering a plea of not guilty by reason of mental disease or defect waives several constitutional rights." *Id.* And "[t]he due process clause of the U.S. Constitution requires a defendant's waiver of constitutional rights be knowing and voluntary." *Id.*

Thus, Wisconsin requires that circuit court comply with Wis. Stat. § 971.08(1) and other mandatory duties at a plea colloquy when a defendant enters a standalone NGI plea. *Shegrud*, 131 Wis. 2d at 137–38.[7] But there is no greater burden imposed on the circuit court than those for accepting a guilty plea. *Duychak*, 133 Wis. 2d at 311–12, 314.

As relevant here, a circuit court must, "address the defendant personally and determine that the plea is made voluntarily with understanding of . . . *the potential punishment if convicted*" and must notify the defendant of the direct consequences of his plea. *Finley*, 370 Wis. 2d 402, ¶ 3 (citation omitted); *see also* Wis. Stat. § 971.08(1)(a); *State v. James Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 716 N.W.2d 906.

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[7] "*Bangert* and *Brown* are the seminal cases analyzing the requirements for plea colloquies set forth in Wis. Stat. § 971.08(1) and the case law, as well as the remedy when a defendant entered his plea not knowing the information . . . that circuit courts are required to impart." *Finley*, 370 Wis. 2d 402, ¶ 17.

"In 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 402, ¶ 4 (emphasis added). An "NGI commitment is, plainly, not a sentence." *Harr*, 211 Wis. 2d at 587. It is not punishment. An NGI commitment is focused on providing treatment until the person no longer presents "a significant risk of bodily harm to the person or to others or of serious property damage." *See* Wis. Stat. § 971.17(1) and (5). *See also State v. Szulczewski*, 216 Wis. 2d 495, 499, 574 N.W.2d 660 (1998).

Thus, Wis. Stat. § 971.08(1)(a) did not require the court to inform Fugere of the maximum potential commitment if found not guilty by reason of mental disease or defect. Rather, it required that the court inform him of the maximum term of imprisonment that he faced if found guilty. *Finley*, 370 Wis. 2d 402, ¶ 3.

As Fugere admitted, "it is imperative that defendants be made aware of the maximum criminal sentence they face if convicted but not found NGI." (R. 67:3.) He argues, however, that the court had to inform him of the maximum statutory commitment term because his plea was special in that he also waived the mental responsibility phase of trial. (Fugere's Br. 10–14.) Fugere is wrong and his argument contains three fundamental flaws. First, it assumes that the court had to accept the terms of the plea agreement, which included a stipulation and waiver of the mental responsibility phase. Second, it assumes that civil commitment is punishment and thus a direct consequence of an NGI plea. (Fugere's Br. 10–14.) And third, it assumes that an NGI plea changes the court's mandatory duties during the plea colloquy if the plea agreement also waives the mental reasonability phase. (Fugere's Br. 10–14.)

First, it is well established that a court is not bound by the terms of a plea agreement. *See generally State v. Hampton*, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14. The court could have rejected the plea agreement and held Fugere to his burden of establishing that he had a mental disease or defect at the time of the crime. The effect of a standalone NGI plea is the waiver of trial on the issue of guilt, and that waiver requires that the defendant be informed of the maximum term of imprisonment. *See* Wis. Stat. § 971.08(1)(a); *Finley*, 370 Wis. 2d 402, ¶ 4. Fugere's counsel conceded at the motion hearing that Fugere had that information: he knew that the maximum statutory penalty was 60 years of imprisonment. (R. 86:4.) Because Fugere knew the punishment he faced as a result of his admission of guilt, there is no basis for plea withdrawal.

