STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP002258-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. FUGERE,

Defendant-Appellant-Petitioner.

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On Appeal from an Order of Commitment and an Order Denying Postdisposition Relief, Entered in the Chippewa County Circuit Court, The Honorable Roderick A. Cameron Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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## ISSUES PRESENTED

1. Should this court exercise its superintending and administrative authority to require circuit courts to personally address a defendant entering a plea of not guilty by reason of mental disease or defect (NGI)[1] to ascertain his understanding of the maximum term of confinement in an institution he faces as a result of his commitment?

   The trial court did not decide this issue.

   The court of appeals did not decide this issue.

2. For a plea of NGI to be knowing, intelligent, and voluntary under *Bangert*, *Shegrud*, and their progeny, must a circuit court personally address the defendant to determine his understanding of the maximum term of confinement in an institution which could be imposed?

   The circuit court held: No.

The court of appeals held: Circuit courts are not required to advise defendants of the maximum commitment they face if found NGI. *State v. Fugere*, 2018 WI App 24, ¶19, 381 Wis. 2d 142, 911 N.W.2d 127 (App. 123). Further, the court reasoned that the

[1] Throughout the brief the phrase "not guilty by reason of mental disease or defect" will be abbreviated as "NGI".

*Bangert* requirements for a valid plea only apply to matters involving the admission of guilt. *Id*. (App. 123).

3. During the plea colloquy on Mr. Fugere's NGI plea, the circuit court, the state, and Mr. Fugere's attorney told Mr. Fugere that he faced 60 years of supervision when he actually faced a 40 year commitment to an institution. Was Mr. Fugere's NGI plea knowingly, intelligently, and voluntarily made?

The trial court held: Yes, because it was not necessary to advise Mr. Fugere of the commitment he faced in order for his NGI plea to be knowing, intelligent, and voluntary.

The court of appeals held: The circuit court informed Mr. Fugere of the potential prison sentence he faced and was not required to also inform him of the maximum commitment he faced if found NGI. *Fugere*, 2018 WI App 24, ¶¶2, 25. (App. 120, 130). Therefore, the incorrect information provided about the commitment period did not render his plea unknowing, unintelligent, or involuntary. *Id*., ¶25 (App. 130-131).

## POSITION ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, both oral argument and publication are warranted.

## STATEMENT OF THE CASE AND FACTS

On April 22, 2015, the state filed a criminal complaint charging Corey R. Fugere with four counts of first degree sexual assault of a child under the age of twelve, two as a party to the crime. (1:1-2).

Mr. Fugere's case resolved with a plea agreement under which Mr. Fugere was to enter a plea of not guilty by reason of mental disease or defect (NGI) to Count 1, and the remaining three counts would be dismissed and read in. (22). The parties further agreed that both would stipulate, "based upon the information and findings in Chippewa County Case No. 11 CF 216", that, due to a mental disease or defect, Mr. Fugere lacked substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. (22) Finally, both parties agreed to recommend that a pre-dispositional investigation be completed and Mr. Fugere be committed to the State of Wisconsin department of health services for 30 years. (22).

At the plea hearing on August 25, 2015, Mr. Fugere entered a plea of "guilty by reason of mental disease or defect." (84:6). The circuit court engaged in a plea colloquy with Mr. Fugere, explaining, among other things, that upon being found "guilty by reason of mental disease or defect" he could be placed on supervision for up to 60 years. (84:7-12; App. 103). During the plea colloquy, both the state and Mr. Fugere's attorney joined the circuit

court in misinforming Mr. Fugere of the consequences of his plea. The circuit court and parties stated:

> THE COURT: You are not actually going to be found guilty of the charge today. You are going to be found guilty by reason of mental disease or defect, which is a bit different, but means you could be placed on *supervision for up to 30 years*.
>
> [ADA] NEWELL: *Sixty years* is the maximum.
>
> THE COURT: *Sixty years*, but the recommendation is 30 years, do you understand that?
>
> [MR. FUGERE]: Yes.
>
> THE COURT: Do you have any questions?
>
> [MR. FUGERE]: No, Your Honor.
>
> THE COURT: You've been on a conditional release on a different case here before, right?
>
> [MR. FUGERE]: Yes.
>
> THE COURT: Do you understand what that's all about?
>
> [MR. FUGERE]: Yes.
>
> …

| | |
|---|---|
| THE COURT: | Did you explain to [Mr. Fugere] the maximum penalty, which is actually *60 years* here? |
| [ATTY.] MORIN: | Yes. |
| THE COURT: | And did you explain to him the elements of the offense? |
| [ATTY.] MORIN: | I did. Also would like to make a brief record, if I could. |
| THE COURT: | Go ahead. Speak loudly. We have a lawnmower outside. |
| [ATTY.] MORIN: | Your Honor, this is pretty serious because it exposes Mr. Fugere to some *30 more years of supervision, could be possibly 60 years*. If he was found not guilty of this, his supervision would end in 2017. Because he knows if he violates any rules of supervision, he could end up back at Mendota or Winnebago during the next 60 years, I think it's important to make a record here. |

(84:12-14; App.103-105)(emphasis added). After this exchange, the circuit court found Mr. Fugere not guilty by reason of mental disease or defect on Count 1, dismissed and read in the remaining counts, and ordered that Mr. Fugere be committed for 30 years and that a predisposition investigation be prepared. (84:18-21).

An order of commitment was entered, specifying that Mr. Fugere's commitment was to commence on August 24, 2015, and run concurrent with any other NGI commitments he was serving. (23; App. 101).

On October 15, 2015, after a hearing, the circuit court entered an order for placement, placing Mr. Fugere in institutional care. (34).

Mr. Fugere subsequently filed a motion for plea withdrawal asserting that he was entitled to withdraw his NGI plea under *Bangert,*[2] as it was not knowingly, intelligently, and voluntarily entered. (61). Specifically, Mr. Fugere alleged that the court had misinformed him about the maximum term of commitment he faced and he did not otherwise know what the correct maximum term of commitment was. (61). Everyone at the plea hearing was under the impression that the maximum term of commitment Mr. Fugere faced was 60 years, when in fact, the maximum commitment available for his offense was 40 years. (61); *See* Wis. Stats. §§ 971.17(1)(b), 948.02(1)(b), 973.01(2)(b).

