No. 16AP2258

# In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

*v.*

COREY R. FUGERE,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Chippewa County Circuit Court,
The Honorable Roderick A. Cameron, Presiding,
Case No. 15CF169

## RESPONSE BRIEF OF THE STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

LUKE N. BERG
Deputy Solicitor General
*Counsel of Record*

TIFFANY M. WINTER
Assistant Attorney General

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

*Attorneys for the State of Wisconsin*

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## ISSUES PRESENTED

1. Whether a circuit court must inform a defendant who pleads insanity of the maximum length of commitment he could receive if the insanity defense is successful.

The circuit court and Court of Appeals answered no.

2. Whether the defendant in this case is entitled to withdraw his insanity plea because the circuit court mistakenly overstated the maximum possible length of commitment.

The circuit court and Court of Appeals answered no.

## INTRODUCTION

Corey R. Fugere reached a plea agreement with the State to resolve charges that he sexually assaulted an eight-year-old girl. Fugere agreed to admit that he committed the crime, and the State agreed to stipulate to his insanity defense and to recommend a 30-year commitment.

Fugere hoped to petition for conditional release, but when that was unsuccessful, he filed a motion to withdraw his plea based on a minor error at his plea hearing. Specifically, the circuit court told Fugere that he could receive 60 years' commitment; in reality the maximum was 40 years. Fugere's plea-withdrawal claim fails because courts have no duty to inform defendants who plead insanity of the possibility of commitment. Insanity is an affirmative defense that may or may not be joined with an admission of guilt, but only the admission of guilt waives constitutional rights. Commitment, however, is not a consequence of admitting guilt, but of a successful insanity defense. And even if commitment were considered a consequence of admitting guilt, it is a non-punitive collateral consequence that is not a required part of the plea colloquy.

In any event, the circuit court's mistake provides no basis for setting aside his plea. He pleaded primarily to avoid a lengthy prison sentence and was willing to accept the possibility that the circuit court could impose a 60-year commitment, in the unlikely event that the court deviated from the parties' 30-year recommendation. It follows that he would

have pleaded the same way had he known the circuit court could only impose, at most, 40 years of commitment. Moreover, Fugere actually received the 30-year commitment he bargained for and expected.

## ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for January 22, 2019, at 9:45 a.m. By granting Fugere's petition for review, this Court has indicated that the case is appropriate for publication.

## STATEMENT OF THE CASE

### A. Background On Insanity Pleas

A person who commits a crime in Wisconsin is deemed not legally responsible if "as a result of a 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). Criminal defendants in Wisconsin raise this defense through a special plea of "[n]ot guilty by reason of mental disease or defect." Wis. Stat. § 971.06(1)(d). This defense is commonly referred to as an "NGI" (not guilty by reason of insanity) defense or "NGI plea."

An NGI plea may or may not be "joined with a plea of not guilty." *Id.* If a criminal defendant pleads both not guilty and NGI, the trial is bifurcated into two phases. Wis. Stat. § 971.165(1)(a); *State v. Magett*, 2014 WI 67, ¶ 33, 355 Wis. 2d 617, 850 N.W.2d 42. In the first phase, the "guilt phase," the

jury considers whether the defendant committed the crime. *Magett*, 2014 WI 67, ¶ 33. If found not guilty, the defendant is acquitted and the criminal case is over. Wis. Stat. § 971.165(1)(d). If the defendant is found guilty, the trial proceeds to the "responsibility phase," where the same jury considers whether the defendant is mentally responsible for the crime. *Magett*, 2014 WI 67, ¶ 33. The responsibility phase "is not a criminal proceeding," but is instead "something close to a civil trial"—the preponderance-of-the-evidence standard applies, the judge can order a directed verdict, and the jury does not need to be unanimous. *Id.* ¶ 39.

A defendant can also waive the guilt phase of the bifurcated trial by entering a standalone NGI plea without joining a plea of not guilty. Wis. Stat. § 971.06(1)(d); App. 124. Such a 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 this plea "closely parallels a plea of no contest" and "waives several constitutional rights" that apply to the guilt phase, this Court has held that trial courts must conduct the standard plea colloquy for a guilty plea (as set forth in Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986)) prior to accepting a standalone NGI plea. *State v. Shegrud*, 131 Wis. 2d 133, 137–38, 389 N.W.2d 7 (1986).

Criminal defendants who are found NGI are not subject to criminal sanctions, but may be civilly committed for a period less than or equal to (and generally two-thirds of) the

maximum sentence for the charged crime. Wis. Stat. § 971.17(1)(b). There are two forms of NGI commitment following a successful NGI defense: institutional care and conditional release. *Id.* § 971.17(3)(a). A court may order commitment to an institution only if it finds "by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage." *Id.* Absent such a finding, the court must order conditional release. *Id.* A person who is conditionally released is still within "the custody and control of the department of health services" and is "subject to the conditions set by the court and to the rules of the department of health services." *Id.* § 971.17(3)(e). If the person violates any conditions or becomes a safety problem, the court may revoke the conditional release and order institutional commitment. *Id.*

### B. Factual And Procedural Background

In the summer of 2008, when Fugere was seventeen years old, he and another boy raped an eight-year-old girl. R. 2:1–3; R. 14. The victim reported the incident five years later, R. 2:2, and in April 2015, the State charged Fugere with four counts of first-degree sexual assault of a child under the age of twelve, R. 2:1–2. When the State filed the charges, Fugere was already committed at the Mendota Mental Health Institute based on another sexual assault charge for which he had been found NGI. App. 121; *see* Wis. Stat. § 971.17.

The State and Fugere reached a plea agreement a few months later. R. 22. Fugere agreed to plead NGI to one count of first-degree sexual assault and to admit that he committed the crime, waiving his right to a trial as to his guilt. R. 22; App. 121. The State agreed to dismiss and read in the other three charges and to stipulate to Fugere's NGI defense, conceding, based on the NGI finding in his prior case, that Fugere was not mentally responsible for the act due to a mental disease or defect. R. 22; App. 121; *see* Wis. Stat. § 971.15. The maximum sentence for first-degree sexual assault, a class B felony, is 60 years' imprisonment, with up to 40 years' "confinement in prison" under Wisconsin's bifurcated sentencing system, Wis. Stat. §§ 939.50(3)(b); 948.02(1)(b); 973.01(2)(b); *see also State v. Finley*, 2016 WI 63, Attachment A, 370 Wis. 2d 402, 882 N.W.2d 761 (explaining the difference between "imprisonment" and "confinement in prison"), so by pleading NGI to this charge, Fugere could be committed for up to 40 years, Wis. Stat. § 971.17(1)(b). Both parties agreed to recommend to the circuit court that Fugere be committed for 30 years, App. 121, and to ask the circuit court to consider whether conditional release would be appropriate, App. 123; R. 22.