Second, a "direct consequence" of a plea is a consequence that has a direct, immediate, and largely automatic effect on the range of a defendant's *punishment*. *State v. Charles Brown*, 2004 WI App 179, ¶¶ 4, 7, 276 Wis. 2d 559, 687 N.W.2d 543. A collateral consequence, in contrast, does not have a definite, immediate, or largely automatic effect on the range of *punishment*. *State v. James*, 176 Wis. 2d 230, 238, 500 N.W.2d 345 (Ct. App. 1993). Again, an NGI commitment is not punishment. *See State v. Randall*, 192 Wis. 2d 800, 833, 532 N.W.2d 94 (1995) ("[T]he legitimate purposes of commitment following an acquittal by reason of insanity in Wisconsin are two-fold: to treat the individual's mental illness and to protect the individual and society from the acquittee's potential dangerousness."). And because an NGI commitment is not punishment, commitment is not a direct consequence of the admission of guilt. Thus, the court's failure to accurately inform Fugere of his potential maximum commitment term is a failure to inform Fugere of a collateral consequence. Failure to inform

a defendant of a collateral consequence is not a manifest injustice warranting plea withdrawal.

Third, when a defendant pleads not guilty by reason of mental disease or defect, there are no greater burdens imposed on the circuit court than those for accepting a guilty plea. *Duychak*, 133 Wis. 2d at 311–12, 314. That is so because the main role of the plea colloquy is the protection fundamental *constitutional rights*. *See State v. Francis*, 2005 WI App 161, ¶¶ 15–18, 285 Wis. 2d 451, 701 N.W.2d 632. It is "abundantly clear" that the right to an NGI plea, and the collateral consequences thereof, are not fundamental constitutional rights. *Id.* ¶¶ 19, 21. "Only fundamental constitutional rights warrant . . . special protection and . . . an NGI plea falls outside the realm." *Id.* ¶ 22.

Moreover, *Bangert* does not require that a defendant be perfectly informed. A defendant's plea can be knowing, voluntary, and intelligent in spite of the fact that the defendant was told an incorrect maximum potential sentence. *Cross*, 326 Wis. 2d 492, ¶¶ 4–5, 38–40, 45. Thus, the same must be true if a defendant is told the incorrect maximum potential commitment term. When a defendant enters into a highly favorable plea agreement, a slight misstatement of the maximum potential commitment term is not a *Bangert* violation that entitles a defendant to plea withdrawal because "a defendant's due process rights are not necessarily violated when he is incorrectly informed." *See id.* ¶ 37. If the potential maximum commitment term that was communicated to the defendant was not "substantially higher" "than that authorized by law, the incorrectly communicated [term] does not constitute a *Bangert* violation." *See id.* ¶ 40.

Here, the court's misstatement cannot be said to be substantially higher than the term allowed by law. As the State argued in the circuit court, the "perceived" maximum

commitment term was only 1.5 times the "actual" maximum commitment term. (R. 68:2.) This is similar to the case in *Cross*, where the "perceived" maximum sentence was only 1.33 times the "actual" maximum sentence. (R. 68:2.) Besides, Fugere suffered no ill from the court's misstatement. Unlike the court in *Cross*, which initially sentenced Cross to an incorrect maximum term, here the court ordered a maximum term of commitment that was 30 years *less than* the maximum stated by the court and ten years *less than* the maximum allowed by law. And Fugere's commitment is not a definite term. He can petition for both release and termination. Wis. Stat. § 971.17(4) and (5). Accordingly, there is no *Bangert* violation warranting plea withdrawal.

The maximum commitment term, whether it be 60 years or 40 years, had no actual impact on Fugere's decision to plead not guilty by reason of mental disease or defect. He was aware of the maximum potential sentence, negotiated a very favorable resolution, and received the full benefits of his negotiations. While courts have allowed defendants to withdraw pleas based on misinformation, those cases involve misinformation about facts important to the decision to not contest *guilt*. *See State v. Riekkoff*, 112 Wis. 2d 119, 128–29, 332 N.W.2d 744 (1983) (the misinformation was a basis for plea withdrawal because it was the "primary inducement" for the defendant's plea). *See also Charles Brown*, 276 Wis. 2d 559, ¶ 13. Fugere does not allege that the maximum commitment term was important to that decision and there is no manifest injustice that warrants plea withdrawal in this case.

CONCLUSION

For the foregoing reason, this Court should affirm the order denying post-disposition plea withdrawal.

Dated this 31st day of March, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,772 words.

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 31st day of March, 2017.

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