The state opposed Mr. Fugere's motion, arguing that Mr. Fugere was informed of the correct maximum sentence he faced if convicted and that the court was not required to inform him of the maximum commitment he faced if found NGI. (66).

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

A hearing on Mr. Fugere's motion for plea withdrawal was held on November 9, 2016. (86). The state conceded that Mr. Fugere did not know that the maximum term of commitment he faced was 40 years. (86:4; App. 109). The circuit court then denied the motion, explaining:

> I think, given the fact that there's no requirement to provide a defendant the maximum amount of time for a confinement or commitment time on an NGI when he's told he's going to get a certain amount against that amount, I think that's distinguishable from the maximum amount of time partly because confinement is not a sentence and partly because he's getting exactly what he expected to get regardless of how much more time he could have gotten. So I believe under that analysis, that the motion is to be denied.

(86:9; App. 114).

Mr. Fugere appealed, renewing his argument that for an NGI plea to be knowingly, intelligently, and voluntarily entered under *Bangert* and its progeny, a circuit court must inform the defendant of the maximum possible term of commitment.

In a decision dated March 6, 2018, the court of appeals affirmed the circuit court's decision. *State v. Fugere*, 2018 WI App 24, 381 Wis. 2d 142, 911 N.W.2d 127. (App. 118-131). In doing so the court of appeals held:

> We conclude that while a circuit court must correctly advise a defendant pleading NGI of the maximum term of imprisonment he or she faces, a court's failure to accurately advise a defendant of his or her possible civil commitment term does not render an NGI plea unknowing, unintelligent, or involuntary. The safeguards required for a valid plea apply only to the guilty phase of an NGI plea, and an individual's possible civil commitment resulting from an acquittal during the subsequent mental responsibility phase is neither a "punishment" nor a direct consequence of a defendant pleading guilty or no contest during the guilt phase. Therefore, a circuit court need not advise a defendant regarding his or her possible civil commitment – much less do so accurately – in order for a defendant's NGI plea to be knowing, intelligent, and voluntary.

*Id.*, ¶2. (App. 120).

This court accepted review of the case on September 4, 2018.

## ARGUMENT

### I. This court should exercise its superintending and administrative authority to clarify or extend the rule pronounced in *Shegrud* and require circuit courts to personally advise a defendant entering an NGI plea of the maximum term of confinement in an institution which may be imposed if he is found NGI.

"Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979).

In Wisconsin, "[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 law." Wis. Stat. § 971.15(1). If a defendant is able to establish this defense, however, he is not set free. Rather, a defendant found to be NGI is committed to the department of health services and faces a significant deprivation of liberty – confinement in an institution for a period up to the maximum confinement in prison he would have faced if convicted of the crimes

for which he was found NGI.[3] *See* Wis. Stat. § 971.17(1)(b).

Because a defendant waives several constitutional rights by entering an NGI plea, and faces this significant deprivation of liberty, due process requires that his NGI plea be knowingly, intelligently, and voluntarily entered, with a full understanding of the consequences of his plea, including the maximum term of confinement in an institution he faces if committed.

A. Overview of Wisconsin's NGI law.

Wisconsin courts recognize four distinct pleas in criminal proceedings: guilty, not guilty, no contest, and not guilty by reason of mental disease or defect (NGI). Wis. Stat. § 971.06(1). A plea of NGI may be coupled with a plea of not guilty, or may be entered as a plea of its own.[4] Wis. Stat. § 971.06(1)(2). When an NGI plea is entered the defendant is asserting an affirmative defense which he or she "must establish to a reasonable certainty by the greater weight of the credible evidence." Wis. Stat. § 971.15(3).

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[3] For felonies committed prior to July 30, 2002, and misdemeanors, the commitment and confinement may be for a period up to two-thirds of the maximum term of imprisonment that could be imposed for the offense. Wis. Stat. § 971.17(1)(a),(d).

[4] Throughout this brief, the phrases "NGI plea" or "plea of NGI", refer to a plea of NGI entered on its own without an accompanying plea of not guilty.

When an NGI plea is joined with a plea of not guilty, the case is set for a bifurcated trial in which the issues of guilt and responsibility are separated. Wis. Stat. § 971.165(1)(a). "The plea of not guilty shall be determined first and the plea of not guilty by reason of mental disease or defect shall be determined second." Wis. Stat. § 971.165(1)(a). If the defendant is found not guilty in the first phase, a judgment of acquittal is entered and the trial concludes. Wis. Stat. § 971.165(1)(d). If the defendant is found guilty in the first phase of the trial, however, the court withholds entry of a judgment and the trial proceeds to the second, responsibility, phase. Wis. Stat. § 971.165(1)(d). In the second phase the factfinder determines "whether the defendant had a mental disease or defect at the time of the crime and whether, 'as a result of mental disease or defect the person lacked substantial capacity to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law.'" *State v. Magett*, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42.

When an NGI plea is entered on its own, it "admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged," and only the defendant's responsibility for the offense remains to be determined. Wis. Stat. § 971.06(1)(d). "The court will find the defendant guilty of the elements of the crimes, and the NGI plea will be left for trial." *State v. Lagrone*, 2016 WI 26, ¶29, 368 Wis. 2d, 1, 878 N.W.2d 636. Alternatively, the parties may agree to

waive the trial on responsibility and stipulate that the defendant should be found NGI.

In either case – a full trial on guilt and responsibility, or a trial on just responsibility – if the defendant *is not* found NGI, a judgment of conviction is entered and the court proceeds to sentencing where the defendant would face up to the maximum penalty applicable for the offenses he was convicted of. Wis. Stat. § 971.165(3)(a).

If a defendant *is* found to be NGI – after a trial or through stipulation – the court enters a judgment of not guilty by reason of mental disease or defect and an order of commitment. Wis. Stat. § 971.165(3)(b). The order of commitment commits the individual to the department of health services. Wis. Stat. § 971.17(1). The length of the commitment is determined by the offense(s) for which the defendant was found NGI. For felonies committed after July 30, 2002, the court may commit the individual "for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155." Wis. Stat. § 971.17(1)(b). On misdemeanors, the court may impose a commitment for a specified period up to two-thirds of the maximum sentence which could be imposed on a person convicted of the offense, plus imprisonment authorized by penalty enhancers, less any sentence credit available. Wis. Stat. § 971.17(1)(d).