At the plea hearing in August 2015, the court conducted a traditional plea colloquy to ensure that Fugere's plea was knowing and voluntary. The court confirmed that Fugere understood he was admitting to having committed the act, R. 84:7, that he appreciated the nature of the allegations,

R. 84:9–10, that he was waiving "a number of Constitutional Rights," including the right to a jury trial, R. 84:8–9, and that Fugere knew that the "maximum penalty" for first-degree sexual assault is 60 years, R. 84:13. Fugere also initialed and signed the "Plea Questionnaire/Waiver of Rights" form, acknowledging the rights he waived and that the "maximum penalty [he] face[d] upon conviction is: 60 years." R. 21:1.

During the plea hearing, the court also addressed the NGI plea, explaining to Fugere that he was "not actually going to be found guilty of the charge today," but would instead be found not guilty "by reason of mental disease or defect" and that, as a result, he "could be placed on supervision for up to 30 years." R. 84:12. The State's attorney interrupted to clarify (incorrectly) that "[s]ixty years is the maximum," R. 84:12, whereas, in fact, the maximum commitment period was 40 years, Wis. Stat. § 971.17(1)(b); *id.* § 973.01(2)(b)1. (The State's attorney believed that the maximum commitment was equal to the maximum sentence, *see supra* p. 6. R. 84:12.)[1] The court agreed with the State's mistaken view that it could potentially order commitment for up to 60 years, but reiterated that "the recommendation is 30 years." R. 84:12. Fugere responded that he understood and did not have any questions. R. 84:12. The court then asked Fugere about the conditional release process, and Fugere confirmed that he understood

[1] Fugere's counsel made the same mistake, later noting that the commitment "could be possibly 60 years." R. 84:13.

"what that's all about," given that he had "been on a conditional release . . . before" in the prior sexual-assault case. R. 84:12. Fugere's attorney represented to the court that Fugere "kn[ew] that if he violate[d] any rules" during any conditional release, "he could end up back at Mendota or Winnebago." R. 84:14.

The court ultimately accepted Fugere's NGI plea, finding both that "[t]here is a factual basis [ ] for the charge" and that Fugere's plea was knowing, intelligent, and voluntary. R. 84:18; App. 101. The court ordered a 30-year commitment, consistent with the parties' joint recommendation. R. 23; App. 101. To determine whether Fugere should remain committed to an institution or could be conditionally released, the court ordered an investigation and scheduled a dispositional hearing for October 2015. R. 84:21–22.

The social services organization that conducted the investigation concluded that Fugere should "remain in institutional care" because a conditional release plan "would [not] keep the community safe." R. 29:1–2. At the dispositional hearing, Fugere did not contest that recommendation. R. 85:2. He admitted that he was "not ready" for release, but was "hoping that [in] six more months" he would be ready. R. 85:2; *see* Wis. Stat. § 971.17(4)(a) (requiring a six-month gap between requests for conditional release).

Six months later, in April 2016, Fugere filed a new petition for conditional release. R. 40. The court ordered an examination by an independent psychologist, *see* R. 42, who

ultimately recommended release, *see* R. 43:12–13. In July, the court granted conditional release "subject to finding [a] suitable group home" and ordered the Department to provide a release plan within 60 days. R. 49; 50.

Before the 60 days had elapsed, however, the Department informed the court that it was "temporarily suspend[ing] planning for the conditional release" because the State had decided to pursue a chapter 980 commitment. R. 57:1; *see State v. Fugere*, No. 16CI01, (Chippewa Cty. Cir. Ct.) (filed Aug. 12, 2016). The Department also notified the court that Fugere had recently committed a "new violation" by "having sexual relations with a peer at Mendota" and that the Department intended to "revoke [his] conditional release" once the chapter 980 petition was resolved. R. 57:1.

One month later, in September 2016, Fugere filed a postconviction motion to withdraw his plea. R. 61. He argued that he was entitled to withdrawal because the court misinformed him that the maximum possible commitment was 60 years, "when in fact the maximum was a 40-year commitment." R. 61:5. The State responded that NGI commitment is not punishment, and therefore the court was not required to inform Fugere of the maximum possible commitment. R. 66:1–2. The State argued that *Bangert* requires only that defendants be informed of the maximum statutory punishment, and Fugere was correctly told that the maximum sentence (if his NGI defense failed) was 60 years. R. 66:1–2. Al-

ternatively, the State argued that there was no "manifest injustice" to correct because Fugere received the 30-year commitment that he bargained for. R. 66:1–2. The circuit court accepted the State's arguments and denied Fugere's motion. App. 102, 114.

Fugere appealed, but the Court of Appeals rejected his plea-withdrawal claim. The court reasoned that *Bangert*'s plea-colloquy requirements are designed to ensure that the defendant has knowingly and voluntarily waived constitutional rights, but these rights apply only "to the guilt phase" and are "not implicated . . . during the mental responsibility phase." App. 127. Accordingly, the court concluded that an NGI plea imposes "no greater [plea-colloquy] burdens" on the circuit court than a guilty plea, and therefore a court "need not advise a defendant pleading NGI of the potential range of civil commitment . . . , much less do so correctly." App. 127. The Court of Appeals also disagreed with the premise that NGI commitment is punishment. App. 128–30. In the end, the court held that the circuit court's mistake "d[id] not render Fugere's NGI plea unknowing, unintelligent, or involuntary." App. 131.

## STANDARD OF REVIEW

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

evidentiary hearing is required," *State v. Reyes Fuerte*, 2017 WI 104, ¶ 16, 378 Wis. 2d 504, 904 N.W.2d 773.

## SUMMARY OF ARGUMENT

A plea is unconstitutional if it "was not entered knowingly, intelligently, and voluntarily." *Finley*, 2016 WI 63, ¶¶ 12, 58; *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). For a plea to be "knowing" and "voluntary," the defendant must be "fully aware of the direct consequences," *Brady v. United States*, 397 U.S. 742, 755 (1970) (citation omitted), which are "[consequences] that impose punishment," *State v. Muldrow*, 2018 WI 52, ¶ 1, 381 Wis. 2d 492, 912 N.W.2d 74.

To ensure that pleas are knowing and voluntary, Wisconsin statutes and caselaw require circuit courts to conduct a plea colloquy with defendants to confirm that they understand, among other things, the nature of the charge, the constitutional rights they waive, and the "potential punishment" they face. Wis. Stat. § 971.08(1)(a); *State v. Brown*, 2006 WI 100, ¶ 23, 293 Wis. 2d 594, 716 N.W.2d 906. This Court has imposed the same plea-colloquy requirement for NGI pleas in which the defendant admits to committing the act. *Shegrud*, 131 Wis. 2d at 138.

If the colloquy is defective in some way, a defendant is normally entitled to a hearing to determine whether the plea was "voluntary," *see Bangert*, 131 Wis. 2d at 261, 272–76, but some errors are so "insubstantial" that they do not even warrant a hearing, *see State v. Cross*, 2010 WI 70, ¶¶ 32, 36–40,

326 Wis. 2d 492, 786 N.W.2d 64; *Taylor*, 2013 WI 34, ¶¶ 32–42, 48–54.

Fugere asks this Court to impose the additional requirement that courts must inform defendants who plead NGI of the possible commitment they could receive if their NGI defense is successful. In this case, the circuit court did discuss commitment, but overstated the maximum possible length of commitment. Fugere argues that this mistake rendered his plea involuntary and therefore seeks withdrawal of his plea.