In addition to the length of commitment, the commitment order shall specify whether it is for institutional care or conditional release. Wis. Stat. § 971.17(3)(a). If the court orders institutional care, the individual is placed in an institution under Wis. Stat. § 51.37, and will remain there unless a petition for conditional release is filed and granted. Wis. Stat. § 971.17(3)(c),(4). If the commitment is for conditional release, the individual is subject to conditions set by the court and rules established by the department of health services. Wis. Stat. § 971.17(3)(e). If the department believes that an individual has violated these conditions or rules, they may hold the person in the custody of a jail or hospital and petition to revoke the conditional release. Wis. Stat. § 971.17(3)(e). If conditional release is revoked, the individual will be placed in an institution until the commitment term is served or a petition for conditional release is filed and granted. Wis. Stat. § 971.17(3)(e).

Any individual on conditional release may petition the court to terminate the order of commitment, which petition shall be granted unless the court determines, by clear and convincing evidence, "that further supervision is necessary to prevent a significant risk of bodily harm to the person or to others or of serious property damage." Wis. Stat. § 971.17(5).

B. History of Wisconsin's NGI law.

"Wisconsin has recognized an insanity defense since statehood." *Magett*, 2014 WI 67, ¶35. Over the years, the definition of insanity, the procedure through which the defense is presented, and the burden of proof for establishing it, have changed. *Id.*, ¶¶35-38. Initially, the state had the burden to establish beyond a reasonable doubt, in one continuous trial, that a defendant did not have a mental disease or defect. *Id.*, ¶37.

This court subsequently decided to give defendants the option of taking on the burden of proof to establish the defense by a preponderance of the evidence under the less stringent American Law Institute definition of insanity, and also bifurcated the guilt and responsibility findings into two phases of the trial. *Id.*

Finally, in 1968, the legislature adopted the current standard, codifying the bifurcated trial procedure and shifting the burden to the defendant to establish the defense by a preponderance of the evidence. *Id.*, ¶38.

While the evolution of the insanity defense has brought the responsibility phase close to a civil trial, it remains "in a category of its own." *Id.*, ¶40. This court has noted that "the mental responsibility phase is not 'purely civil'", it is "a special proceeding in the dispositional phase of a criminal proceeding – a proceeding that is not criminal in its attributes or

purposes." *Lagrone*, 2016 WI 26, ¶34; *State v. Koput*, 142 Wis. 2d 370, 397, 418 N.W.2d 804 (1988)(declining to label the responsibility phase a "civil proceeding").

### C. In *Bangert* and *Shegrud* this court exercised its superintending and administrative authority to ensure that guilty, no contest, and NGI pleas are knowingly, intelligently, and voluntarily entered.

It is well settled that "the constitutional validity of a plea must be measured in terms of whether it was entered knowingly, voluntarily, and intelligently." *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Accordingly, the Wisconsin legislature created Wis. Stat. § 971.08(1) which states that, prior to accepting a guilty or no contest plea, circuit courts must "[a]ddress the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. § 971.08(1)(a).

This court used its superintending and administrative authority over circuit courts in *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) to expand upon this statutory requirement. Noting that the United States Constitution did not require or set forth a specific procedure for accepting a no contest or guilty plea, this court made it mandatory that circuit courts, at plea hearings, undertake a personal

colloquy with the defendant to ascertain his understanding of the nature of the charge and the constitutional rights he is waiving. *Id*. at 255, 267-272. This court stated that, "[t]he duty to inform, although not expressly required by Section 971.08, is a logical outgrowth of the constitutional standard that a defendant's plea be knowingly, voluntarily, and intelligently entered." *Id*. at 269-270.

In *State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906, this court restated and supplemented the *Bangert* requirements. Specifically, it held that in order to fulfill its duties under Wis. Stat. § 971.08 and *Bangert*, a circuit court accepting a plea must address the defendant personally and,

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an

attorney will be provided at no expense to him;

(5) Establish the defendant's understanding of the nature of the crime with which he is charged *and the range of punishments to which he is subjecting himself by entering a plea*;

(6) Ascertain personally whether a factual basis exists to support the plea;

(7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;

(8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;

(9) Notify the defendant of the direct consequences of his plea; and

(10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

*Brown*, 2006 WI 100, ¶35 (emphasis added).

These requirements are equally applicable when a circuit court accepts an NGI plea. In *State v. Shegrud*, 131 Wis. 2d 133, 389 N.W.2d 7 (1986), this court again exercised its superintending and administrative authority and held that the *Bangert* requirements apply to NGI pleas. Noting that, on its face, the requirements of Wis. Stat. § 971.08 did not apply to NGI pleas, this court nonetheless found that the protections given to defendants entering guilty or no contest pleas must be extended to those entering NGI pleas. *Shegrud*, 131 Wis. 2d 133, 138. In doing so, this court relied upon the fact that, "[a] plea of not guilty by reason of mental disease or defect closely parallels a plea of no contest," as the defendant admits that, but for lack of mental capacity, he committed the offense, and waives several constitutional rights. *Id.* at 137.

By this same reasoning, this court should exercise its superintending authority to clarify or expand the protections granted in *Shegrud* to include a requirement that, prior to accepting an NGI plea, circuit courts personally address the defendant and determine his understanding of the maximum term of commitment to an institution which could be imposed if he is found to be NGI.

D. This court should again exercise its superintending and administrative authority to clarify or extend the rule pronounced in *Shegrud* and require circuit courts to personally address a defendant's understanding of the maximum term of confinement in an institution he faces upon entry of an NGI plea.

1. Superintending and Administrative Authority.

"Pursuant to Article VII, Section 3 of the Wisconsin Constitution, this court has superintending authority 'that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice.'" *State v. Scott*, 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141 (quoting *Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996)). Among other things, this court's superintending authority enables it "to control the course of ordinary litigation in the lower courts." *Jezwinski*, 206 Wis. 2d 217, 226. The authority is "as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." *In re Kading*, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975).

As set forth above, this court chose to exercise its superintending and administrative authority in both *Bangert* and *Shegrud*. In both cases, this court

did so in order to establish the procedures circuit courts must follow in accepting guilty, no contest, and NGI pleas. *Bangert*, 131 Wis. 2d 246, 267-68; *Shegrud*, 131 Wis. 2d 133. These requirements were established to ensure that such pleas are knowingly, intelligently, and voluntarily entered as required by the Due Process Clause of the United States Constitution. *Brown*, 2006 WI 100, ¶23.

The reasoning employed in *Shegrud* to find that the *Bangert* requirements apply to NGI pleas supports a minimal expansion of those requirements to mandate that a circuit court, when accepting an NGI plea, personally address the defendant and advise him of the consequences of that plea – the maximum sentence he faces if his defense is not successful and the maximum term of commitment to an institution he faces if it is. A plea of NGI is analogous to a plea of guilty or no contest in that the defendant admits that he committed the offense(s), waives several constitutional rights, and faces a significant deprivation of liberty. The duty to inform the defendant of the maximum term of commitment he faces is a logical product of the requirement that his waiver of constitutional rights through his plea be knowingly, intelligently, and voluntarily made.

This court should, therefore, exercise its superintending and administrative authority to hold that when a defendant enters an NGI plea, the circuit court must personally address the defendant to ensure his understanding of both the maximum sentence and the maximum term of commitment to

an institution he faces. This court would not be the first to make such a holding; as the cases cited in the next section show, several courts throughout the United States have found a similar duty to be necessary. Moreover, this court would not be creating an unduly burdensome rule or a rule that departs from well-established principles regarding the entry and withdrawal of pleas.

2. Other courts require that a defendant be informed of the maximum commitment he faces when entering an NGI plea.

As set forth below, several jurisdictions have recognized that, upon accepting a plea of NGI, a circuit court must personally address the defendant and inform him of the commitment he faces. Further, they have held that if that requirement is not met, and it cannot be shown that the defendant otherwise knew the maximum commitment he faced, his plea was not knowingly, intelligently, and voluntarily entered.

In *Duppery v. Solnit*, 261 Conn. 309, 803 A.2d 287 (2002), the Supreme Court of Connecticut used its "supervisory authority over the administration of justice" to require trial courts, in cases in which the defendant pleads not guilty by reason of mental disease or defect and the state substantially agrees, to canvass the defendant to ensure the plea is "made voluntarily and with a full understanding of its consequences." *Duppery*, 261 Conn. 309, 329. It

specified that the canvass, at a minimum, must establish that the defendant has knowledge that:

> (1) he is waiving his right to a jury trial; (2) he is waiving his right not to incriminate himself; (3) he is waiving his right to confront the witnesses against him; *(4) he is exposing himself to the possibility of commitment to the jurisdiction of the board and of confinement in a hospital for psychiatric disabilities*; (5) he must remain committed during any term of commitment imposed by the trial court unless the court finds that the defendant is a person who should no longer be committed and orders his discharge; (6) *the maximum term of commitment ordered by the court can be equal to the maximum sentence that could have been imposed if the defendant were convicted of the offense, with a statement of that actual sentence*; and (7) any term of commitment imposed by the trial court may be extended, potentially for an indefinite duration, as a result of a civil commitment proceeding pursuant to General Statutes § 17a-593.

*Id*. (emphasis added). In so holding, the court relied upon the practical similarities between a guilty plea and a plea of not guilty by reason of mental disease or defect. *Id*. at 327.

The United States District Court for the District of Connecticut has also held that, "[b]ecause NGRI pleas impose the consequence of involuntary confinement and operate as waivers of important constitutional trial rights in the same way that guilty pleas do, the longstanding constitutional principles

that obligate guilty pleas be made knowingly, intelligently, and voluntarily, attach with equal force to NGRI pleas." *Duppery v. Kirk*, 563 F. Supp. 2d 370, 388 (D. Conn. 2008). The court stated that to be constitutionally valid, the defendant must have pled NGRI knowingly, and with a complete understanding of the potential consequences he faced, including the term of involuntary confinement. *Id*.

In *People v. Vanley*, 41 Cal. App. 3d 846, 856, 116 Cal. Rptr. 446 (Ct. App. 1974), the California Court of Appeals held that any defendant who pleads not guilty by reason of insanity must be advised that he faces a possible lifetime commitment. It noted that informing the defendant of the consequences of his plea is especially important in the case of an insanity plea as:

> a person who pleads *not* guilty by reason of insanity may figure that the plea is simply another way to "beat the rap." We can hardly impute to the average defendant enough legal sophistication to realize that the very evidence which establishes the truth of a plea, can also confine him in a state hospital for the minimum period of 90 days and that he can remain involuntarily committed at such hospital for the rest of his life unless he successfully uses his annual opportunity to convince three-fourths of a jury that the hospital staff, which refuses to release him absent judicial compulsion, is wrong in its diagnosis.

*Vanley*, 41 Cal. App. 3d 846, 856.[5]

In *Legrand v. United States*, 570 A.2d 786, 792 (D.C. 1990), the District of Columbia Court of Appeals found that, "it is imperative for the judge who accepts a plea of not guilty by reason of insanity to ensure that the defendant understands fully and in some detail exactly what can happen to him, and for how long, if the plea is accepted and he is adjudicated accordingly." The court noted that as "the defendant may lose his liberty for a very long time, thoroughness and meticulousness are essential if the uninformed relinquishment of constitutionally protected liberty interests is to be avoided." *Legrand*, 570 A.2d 786, 792. The court held that the plea colloquy required for guilty pleas should apply by analogy in cases where the defendant admits factual guilt and asserts a defense of insanity. *Id.* at 793.