I. This Court should not require circuit courts to inform defendants who plead NGI of the possible length of commitment.

A. A standalone NGI plea has two parts: an admission that the defendant committed the act, and an affirmative defense that the defendant is nevertheless not mentally responsible. Only the first half, the admission of guilt, waives constitutional rights, and this Court already requires a robust colloquy to ensure that the waiver is knowing and voluntary. Courts currently must inform defendants who plead NGI of the nature of the charge, the rights they waive by admitting that they committed the act, and the potential punishment if their NGI defense fails, which is the primary consequence of admitting to committing the act. The mental responsibility portion of an NGI plea, by nature of being an affirmative defense, does not waive any additional rights, but instead *invokes* the statutory right to a separate trial as to mental re-

sponsibility. Although a defendant whose NGI defense is successful may be civilly committed, the maximum possible commitment is both shorter and less restrictive than the maximum possible sentence if convicted, so defendants informed of the maximum sentence do not also need to know the maximum commitment for their admission to be knowing and voluntary.

B. Even if commitment is viewed as a consequence of waiving constitutional rights, it is a collateral consequence that is not a required part of the plea colloquy. A plea colloquy needs to cover only those "consequences . . . that impose punishment." *Muldrow*, 2018 WI 52, ¶ 1. Just last term, this Court adopted the intent-effects test for determining whether a particular consequence is "punishment" and, in turn, a required part of the plea colloquy.

Both this Court and the U.S. Supreme Court have already held that the purpose of NGI commitment is not to punish, but "to treat the NGI acquittee's mental illness and to protect the acquittee and society from the acquittee's potential dangerousness." *State v. Szulczewski*, 216 Wis. 2d 495, 504, 574 N.W.2d 660 (1998); *Jones v. United States*, 463 U.S. 354, 368 (1983). Applying the recently adopted intent-effects test does not alter that conclusion. Fugere concedes that the intent of NGI commitment is non-punitive, and six of the seven effects factors support the non-punitive nature of commitment.

II. Regardless of whether this Court requires circuit courts to inform defendants who plead NGI of the possible length of commitment, the error in this case does not warrant plea withdrawal.

A. Two of this Court's recent cases raise a preliminary question over whether traditional harmless-error analysis applies to plea-colloquy defects, or whether such errors should be analyzed directly under the "manifest injustice" and "knowing, intelligent, and voluntary" standards. *Reyes Fuerte*, 2017 WI 104, ¶¶ 32–33; *Taylor*, 2013 WI 34, ¶¶ 39–41 & nn.10–11.

B. Whichever test applies—and this Court should apply the harmless-error standard—the error here does not warrant plea withdrawal. Fugere pleaded to avoid a lengthy prison term entirely. The only claimed error was that the circuit court *overstated* the maximum possible commitment. But Fugere was willing to accept the possibility that the court might reject the 30-year recommendation and impose a 60-year commitment in order to avoid prison, so he would have pleaded the same way had he known that the circuit court would be limited to 40 years of commitment. Furthermore, Fugere actually received the exact commitment term that he and the State agreed to.

## ARGUMENT

To withdraw a plea, a defendant must provide "clear and convincing evidence" that withdrawal is necessary to correct a "manifest injustice." *Finley*, 2016 WI 63, ¶ 58. This is meant to be a "heavy burden," *State v. Sulla*, 2016 WI 46, ¶ 24, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted), because "the state's interest in finality [ ] requires a high standard of proof to disturb [a] plea," *State v. Cain*, 2012 WI 68, ¶ 25, 342 Wis. 2d 1, 816 N.W.2d 177 (citation omitted).

A plea is both "manifestly unjust" and violates the Due Process Clause of the United States Constitution if it was not entered "knowingly, intelligently, and voluntarily." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005); *United States v. Haslam*, 833 F.3d 840, 844 (7th Cir. 2016); *Taylor*, 2013 WI 34, ¶ 49; *Finley*, 2016 WI 63, ¶ 12. To be "knowing" and "voluntary," the defendant must be "fully aware of the direct consequences" of the plea. *Brady*, 397 U.S. at 755 (citation omitted); *Virsnieks v. Smith*, 521 F.3d 707, 715 (7th Cir. 2008); *State v. Chamblis*, 2015 WI 53, ¶¶ 23–27, 362 Wis. 2d 370, 864 N.W.2d 806. "Direct consequences" are those that have a "definite, immediate, and largely automatic effect on the range of a defendant's punishment." *State v. Byrge*, 2000 WI 101, ¶¶ 60–61, 237 Wis. 2d 197, 614 N.W.2d 477; *Muldrow*, 2018 WI 52, ¶ 1; *State v. Bollig*, 2000 WI 6, ¶¶ 16–17, 27, 232 Wis. 2d 561, 605 N.W.2d 199. Defendants do not need to be aware of "collateral consequences" "to enter[ ] a knowing and

intelligent plea," *Byrge*, 2000 WI 101, ¶ 61, but in some circumstances, misinformation about a collateral consequence can warrant plea withdrawal if reliance on that misinformation was a significant "inducement" for the plea, *see State v. Riekkoff*, 112 Wis. 2d 119, 129, 332 N.W.2d 744 (1983); *State v. Brown*, 2004 WI App 179, ¶¶ 10–11, 13, 276 Wis. 2d 559, 687 N.W.2d 543, *abrogated on other grounds by State v. LeMere*, 2016 WI 41, 368 Wis. 2d 624, 879 N.W.2d 580.

Wisconsin Statute Section 971.08(1)(a) requires circuit courts to conduct a colloquy with defendants who plead guilty or "no contest" to ensure that the plea is "voluntary" and based upon awareness of all "direct consequences." Among other things, courts must inform defendants of the nature of the charges against them and the "potential punishment" they face. Wis. Stat. § 971.08(1)(a); *Brady*, 397 U.S. at 756; *Brown*, 2006 WI 100, ¶ 23. This plea-colloquy procedure is not "a constitutional requirement," *Bangert*, 131 Wis. 2d at 266—after all, defendants often "learn of the implications of [their] plea[s] from another source," like their attorney, *Chamblis*, 2015 WI 53, ¶ 26—but a proper colloquy is the "best way . . . to avoid constitutional problems," *Brown*, 2006 WI 100, ¶ 23.

Although Section 971.08 does not "[o]n its face" apply to NGI pleas, this Court has recognized that a standalone NGI plea (i.e., without joining a not-guilty plea) "closely parallels a plea of no contest," and so this Court has exercised its "superintending and administrative authority" to require circuit

courts to conduct the same plea colloquy for standalone NGI pleas. *Shegrud*, 131 Wis. 2d at 137–38. Thus, a circuit court must inform a defendant who enters a standalone NGI plea of the "nature of the charge[s]" and the "potential punishment" if the NGI defense fails. *Id.* at 138.

Given that plea colloquies are not constitutionally required, *Bangert*, 131 Wis. 2d at 266, an error in a colloquy does not automatically require plea withdrawal. Instead, an improper colloquy entitles the defendant to a hearing (known as a *Bangert* hearing), in which the State bears the burden of establishing that the plea was nevertheless "voluntary." *Id.* at 272–76; *Brown*, 2006 WI 100, ¶¶ 36–41. And not all errors "require a formal evidentiary hearing." *Cross*, 2010 WI 70, ¶¶ 32–40; *Taylor*, 2013 WI 34, ¶¶ 32–42, 48–54. If the "record makes clear" that the "plea was entered knowingly, intelligently, and voluntarily" and that there was no "manifest injustice," courts may "deny[ ] [a] plea withdrawal motion without holding a *Bangert* hearing," even despite some "small deviations" or "insubstantial defects." *Taylor*, 2013 WI 34, ¶¶ 33–34, 42, 55–56.

Fugere raises two arguments in this case. First, he asks this Court to impose a new plea-colloquy requirement that courts must inform defendants who plead NGI of the maximum possible length of commitment. Opening Br. 9–33. Second, Fugere argues that he is entitled to withdraw his NGI plea because the circuit court misstated the possible length of civil commitment. Opening Br. 39–45. Both arguments are

unconvincing and offer two independently sufficient reasons to affirm the Court of Appeals.

## I. A Plea Colloquy Does Not Need To Cover The Possible Length Of An NGI Commitment

### A. An NGI Plea Does Not Waive Any Additional Constitutional Rights Beyond Those Rights Forfeited By Admitting Guilt, So The Colloquy Need Not Cover The Length Of An NGI Commitment

1. A defendant who pleads *guilty* waives a number of significant constitutional rights, including the rights to a jury trial, to present evidence and cross examine witnesses, to confront one's accusers, and to require the State to establish guilt beyond a reasonable doubt. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Brown*, 2006 WI 100, ¶ 14; *Bangert*, 131 Wis. 2d at 265. For a guilty plea "to function as a valid waiver of constitutional rights," it must be "an intentional relinquishment of known rights." *Brown*, 2006 WI 100, ¶ 29 (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969) and *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Thus, while a plea colloquy is not constitutionally required, *Bangert*, 131 Wis. 2d at 266, the colloquy is "designed to ensure" that a defendant's waiver of constitutional rights was "knowing, intelligent, and voluntary," *Brown*, 2006 WI 100, ¶ 23.

Whether an NGI plea waives constitutional rights depends on whether it is joined with a plea of not guilty. If a defendant also pleads not guilty, he does not waive any rights—by so pleading, the defendant asserts that he did not

commit the crime, but even if he did, he was not mentally responsible for it. The trial is bifurcated into two phases, a guilt phase and a responsibility phase, Wis. Stat. § 971.165, and the defendant is entitled to the full procedural rights granted to each phase, *see Magett*, 2014 WI 67, ¶¶ 32–40; *supra* pp. 3–4, 6–7.

If, on the other hand, a defendant enters a *standalone* NGI plea (without joining a plea of not guilty), he "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). A standalone NGI plea therefore waives the guilt phase of the bifurcated proceeding and, in turn, the constitutional rights attached *to that half of the bifurcated proceeding*. Because the guilt portion of a standalone NGI plea "closely parallels a plea of no contest" and "waives several constitutional rights," this Court has held that circuit courts must conduct the same plea colloquy as for a guilty plea. *Shegrud*, 131 Wis. 2d at 137. Thus a court must inform a defendant who enters a standalone NGI plea of the nature of the charges, the "nature of the constitutional rights which he [is] waiving," and the potential punishment if the NGI defense is unsuccessful. *See id.* at 136–38.

The mental responsibility portion of an NGI plea—in other words, the defendant's assertion that he is "[n]ot guilty by reason of a mental disease or defect," Wis. Stat. § 971.06(1)(d)—does not waive any additional rights, constitutional or otherwise, because it is an "*affirmative defense*,"

not a concession, *id.* § 971.15(3) (emphasis added). *See* App. 128. The defendant pleading NGI asserts that he is not mentally responsible and invokes his statutory right to a trial as to his responsibility (the second half of the bifurcated proceedings). A defendant does not have to raise this defense, but often chooses to do so because he stands to benefit if the defense is successful; he cannot be incarcerated, and may even be entitled to conditional release if he is not dangerous. Thus, unlike other forms of civil commitment (such as chapter 980 or chapter 51) where *the State* pursues commitment and must show that the individual satisfies the criteria for commitment, in an NGI defense, the *defendant* argues that he meets the criteria that make him eligible for commitment. Therefore, because the rights waived by a standalone NGI plea are, as the Court of Appeals put it, "only attendant to the guilt phase," courts should have "no greater burdens" during a plea colloquy for a standalone NGI plea "than those for otherwise accepting a guilty or no-contest plea." App. 127.

This holding would also be consistent with this Court's prior cases addressing NGI pleas. In *State v. Burton*, 2013 WI 61, 349 Wis. 2d 1, 832 N.W.2d 611, for example, this Court held that courts have "no obligation to personally address a defendant in regard to the withdrawal of an NGI plea" because there is no "[constitutional] right to an insanity defense," *id.* ¶ 82. If there is no need for a colloquy when a defendant *withdraws* an NGI defense—in essence waiving a

statutory right to that defense—then no special colloquy should be required when a defendant *asserts* that defense.

Similarly, in *State v. Lagrone*, 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636, this Court held that during the responsibility phase of a bifurcated trial, courts are not required to conduct a colloquy with defendants about whether they want to testify, *id.* ¶¶ 51–56. Although a right-to-testify colloquy is required during the *guilt* phase, this Court explained that "the fundamental right to testify on one's own behalf . . . does not exist at the responsibility phase" because that phase is "a statutory, noncriminal proceeding to which [defendants] have no independent constitutional right." *Id.* ¶ 41. This Court left open whether defendants possess some lesser due-process right "to be heard and offer evidence" at the responsibility phase, *id.* ¶¶ 49–50, but nevertheless held that a right-to-testify colloquy is not required even when a defendant waives that lesser right, *id.* ¶¶ 51–56. Thus, even if entering an NGI defense could be characterized as waiving some rights, *but see supra* pp. 19–20, whatever rights are waived are not fundamental and do not require a special colloquy.