Similarly, in *State v. Brasel*, 28 Wash.App. 303, 313, 623 P.2d 696 (1981), the Washington Court of Appeals held that due process requires that a defendant entering a plea of not guilty by reason of

[5] The California Court of Appeals expanded this requirement in *People v. Lomboy*, 116 Cal. App.3d 67, 69, 171 Cal.Rptr. 812 (1981), when it held that, for a plea to be knowingly entered, a defendant must be specifically advised that the maximum possible length of commitment exceeds the longest term of imprisonment he would be facing. That court found that the possibility of a lifetime commitment upon a finding of not guilty by reason of insanity was a direct, rather than a collateral consequence of the plea. *Lomboy*, 116 Cal. App.3d 67.

insanity must understand that he could be committed for a term up to the maximum penalty for the offense charged. In so holding, that court also relied upon the similarities between a plea of guilty and a plea of not guilty by reason of insanity: that the defendant admits to committing the acts, waives his constitutional rights, and subjects himself to the possibility of commitment for up to the maximum sentence available for the offense charged. *Brasel*, 28 Wash.App. 303, 312.

Unlike the courts in Connecticut, California, the District of Columbia, and Washington, when this court held in *Shegrud*, that the protections afforded to defendants pleading guilty also apply to defendants pleading NGI, it did not explicitly state that such protections required the circuit court to advise the defendant of the maximum term of commitment he faced if found NGI. Mr. Fugere requests that this court now exercise its superintending and administrative authority in order to clarify its holding in *Shegrud* and implement such a requirement.

3. The rule requested would ensure that NGI pleas are constitutionally valid, would be a minimal departure from the current plea colloquy requirements, and would not alter well-established law regarding plea withdrawal.

Mr. Fugere requests that, in addition to the requirement that, before accepting an NGI plea, a circuit court ascertain the defendant's understanding of the maximum sentence he faces if convicted, this court also require circuit courts to ascertain the defendant's understanding of the maximum term of commitment and confinement in an institution he faces if found NGI. Mr. Fugere does not request that this court otherwise alter the *Bangert* requirements or well-recognized procedure and law governing plea withdrawal.

This proposed rule is a minimal departure from the rule set forth in *Bangert*, *Shegrud*, and their progeny. The only additional burden it places on the circuit court is to inform the defendant of the maximum term of commitment he faces, something the circuit court can easily determine as it is directly related to the sentence the defendant faces if convicted. *See* Wis. Stat. § 971.17(1). For felonies committed after July 30, 2002, the maximum term of commitment is simply the maximum term of confinement in prison for the offense, plus any imprisonment allowed by applicable penalty

enhancement statutes. Wis. Stat. § 971.17(1)(b). For felonies committed before July 30, 2002, and all misdemeanors, the maximum term of commitment is two-thirds the maximum imprisonment for the offense, plus any imprisonment allowed by applicable penalty enhancement statutes. Wis. Stat. § 971.17(1)(a),(d). As the circuit court should already know the maximum sentence allowed for the offense, it would not be difficult to determine the maximum term of commitment available.

A defendant cannot be said to have knowingly, intelligently, and voluntarily waived his constitutional rights and pled NGI unless he has a full understanding of the likely consequences of that plea. The requirement that a circuit court determine and inform the defendant of the maximum term of commitment he faces is negligible in comparison to the important liberty interests at stake, and is a logical component of the requirement that the defendant's NGI plea be knowingly, intelligently, and voluntarily entered. In the case of an NGI plea, one consequence is imprisonment. But another, equally likely consequence is commitment to an institution. *See State v. Langenbach*, 2001 WI App 222, ¶13, 247 Wis. 2d 933, 634 N.W.2d 916 (An NGI plea results in "a legitimate impending threat of the deprivation of [the defendant's] liberty, either through commitment to a mental hospital or imprisonment."). If a defendant pleading NGI faces either imprisonment or confinement in a mental institution, why must he only be informed of one?

In practice, defendants are often confined in a mental institution for longer than they would have been confined in prison if convicted of the crime. This is because some courts view defendants found NGI as more dangerous as a result of their mental disease or defect and thus think that they need to be institutionalized or supervised longer. Additionally, circuit courts may think that they are justified in imposing a longer term of commitment than the prison sentence they would have imposed because the individual can petition for conditional release from an institution and, if on conditional release, discharge from the commitment. Defendant's found to be NGI face a real threat of a significant deprivation of their liberty.

Finally, under the rule proposed in this brief, the *Bangert* procedures for plea withdrawal would remain unchanged. If the defendant has not been advised of both of the possible consequences of his NGI plea, and he did not otherwise know them, he has established a manifest injustice and his plea may be withdrawn as a matter of right. *See State v. Cross*, 2010 WI 70, ¶¶14-20, 326 Wis. 2d 492, 786 N.W.2d 64. The standard for plea withdrawal would be the same regardless of whether the defendant's plea was guilty, no contest, or NGI.

For these reasons, Mr. Fugere requests that this court use its superintending and administrative authority to require that, prior to accepting an NGI plea, a circuit court inform the defendant of both the maximum sentence he faces if convicted and the

maximum term of commitment and confinement in an institution he faces if found NGI. This small departure from the rules set forth in *Bangert*, *Shegrud*, and their progeny, will make a large impact in ensuring that a defendant's waiver of his constitutional rights upon entry of an NGI plea is knowingly, intelligently, and voluntarily made.

Should this court decide not to utilize its superintending and administrative authority over circuit courts, however, Mr. Fugere asserts that the rules set forth in *Bangert*, *Shegrud*, and their progeny already require that circuit courts inform defendants of the maximum term of commitment which may be imposed.

## II. To fulfill their duties under *Bangert, Shegrud*, and their progeny, and to ensure an NGI plea is being entered knowingly, intelligently, and voluntarily, circuit courts must advise defendants of the maximum term of confinement to an institution they are facing as a result of their commitment.

### A. Applicable law and standard of review.

As set forth above, to ensure that a plea is knowingly, intelligently, and voluntarily entered, circuit courts are "constitutionally required to notify defendants of the 'direct consequences' of their pleas." *State v. Bollig*, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199 (citing *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.E.2d 747 (1970)). A

direct consequence of a plea is a consequence that "has a definite, immediate, and largely automatic effect on the range of a defendant's punishment." *Id*.