2. In this case, the circuit court fully informed Fugere of the rights that he waived by the guilt portion of his NGI plea and of the potential consequences of admitting guilt. Before the plea hearing, Fugere initialed and signed the "Plea Questionnaire/Waiver of Rights" form, indicating that he understood he was giving up his rights "to a trial," "to testify and

present evidence," "to confront . . . and cross-examine [witness]," and "to make the State prove [ ] guilt[ ] beyond a reasonable doubt," among others. R. 21:1. He also acknowledged his understanding that "the judge is not bound by any plea agreement or recommendations" and that "[t]he maximum penalty . . . [was] 60 years in prison." R. 21:1. (This was the correct maximum sentence if Fugere's NGI defense failed, *see supra* p. 6.) At the plea hearing, the court explained the charge to Fugere and confirmed that he knew he was admitting to committing the act. R. 84:7, 9–10. The court also verified that Fugere understood the various constitutional rights he was waiving, R. 84:8–9, 11, and that the "maximum penalty" was 60 years in prison, R. 84:13. All of that was enough to satisfy the plea-colloquy requirements in *Bangert* and *Shegrud*, which, as relevant here, require courts to inform a defendant of the "nature of the . . . charge[ ] and the range of punishments which it carries," and "of the constitutional rights which he will be waiving." *See Bangert*, 131 Wis. 2d at 262, 272; *Shegrud*, 131 Wis. 2d at 138 (holding that "the procedures delineated in *Bangert* shall apply in cases in which a defendant pleads not guilty by reason of mental disease or defect").

3. Fugere argues that this Court should exercise its "superintending and administrative authority" over lower courts to expand the plea-colloquy requirements for NGI pleas, requiring courts to inform defendants of the maximum possible commitment they face if their NGI defense succeeds. Opening

Br. 9–29. The heart of Fugere's argument is that "[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." Opening Br. 27.

But, as the Court of Appeals correctly pointed out, the "mental responsibility" portion of an NGI plea does not "involve[ ] any waiver of [ ] constitutional rights." App. 128. The constitutional rights waived by a standalone NGI plea "are only attendant to" the defendant's admission of guilt. App. 127. And the primary consequence of an admission of guilt is the maximum penalty—in this case, 60 years of imprisonment. Fugere concedes that he was fully informed of that. App. 123 & n.5. Fugere's affirmative NGI defense, if successful, could only *improve* the possible outcomes: he would be committed, rather than imprisoned, and the possible length of commitment would be shorter (two-thirds) than the maximum possible term of imprisonment. Wis. Stat. §§ 971.17(1)(b); 973.01(2)(b). This Court has never held that courts must conduct a colloquy with defendants to inform them of the possible *benefits* of an affirmative defense.

Fugere does not engage with the Court of Appeals' reasoning, but relies mostly on inapposite or thinly reasoned out-of-state cases. Two of the out-of-state cases Fugere cites, Opening Br. 21–25, are distinguishable because the NGI procedures in those jurisdictions are fundamentally different from Wisconsin's. In California and the District of Columbia,

an NGI acquittee is committed for an *indefinite* term, which can extend well beyond the maximum possible confinement for the crime. *See California v. Vanley*, 41 Cal. App. 3d 846, 855–56 (Cal. Ct. App. 1974); *Legrand v. United States*, 570 A.2d 786, 788, 794 (D.C. 1990). As a result, an NGI plea in such jurisdictions "relinquish[es] [additional] constitutionally protected liberty interests" beyond the rights waived by a guilty plea. *Legrand*, 570 A.2d at 792. It was that "serious [ ] consequence[ ]" that led those jurisdictions to conclude that defendants must be informed that they could be committed indefinitely. *Id.* at 792–94; *Vanley*, 41 Cal. App. 3d at 856 (noting that the average defendant does not have the legal sophistication to realize that "he can remain involuntarily committed . . . for the rest of his life"). In Wisconsin, on the other hand, the maximum length of an NGI commitment is always less than (generally two-thirds of) the maximum possible term of imprisonment, *see* Wis. Stat. §§ 971.17(1); 973.01(2)(b); 939.50(1)(b), so an NGI plea does not "relinquish[ ]" any additional "liberty interests," *see Legrand*, 570 A.2d at 792.

The remaining two cases Fugere cites did not fully wrestle with the question presented here. The issue in both *Duperry v. Solnit*, 803 A.2d 287 (Conn. 2002), and *Washington v. Brasel*, 623 P.2d 696 (Wash. Ct. App. 1981), was whether an NGI defense requires any colloquy *whatsoever*. *See Duperry*, 803 A.2d at 300–02; *Brasel*, 623 P.2d at 701. The

Connecticut and Washington courts imposed plea-colloquy requirements primarily to ensure that the defendant understood the nature of the charge and the rights being waived. *Brasel*, 623 P.2d at 702; *Duperry*, 803 A.2d at 301–02. Both courts also required the plea colloquy to include the maximum term of commitment, but with little explanation. *See Duperry*, 803 A.2d at 300–02; *Brasel*, 623 P.2d at 702. This Court in *Shegrud* already imposed the standard plea-colloquy requirements for NGI pleas as for guilty pleas, which includes the rights being waived, 131 Wis. 2d at 138, and the NGI defense does not waive any additional constitutional rights.

### B. An NGI Commitment Is Not Punishment

Even if this Court views commitment as a consequence of waiving constitutional rights by admitting to committing the act, this Court still should not require courts to address the length of a possible NGI commitment during a plea colloquy because commitment is not "punishment."

1. As explained above, a defendant must be aware of the direct consequences of his plea for it to be "knowing" and "voluntary," *Brady*, 397 U.S. at 755; *Virsnieks*, 521 F.3d at 715; *Muldrow*, 2018 WI 52, ¶ 1, and this Court has frequently equated direct consequences with punishment, *see, e.g.*, *Chamblis*, 2015 WI 53, ¶ 24; *Bollig*, 2000 WI 6, ¶¶ 16–17, 27; *Byrge*, 2000 WI 101, ¶¶ 60–61. Just a few months ago, this Court reaffirmed that the "direct consequences of a plea [are] those that impose punishment." *Muldrow*, 2018 WI 52, ¶ 1.

Indeed, this Court and the Court of Appeals have consistently rejected plea-withdrawal claims based on a circuit court's failure to inform a defendant of a non-punitive consequence of a plea, including lifetime GPS tracking, *Muldrow*, 2018 WI 52, ¶ 63, sex-offender registration, *Bollig*, 2000 WI 6, ¶ 27, potential chapter 980 commitment, *State v. Myers*, 199 Wis. 2d 391, 394–95, 544 N.W.2d 609 (Ct. App. 1996); *see also State v. LeMere*, 2016 WI 41, ¶¶ 56–57, 368 Wis. 2d 624, 879 N.W.2d 580, restitution, *State v. Dugan*, 193 Wis. 2d 610, 624, 534 N.W.2d 897 (Ct. App. 1995), *abrogated on other grounds by Muldrow*, 2018 WI 52, mandatory license revocation, *State v. Madison*, 120 Wis. 2d 150, 153–61, 353 N.W.2d 835 (Ct. App. 1984), federal firearm restrictions, *State v. Kosina*, 226 Wis. 2d 482, 487, 489, 595 N.W.2d 464 (Ct. App. 1999), and federal healthcare restrictions, *State v. Merten*, 2003 WI App 171, ¶ 10, 266 Wis. 2d 588, 668 N.W.2d 750.

In *Muldrow*, this Court adopted the two-part intent-effects test used in other constitutional contexts for determining whether a particular consequence of a plea is punitive. 2018 WI 52, ¶ 32 (citing *Smith v. Doe*, 538 U.S. 84 (2003) (Ex Post Facto Clause case) and *Hudson v. United States*, 522 U.S. 93 (1997) (Double Jeopardy Clause case)). Under that test, this Court first considers whether the "legislative intent of [a statute] was to impose punishment"; if so, the "law is considered punitive and [the] inquiry ends." *State v. Scruggs*, 2017 WI 15, ¶ 16, 373 Wis. 2d 312, 891 N.W.2d 786. If a law's intent

is not punitive, this Court then considers "whether [the] statute is [nevertheless] punitive in effect," "guided by the seven factors [ ] set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)." *See id.* ¶¶ 40–41. These factors are: "[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." *Muldrow*, 2018 WI 52, ¶ 31 (quoting *Mendoza-Martinez*, 372 U.S. at 168) (brackets in original). This Court affords "great deference" to the Legislature's intent, such that only "the clearest proof will suffice to override [that] intent." *Id.* ¶ 49 (citation omitted); *see also Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("heavy burden" to "negate [the State's] intention" (brackets in original)).

2. Although this Court has not yet applied the intent-effects test to NGI commitment, this Court has already held that NGI commitment is not designed to punish, but instead "to treat the NGI acquittee's mental illness and to protect the acquittee and society from the acquittee's potential dangerousness." *Szulczewski*, 216 Wis. 2d at 504; *State v. Randall*,

192 Wis. 2d 800, 833, 532 N.W.2d 94 (1995). The U.S. Supreme Court has held the same. *Jones*, 463 U.S. at 368 ("The purpose of commitment following an insanity acquittal . . . is to treat the individual's mental illness and protect him and society from his potential dangerousness.").

Even more, the U.S. Supreme Court in *Jones* held that a person found NGI "*may not* be punished," because "he was not convicted." 463 U.S. at 369 (emphasis added). After all, an NGI plea is a plea of "*[n]ot guilty* by reason of mental disease or defect," Wis. Stat. § 971.06(1)(d) (emphasis added), and under Wisconsin law, a person found NGI is "not responsible for [his] criminal conduct," *id.* § 971.15(1). Thus an NGI commitment following a successful NGI defense is entered "*in lieu of* criminal sentence or probation." *Id.* § 971.165(2) (emphasis added).

Additionally, both this Court and the U.S. Supreme Court have found similar forms of civil commitment not to be punitive even after applying the intent-effects test. For example, this Court has rejected both ex-post-facto and double-jeopardy challenges to chapter 980 commitment (for sexually violent persons)—which was "modeled after" NGI commitment, *see In re Commitment of Burris*, 2004 WI 91, ¶ 47, 273 Wis. 2d 294, 682 N.W.2d 812—by holding that chapter 980 commitment is not punishment. *In re Commitment of Rachel*, 2002 WI 81, ¶¶ 18–60, 254 Wis. 2d 215, 647 N.W.2d 762; *see also In re Commitment of West*, 2011 WI 83, ¶¶ 27–48, 336 Wis. 2d 578, 800 N.W.2d 929; *State v. Carpenter*, 197 Wis. 2d

252, 258–74, 541 N.W.2d 105 (1995). In reaching that conclusion, this Court reasoned that a chapter 980 commitment is designed to serve the same purposes as an NGI commitment: "the treatment of the individual and the protection of the public." *Rachel*, 2002 WI 81, ¶¶ 18–60. Likewise, the U.S. Supreme Court upheld Kansas's sexual-predator commitment law against both ex-post-facto and double-jeopardy claims because the law was "not punitive." *Kansas v. Hendricks*, 521 U.S. 346, 360–71 (1997).

3. Even putting these precedents aside and freshly applying the intent-effects test that this Court adopted in *Muldrow*, NGI commitment is clearly non-punitive.

Fugere concedes that "[t]he legislature did not intend NGI commitments . . . to be punitive." Opening Br. 32–33. He argues instead that the effects of NGI commitment are so punitive that they override the Legislature's non-punitive intent, Opening Br. 33–39, but he falls far short of meeting his "heavy burden" to negate legislative intent, *Hendricks*, 521 U.S. at 361; *Muldrow*, 2018 WI 52, ¶ 49. Indeed, Fugere discusses only three of the seven *Mendoza-Martinez* factors, Opening Br. 33–39, therefore conceding the remaining four. Fugere argues that NGI commitment "involves a disability or restraint, applies to criminal behavior, [and] is excessive in relation to its alternative, non-criminal purpose," Opening Br. 33–39 (factors (1), (5), and (7)), but he is wrong about the latter two.

*Rationally Connected To An Alternative Purpose.* "[T]he most significant factor" in determining whether a statute's effects are punitive is whether the statute bears a rational connection to an alternative, non-punitive purpose. *Muldrow*, 2018 WI 52, ¶ 57. In *Muldrow*, this Court held that lifetime GPS tracking of sex offenders is non-punitive because its purpose is "protecting the public from future sex offenses," and lifetime GPS tracking is rationally connected to that legitimate non-punitive purpose. *Id.* ¶¶ 57–59. For NGI commitment, both this Court and the U.S. Supreme Court have already held that NGI commitment serves a similar non-punitive purpose: "to treat the NGI acquittee's mental illness and to protect the acquittee and society from the acquittee's potential dangerousness." *Szulczewski*, 216 Wis. 2d at 504; *Jones*, 463 U.S. at 368. Therefore, this factor weighs heavily in favor of finding NGI commitment non-punitive, and the other factors do not tip the balance.

*Affirmative Disability Or Restraint.* Although civil commitment involves an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Hendricks*, 521 U.S. at 363; *Rachel*, 2002 WI 81, ¶ 45. Rather, confining dangerous mentally ill individuals for the purposes of protecting the community from harm is a "classic example of nonpunitive detention." *Hendricks*, 521 U.S. at 363.

*Not Historically Regarded As Punishment.* Both the U.S. Supreme Court and this Court have held that "measures to restrict the freedom of the dangerously mentally ill . . . ha[ve] been historically [ ] regarded" as "nonpunitive." *Hendricks*, 521 U.S. at 363; *Rachel*, 2002 WI 81, ¶ 50 ("Historically, an involuntary commitment proceeding . . . has not been regarded as punishment."). Further, the government has a "well-established authority . . . to restrain individuals' liberty . . . on the basis of dangerousness" even in the absence of any criminal trial or conviction. *Salerno*, 481 U.S. at 749.