This court has recognized, however, that circuit courts need not advise defendants of the collateral consequences of their pleas – those consequences "which are indirect and do not flow from the conviction." *State v. Byrge*, 2000 WI 101, ¶61, 237 Wis. 2d 197, 234 N.W.2d 477. "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." *Id*.

To be a direct consequence of a plea such that the defendant must be advised of it at the plea hearing, the statute in question must impose "punishment." *State v. Muldrow*, 2018 WI 52, ¶17, 381 Wis. 2d 492, 912 N.W.2d 74. To determine whether the sanction imposed by the statute is punishment, and thus a direct consequence of the plea, this court applies the intent-effects test. *Id*., ¶¶5-6.

The intent-effects test is a two-step test. First, the court looks to the "statute's primary function" or intent to determine whether the legislature intended the statute to be punitive. *Id*., ¶¶31, 37 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169, 83 S.Ct 554, 9 L.Ed.2d 644 (1963)). If the intent of the statute is to impose punishment, the law is deemed

punitive and the inquiry ends; the sanction is a direct consequence of the plea. *State v. Scruggs*, 2017 WI 15, ¶16, 373 Wis. 2d 312, 891 N.W.2d 786. However, if the intent is not punitive, the court moves to the second step to determine whether the sanction "is so punitive in effect as to transform [it] into a criminal penalty." *Muldrow*, 2018 WI 52, ¶¶31, 49 (quoting *State v. Scruggs*, 2017 WI 15, ¶39, 373 Wis. 2d 312, 891 N.W.2d 786)).

To evaluate the effect of a statute, the court looks at the following factors, known as the *Mendoza-Martinez* factors:

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

*Id.*, ¶31. These factors have been described as "useful guideposts," but the list is not exhaustive, "nor is any one factor dispositive." *Scruggs*, 2017 WI 15, ¶41.

This court's interpretation of a statute to determine whether it is punishment is done de novo. *Muldrow*, 2018 WI 52, ¶25.

### B. Under the intent-effects test, a Wis. Stat. § 971.17 commitment is a direct consequence of an NGI plea of which a defendant must be informed.

Applying the intent-effects test to Wis. Stat. § 971.17 demonstrates that while the legislature did not intend it to be punitive, an NGI commitment is so punitive in effect that it is tantamount to punishment.

#### 1. The legislature did not intend NGI commitments under Wis. Stat. § 971.17 to be punitive.

Mr. Fugere concedes that the legislature did not intend that an NGI commitment be punishment. The legislature's intent is determined by applying the rules of statutory construction to determine "whether the legislature expressly or impliedly indicated" whether the statute is "a civil remedy or a criminal penalty." *Scruggs*, 2017 WI 15, ¶¶17-18; *Muldrow*, 2018 WI 52, ¶37. Statutory construction begins with the plain meaning of the text, as well as its context and structure. *Muldrow*, 2018 WI 52, ¶38. "Where a statutory provision is codified is indicative of whether the legislature intended a provision to be punitive." *Id*.

While the statutes governing NGI pleas and commitments are in Chapter 971, which governs criminal procedure, the language and structure of the statutes demonstrate an intent to provide treatment and protect the community, not penalize the

defendant for his criminal conduct. *See* Wis. Stats. §§ 971.15(1)("not responsible for criminal conduct"), 971.165(2)("in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health services"). Nevertheless, the effects of a finding and commitment as NGI are punitive and demonstrate that an NGI commitment is equivalent to a criminal penalty.

2. The effects of being committed under Wis. Stat. § 971.17 render it punishment.

An NGI commitment under Wis. Stat. § 971.17 is "so punitive in effect as to transform [it] into a criminal penalty." *See Scruggs*, 2017 WI 15, ¶39. This court has recognized that the legislature's intent is to be given "great deference" and only the "clearest proof" will be sufficient to override that intent and transform what the legislature called a civil remedy into a criminal penalty. *Muldrow*, 2018 WI 52, ¶49. Applying the *Mendoza-Martinez* factors, it becomes apparent that an NGI commitment is the equivalent of a criminal penalty – it involves a disability or restraint, applies to criminal behavior, is excessive in relation to its alternative, non-criminal purpose, and is similar in form and length to criminal sentences.

Commitment to an institution under Wis. Stat. § 971.17 involves an affirmative restraint. While committed to an institution the defendant is involuntarily confined and under state control. This court has recognized that time spent committed

"results in a deprivation of liberty for the person subject to commitment." *State v. LeMere*, 2016 WI 41, ¶54, 368 Wis. 2d 624, 879 N.W.2d 580. Affirmative restraint alone does not always require a finding that the statute imposes punishment, however, when combined with the fact that the statute applies to behavior that is already criminal and is excessive in relation to its alternative, non-criminal purposes, that conclusion is inevitable. *See Kansas v. Hendricks*, 521 U.S. 346, 363, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

An NGI commitment is only imposed upon an individual after he or she is found, beyond a reasonable doubt, to have committed a crime. *State v. Langenbach*, 2001 WI App 222, ¶19, 247 Wis. 2d 933, 634 N.W.2d 916. "Commitment following an insanity acquittal is, in part, premised on the defendant's criminal conduct. *State v. Randall*, 192 Wis. 2d 800, 833, 532 N.W.2d 94, (1995). This reveals that Wis. Stat. § 971.17 has the effect of punishing criminal behavior. "Where '[e]vidence of a crime … is essential to the [sanction],' then the sanction is more likely punitive." *Muldrow*, 2018 WI 52, ¶55 (quoting *Lipke v. Lederer*, 259 U.S. 557, 562, 42 S.Ct. 549, 66 L.Ed. 1061 (1922)).

NGI commitments under Wis. Stat. § 971.17 are punitive, they involve an affirmative restraint imposed upon criminal behavior and are also excessive in relation to the alternative, non-criminal purposes which have been assigned to them. The non-criminal purposes of NGI commitments have been

identified as: treatment of the individual's mental health and protection of the individual and society. *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983); *State v. Szulczewski*, 216 Wis. 2d 495, ¶22, 574 N.W.2d 660 (1998). The existence of an alternative non-punitive purpose may be considered "the most significant factor" in determining whether a statute's effect is punitive, however, the sanction must be reasonable in relation to the alternative, non-punitive purpose assigned. *See Muldrow*, 2018 WI 52, ¶57. *See also Jones*, 463 U.S. 354, 368 ("The Due Process Clause 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'"). The length and nature of NGI commitments under Wis. Stat. § 971.17 are not commensurate with the non-criminal purposes of treatment of the defendant and protection of the defendant and society. Rather, applying this factor to the statute reveals that an NGI commitment is so punitive in effect that it is tantamount to a criminal penalty, and thus, a direct consequence of an NGI plea.

As explained in Section I.A. above, when a defendant is found to be NGI, the circuit court must commit him to the custody of the department of health services for a set period of time. Wis. Stat. § 971.17. The commitment order must also specify whether it is for institutional care or conditional release. Wis. Stat. § 971.17(1),(3)(a). The defendant does not have the right "to confinement in the least restrictive conditions necessary to achieve the

purposes of their commitment," and if initially placed in an institution, will serve the entire term of the commitment in that institution unless a petition for conditional release is filed and granted. *Randall*, 192 Wis. 2d 800, 835; Wis. Stat. § 971.17(3)(c),(4)(a). Further, the length of a defendant's commitment is determined by the offense or offenses for which he was found to be NGI and any applicable sentence enhancers. Wis. Stat. § 971.17(1). For example, a defendant found NGI of a Class A felony may be committed for life, and a defendant found NGI of three Class H felonies may be committed for up to nine years. *See* Wis. Stats. §§ 971.17(1), 973.01. The circuit court is also required to grant any sentence credit earned under Wis. Stat. § 973.155, against the term of commitment. Wis. Stat. § 971.17(1).

The length and nature of the NGI commitment described above demonstrate that the purpose of Wis. Stat. § 971.17 is, at least in part, to punish the defendant for his criminal conduct, rather than to provide treatment or protect society. It is excessive in relation to those goals. If treatment and protection of the public were the primary purposes of the statute, the length and nature of the commitment would be based upon the defendant's condition and treatment needs, rather than the length of confinement available if convicted of the offense. *See In re the Commitment of Rachel*, 2002 WI 81, ¶98, 254 Wis. 2d 215, 647 N.W.2d 762 (Bablitch, J., dissenting). The length of an NGI committee's hypothetical criminal sentence is irrelevant to the purposes of his commitment, as there "simply is no necessary

correlation between severity of the offense and length of time necessary for recovery." *Jones v. United States*, 463 U.S. 354, 369, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983). A particular jail or prison sentence is chosen to "reflect society's view of the proper response to commission of a particular criminal offense," however, different considerations are supposed to underlie an NGI commitment. *Id*. at 368-69.

The *Mendoza-Martinez* factors – affirmative restraint, applicable to criminal behavior, excessive in relation to non-criminal purpose – weigh in favor of a finding that an NGI commitment under Wis. Stat. § 971.17 is indistinguishable from a criminal penalty. Such a conclusion is shown by the "clearest of proof" when the additional parallels between a finding of NGI and commitment, and a finding of guilt and sentence, are examined.

Several aspects of the NGI process and commitment mirror those of a finding of guilt and criminal sentence. In addition to the length of commitment being tied to the offense which was committed, when a defendant is found NGI the circuit court may order a pre-disposition report similar to the presentence investigation report that may be ordered when a defendant is found guilty. Wis. Stats. §§ 971.17(2)(a), 972.15. The defendant's NGI commitment can be run consecutive or concurrent to an NGI commitment already imposed, and the defendant is granted sentence credit against his term of commitment. Wis. Stat. § 971.17(1).

There are also several collateral consequences imposed upon individuals found NGI that are also imposed upon individuals convicted of committing the same acts. Like felons, individuals found NGI of a felony are prohibited from possessing a firearm, and those found NGI of a violent felony are prohibited from possessing body armor. *See* Wis. Stat. § 971.17(1g)-(1h). Additionally, individuals found NGI of certain sex offenses, serious sex offenses, and child sex offenses are required to register as sex offenders under Wis. Stat. § 301.45, are subject to lifetime supervision under Wis. Stat. § 939.615, are subject to lifetime gps tracking under Wis. Stat. § 301.48(2)(a), and may be the subject of a ch. 980 proceeding. *See* Wis. Stat. § 971.17(1j)-(1m). Like individuals convicted of a crime, those found NGI are required to provide a DNA sample under Wis. Stat. § 165.76. Finally, just like those serving a sentence in prison, individuals serving NGI commitments may be charged with escape and are considered prisoners who can be convicted of assault or battery by prisoner. Wis. Stats. §§ 940.20, 946.43, 946.42(3); *State v. Skamfer*, 176 Wis. 2d 304, 500 N.W.2d 369 (Ct. App. 1993).

These collateral consequences, in combination with the similarities between the statutes, demonstrate that the distinction between being found guilty and sentenced, and being found NGI and committed, is a matter of form rather than substance. Application of the intent-effects test thus reveals that an NGI commitment under Wis. Stat, § 971.17 is tantamount to punishment. Accordingly, the

maximum term of commitment available is a direct consequence of an NGI plea that the defendant must be informed of in order to knowingly, intelligently, and voluntarily enter his plea.

## III. Mr. Fugere's NGI plea was not knowingly, intelligently, and voluntarily entered as the circuit court misinformed him of the maximum term of commitment he faced and he did not otherwise know the correct maximum term of commitment.

The circuit court, state, and Mr. Fugere's attorney, all affirmatively misinformed Mr. Fugere that he faced a maximum of 60 years of supervision as a result of his NGI plea. (84:12-13; App. 103-104). In reality, Mr. Fugere faced a possible 40 years of confinement in a mental institution. In providing this misinformation, the circuit court violated its duties under *Bangert* and *Shegrud* and, as Mr. Fugere did not know the actual consequence of his NGI plea, rendered that plea unknowing, unintelligent, and involuntary. Mr. Fugere, therefore, is entitled to plea withdrawal.