*Does Not Depend On A Finding Of Scienter.* NGI commitment not only does not require a finding of scienter, it is premised entirely on the *lack* of scienter. After all, an NGI adjudication is a finding that a person who committed a crime is *not* "[m]ental[ly] responsib[le]" due to a "mental disease or defect." Wis. Stat. § 971.15(1); *Lagrone*, 2016 WI 26, ¶ 1. This "absence of a mental state requirement is evidence that confinement under the statute is not intended to be retributive." *Rachel*, 2002 WI 81, ¶ 51; *Hendricks*, 521 U.S. at 362.

*Does Not Promote The Traditional Aims Of Retribution And Deterrence.* The U.S. Supreme Court and this Court have explained that neither retribution nor deterrence "underlie commitment of an insanity acquittee." *Jones*, 463 U.S. at 368–69. Instead, "confinement rests on [the NGI acquittee's] continuing illness and dangerousness." *Id.* at 369; *see also*

*Randall*, 192 Wis. 2d at 827 n.17 ("recovery rather than retribution or deterrence [is] the rationale for [NGI] commitment").

*Applies To Behavior That Is Not A Crime.* NGI commitment applies only to behavior that the Legislature has deemed to be non-criminal. *See Muldrow*, 2018 WI 52, ¶ 56. While NGI commitment requires a predicate act that would ordinarily be considered criminal, *see* Opening Br. 34, a person who commits such an act as a result of a mental disease or defect "is not responsible for [the] conduct," Wis. Stat. § 971.15(1). An NGI plea is ultimately a plea of "*[n]ot guilty*," *id.* § 971.06(1)(d) (emphasis added), and commitment is imposed "*in lieu of* criminal sentence or probation," *id.* § 971.165(2) (emphasis added). In this way, NGI commitment is even less punitive than chapter 980 commitment. A chapter 980 commitment, unlike an NGI commitment, can be "triggered" by a criminal conviction, yet this Court nevertheless held that "a mere connection to criminal activity is not sufficient to render [chapter 980 commitment] punitive." *Rachel*, 2002 WI 81, ¶ 58. An NGI commitment is triggered by an individual's mental disease or defect, combined with the risk they pose to themselves and the community—neither of which are criminal on their own. *See Hendricks*, 532 U.S. at 358.

*Not Excessive In Relation To Alternative Purposes.* Finally, NGI commitment is not excessive in relation to its rehabilitative and protective purposes. *See Muldrow*, 2018 WI

52, ¶¶ 60–61. The statute requires a court to order conditional release unless it finds by "clear and convincing evidence" that release "would pose a significant risk of bodily harm to [the defendant] or to others or of serious property damage." Wis. Stat. § 971.17(3)(a). If institutional commitment is warranted, the department of health services must place the person in a facility "that the department considers appropriate in light of the rehabilitative services required by the person and the protection of public safety," *id.* § 971.17(3)(c). A person who has been institutionally committed may petition for conditional release every six months, and the court must order release unless the person continues to pose a significant danger. *Id.* § 971.17 (4)(a), (d). The fact that an NGI committee is "entitled to release" when he is "no longer dangerous" demonstrates that NGI commitment is tailored to its non-punitive purposes. *See Jones*, 463 U.S. at 368–69.

Fugere argues that NGI commitment must be punitive because, under Wisconsin law, the possible length of a commitment depends on the underlying criminal charge. Opening Br. 35–37; *see* Wis. Stat. § 971.17(1). According to Fugere, "[i]f 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." Opening Br. 36. But the nature of the commitment *is* "based upon the defendant's condition and treat-

ment needs." As just explained, an NGI acquittee can be either committed to an institution or conditionally released, and a court must order conditional release unless the person is dangerous. Wis. Stat. § 971.17(3)(a). Furthermore, the length of *institutional* commitment—the most restrictive form—is also tied directly to the person's treatment needs. If a person committed to an institution has successfully completed treatment and is no longer dangerous, he may petition for conditional release. *Id.* § 971.17(4).

The fact that the total commitment term (whether institutional or conditional release) is limited by the underlying criminal charge does not render the NGI commitment statute punitive. In *Jones*, which Fugere cites as support for his argument, Opening Br. 35, the U.S. Supreme Court held that the District of Columbia's NGI commitment regime was non-punitive even though it allowed for lifetime commitment, well *beyond* the time that the person could have been incarcerated if convicted, 463 U.S. at 368–70. If that more restrictive regime is non-punitive, it is hard to see how Wisconsin's regime becomes punitive by limiting the maximum time that a person adjudicated NGI can be committed.

## II. Overstating The Maximum Possible NGI Commitment Does Not Warrant Plea Withdrawal

Regardless of whether this Court holds that courts must inform defendants pleading NGI of the maximum possible length of commitment, the court's error in this case does not warrant plea withdrawal.

A. On more than one occasion, this Court has rejected plea-withdrawal claims based on "small deviations" or "insubstantial defects" in the plea colloquy without holding a *Bangert* hearing. *Cross*, 2010 WI 70, ¶¶ 30–40; *Taylor*, 2013 WI 34, ¶¶ 27–54; *Reyes Fuerte*, 2017 WI 104, ¶¶ 37–41. In *Taylor*, this Court held that minor plea-colloquy errors should be assessed against the "manifest injustice" and "knowing, intelligent, and voluntary" standards, rather than by applying traditional harmless-error doctrine. 2013 WI 34, ¶¶ 39–41, 44–47 & n.11. This Court explained that plea-withdrawal claims will be rejected as a matter of law (i.e., without a *Bangert* hearing) if the "record makes clear" that the plea "was entered knowingly, intelligently, and voluntarily" and that there was no "manifest injustice." *Id.* ¶¶ 42–43, 55. Based on a concession from the State, this Court also held that the traditional "harmless error doctrine [does] not apply" to "alleged violation[s] of Wis. Stat. § 971.08 or other court-mandated dut[ies] during the plea colloquy." *Id.* ¶¶ 40–41 & nn.10–11.

In *Reyes Fuerte*, 2017 WI 104, however, this Court implicitly overruled *Taylor*'s rejection of traditional harmless-error analysis for plea-colloquy defects. *Reyes Fuerte* held that the harmless-error statute, Wis. Stat. § 971.26, *does* "apply to" defects in the plea-colloquy warning required by Section 971.08(1)(c) (related to the immigration consequences of pleading guilty). 2017 WI 104, ¶ 4. Although this Court's direct holding is limited to the immigration warnings required

by Subsection (1)(c), the Court's textual analysis of Section 971.26's scope applies equally to Section 971.08(1)(a), the provision at issue in *Taylor* that requires courts to inform defendants of the "potential punishment if convicted." *See Taylor*, 2013 WI 34, ¶ 30. Because "[s]ections 971.08 and 971.26" appear "in the same chapter" and are "closely related," this Court in *Reyes Fuerte* concluded as a matter of "statutory interpretation" that these sections "must be construed together." 2017 WI 104, ¶¶ 26–28. Section 971.26 provides, without exception, that "[n]o indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Wis. Stat. § 971.26. If the "mandatory . . . command[ ]" of Section 971.26 "appl[ies] to" Section 971.08(2), *see Reyes Fuerte*, 2017 WI 104, ¶¶ 4, 23, then it should apply equally to the "potential punishment" requirements in Section 971.08(1)(a). *Taylor*'s rejection of harmless-error analysis for such errors cannot survive.