### A. Applicable law and standard of review.

A defendant seeking to withdraw a plea after sentencing must prove, by clear and convincing evidence, that refusal to allow plea withdrawal would result in a "manifest injustice." *State v. Brown*, 2006 WI 100, ¶18. One way to establish a manifest injustice is to show that his plea was not knowingly, intelligently, and voluntarily entered. *Id.*

Under the United States Constitution, an NGI plea must be affirmatively shown to be knowing, intelligent, and voluntary. *See State v. Brown*, 2006 WI 100, ¶25; *Shegrud*, 131 Wis. 2d 133. Thus, before a circuit court accepts an NGI plea, it must "address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted." Wis. Stat. § 971.08(1)(a); *Shegrud*, 131 Wis. 2d 133. To do this, this court has established a list of things the circuit court must personally address with the defendant, including the range of punishments to which he is subjecting himself and the direct consequences of his plea. *See State v. Brown*, 2006 WI 100, ¶35.

If a circuit court fails to fulfill its duties, and the defendant alleges that he or she did not know or understand the information that the circuit court should have provided, a *Bangert* hearing must be held at which the state has the opportunity to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary, despite the errors in the plea colloquy. *State v. Cross*, 2010 WI 70, ¶¶19-20, 326 Wis. 2d 492, 786 N.W.2d 64. "If the state cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right." *Id*., ¶20.

However, when a circuit court informs a defendant that he "faces a maximum possible sentence that is higher, but not substantially higher, than that authorized by law," it has not violated the

requirements of Wis. Stat. § 971.08 and *Bangert*, and the defendant is not entitled to plea withdrawal as a matter of right. *Cross*, 2010 WI 70, ¶4. "[W]hen the difference is significant, or when the defendant is told the sentence is lower than the amount allowed by law, a defendant's due process rights are at a greater risk and a *Bangert* violation may be established." *Id*. ¶39. Whether the difference is "substantial" is to be determined on the facts of each case. *Id*. ¶41.

Whether an NGI plea was entered knowingly, voluntarily, and intelligently is a question of constitutional fact. *State v. Finley*, 2016 WI 63, ¶59, 370 Wis. 2d 402, 882 N.W.2d 761. In making this determination, this court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Id*. However, this court independently applies the law to the findings of historical fact to determine whether the plea was knowing, intelligent, and voluntary. *Id*.

### B. Mr. Fugere's plea was not knowing, intelligent, or voluntary.

Mr. Fugere is entitled to plea withdrawal as a matter of right. The circuit court and the parties misinformed Mr. Fugere about the consequences of his NGI plea and, as Mr. Fugere did not otherwise know the maximum term of commitment he faced, his plea was not knowingly, intelligently, or voluntarily made. The nature and length of the consequences Mr. Fugere faced upon entry of his NGI

plea were substantially different from those of which he was informed.

The circuit court initially informed Mr. Fugere that he was facing a maximum 30 years of supervision. (84:12; App. 103). The state then corrected the court, indicating that Mr. Fugere was actually facing 60 years. (84:12; App. 103). Mr. Fugere's counsel later reaffirmed that Mr. Fugere was facing a maximum 60 years of supervision. (84:13; App. 104). In fact, Mr. Fugere faced a maximum commitment term of 40 years if found NGI of Count 1. Wis. Stats. §§ 971.17(1)(b), 973.01(2)(b)1. Moreover, Mr. Fugere faced the possibility of serving that entire term of commitment in a mental institution, rather than on supervision. Wis. Stat. § 971.17(3).

There is no dispute that Mr. Fugere did not know that he faced a maximum of 40 years in a mental institution. (86:4; App. 109). Further, the facts of this case demonstrate the difference between the 60 years of supervision Mr. Fugere was informed he faced, and the 40 years of commitment to a mental institution he actually faced, is substantial. There is a significant difference between supervision and confinement in a mental institution. One involves living on your own, subject to rules and conditions imposed by the court and your agent, while the other involves involuntary confinement in an institution. The circuit court did not confirm that Mr. Fugere understood that he could serve a maximum of 40 years confined in an institution. Rather,

Mr. Fugere was erroneously informed that he faced a maximum of 60 years of supervision. (84:12; App. 103). A plea entered under such circumstances cannot be said to be knowingly, voluntarily, and intelligently made.

Aside from the misinformation regarding the nature of the consequences Mr. Fugere faced, he was also misinformed about the maximum length of commitment he faced. The 20 year difference between the time Mr. Fugere was told he faced, and what he actually faced is substantial. Even if Mr. Fugere was initially placed on conditional release, if revoked, he could serve the remainder of his time in institutional care. Twenty years of potential confinement is substantial to anyone, and is especially substantial to a defendant like Mr. Fugere, who was 24 at that time he entered his plea and was thus looking at the difference between finishing his commitment term at age 64 or 84.

A twenty year difference in the maximum penalty faced is substantial in regards to any defendant's decision to enter a plea. For example, the maximum penalty a defendant is facing may determine if he wants to risk going to trial or accept a plea agreement. A defendant knowing that he was faces a maximum of sentence of 40 years, instead of 60 years, may be more willing to take that risk. Additionally, the maximum penalty affects negotiations and how good of a "deal" the defendant believes he got. In this case, Mr. Fugere and the state agreed to jointly recommend a 30 year commitment –

half of the 60 year commitment Mr. Fugere believed could have been imposed. Instead of lowering his exposure by 30 years, this agreement only lowered it by 10. A defendant in Mr. Fugere's position, knowing the correct maximum commitment, may have opted to have a trial, negotiate for a lower recommendation from the state, or have a free to argue disposition hearing.

Twenty years of a person's life is not a negligible amount of time. The difference between the 60 years of supervision Mr. Fugere was informed he could receive, and the 40 year commitment to a mental institution he actually faced, is substantial and rendered Mr. Fugere's plea unknowing, unintelligent, and involuntary. Accordingly, Mr. Fugere is entitled to plea withdrawal.

## CONCLUSION

Mr. Fugere respectfully requests that this court grant him plea withdrawal. Further, he requests that this court use its superintending and administrative authority to establish the rule set forth in this brief.

Dated this 4th day of October, 2018.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,400 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 4th day of October, 2018.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender

## 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.

Dated this 4th day of October, 2018.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender

# APPENDIX

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