There is an even stronger case for applying traditional harmless-error analysis to defects relating to the possible length of an NGI commitment. Unlike either the immigration warnings required by Section 971.08(1)(c) or the "potential punishment" warnings required by Section 971.08(1)(a), there is no statutory requirement anywhere for courts to inform defendants pleading NGI of the possible term of commitment.

Indeed, that is why Fugere asks this Court to exercise its "superintending and administrative authority" to impose such a requirement. Opening Br. 15. But there *is* a "mandatory" statutory command to apply harmless-error analysis to any alleged defect in a "judgment." Wis. Stat. § 971.26; *Reyes Fuerte*, 2017 WI 104, ¶¶ 31–32. If this Court were to hold that traditional-harmless error analysis does not apply to the new requirement Fugere asks for, it would also need to exercise its "superintending authority" to create an exception to this otherwise "mandatory" statutory command.

A clear holding from this Court that traditional harmless-error analysis applies to all plea-colloquy defects would not only resolve the tension between *Taylor* and *Reyes Fuerte*, it would also align Wisconsin courts with the federal courts. As this Court noted in *Reyes Fuerte*, "[i]mperfect plea colloquies in federal courts are subject to harmless error analysis" under Federal Rule of Criminal Procedure 11(h). 2017 WI 104, ¶ 35. Federal courts apply harmless-error analysis even to plea-colloquy defects relating to the potential penalties. *E.g.*, *Dansberry v. Pfister*, 801 F.3d 863, 867–69 (7th Cir. 2015) (misinforming the defendant that the mandatory minimum sentence was 20 years, rather than 26 years, was harmless); *United States v. Westcott*, 159 F.3d 107, 111–14 (2d Cir. 1998) (court overstating the maximum possible sentence); *see United States v. Davila*, 569 U.S. 597, 598 (2013) ("Rule 11(h) . . . calls for across-the-board application of the harmless-error prescription.").

The question under traditional harmless-error analysis is whether there is any "reasonable probability that the error contributed to the outcome." *State v. Thompson*, 2012 WI 90, ¶ 85, 342 Wis. 2d 674, 818 N.W.2d 904. Translated to the plea-colloquy context, the harmless-error standard "naturally should focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." *United States v. Fernandez*, 205 F.3d 1020, 1024 (7th Cir. 2000) (citation omitted).

B. Whether or not this Court holds that traditional harmless-error analysis applies to all plea-colloquy defects, the error here does not warrant plea withdrawal as a matter of law.

1. The circuit court's overstatement of the possible length of commitment is clearly harmless under a traditional harmless-error analysis. There is no "reasonable probability," *Thompson*, 2012 WI 90, ¶ 85, that the circuit court's mistake had any effect on Fugere's decision to plead NGI. Fugere pleaded NGI in order to avoid a lengthy prison sentence, while mistakenly believing that the circuit court retained the discretion to commit him for as many as 60 years, notwithstanding the parties' 30-year recommendation. R. 84:12–18; R. 66:2. If Fugere knew that the upper bound of the commitment that the circuit court could have imposed was only 40 years, he surely would have pleaded the same way, as the possible outcomes were *more favorable* to him. *See Cross*, 2010

WI 70, ¶¶ 31, 41, 43; *Westcott*, 159 F.3d at 111–14 (overstating the maximum possible sentence was harmless error); *Long v. United States*, 883 F.2d 966, 969 (11th Cir. 1989) (per curiam) (same); *United States v. Hughes*, 726 F.3d 656, 662 (5th Cir. 2013) ("a defendant informed of the possibility of fines larger than any potential special assessment suffers no prejudice"); *see also Cross*, 2010 WI 70, ¶ 33 & n.7 (listing cases). In any event, the court adopted the parties' 30-year recommendation, so Fugere got exactly what he bargained for.

Fugere suggests, at the very end of his brief, that knowing the correct maximum possible commitment might have affected his plea decision because it was relevant to "how good of a 'deal' [ ] he got," namely, whether the deal "lower[ed] his exposure [to civil commitment] by 30 years, [or] only lowered it by 10." Opening Br. 43–44. But there is no indication in the record that the delta between the maximum possible commitment and the 30-year joint recommendation played any part in the negotiations or in Fugere's plea calculus. Rather, the core "deal" was that Fugere would admit to committing the act in exchange for the State stipulating to his NGI defense. The primary gain for Fugere, then, was not obtaining a certain recommendation as to the term of commitment, but avoiding a lengthy prison sentence entirely. In other words, by accepting the plea deal, Fugere moved from a potential 60-year sentence (with up to 40 years in prison and 20 years of extended supervision, *supra* p. 6) to a joint recommendation for a 30-year civil commitment.

2. Even if this Court declines to apply traditional harmless-error analysis and instead analyzes the error as in *Taylor* and *Cross*, the "record [here] makes clear" that the error was so "insubstantial" that it did not "prevent [Fugere's] plea from being knowing, intelligent, and voluntary" or cause a "manifest injustice." *Taylor*, 2013 WI 34, ¶¶ 39–41, 55–56.

The error in this case was "insubstantial" for similar reasons that it was harmless under a traditional harmless-error inquiry: Fugere pleaded primarily to avoid the potential for a long prison sentence; the maximum possible commitment he could receive (which was in fact *lower* than he thought) was insignificant, especially given that he received the commitment term he expected.

This Court's decision in *Cross*, 2010 WI 70, is also instructive here. In that case, the circuit court overstated the maximum possible sentence the defendant was exposed to by pleading guilty. The court told the defendant that the maximum was 40 years, when in reality it was only 30. *Id.* ¶ 1. This Court found the error to be an "insubstantial defect[ ]" that did "not constitute a *Bangert* violation" and therefore did not warrant plea withdrawal "as a matter of law." *Id.* ¶¶ 32, 40, 44. This Court explained, among other things, that "a defendant who believes he is subject to a greater punishment is obviously aware that he may receive the lesser punishment." *Id.* ¶ 31. Because Cross agreed to plead guilty believing he could receive "a punishment *greater than* what the law pro-

vided," the fact that the plea agreement "was even *more* favorable to him than he thought" could not have affected his decision to plead guilty. *Id.* ¶¶ 41–43. Here, similar to *Cross*, the circuit court mistakenly *overstated* the maximum possible term of commitment that Fugere could receive as a result of his NGI plea. Given that, Fugere was "obviously aware that he m[ight] receive [a] lesser [commitment]." *Id.* ¶ 31. The fact that the plea deal "was even *more* favorable to [Fugere] than he thought," cannot be a manifest injustice warranting withdrawal of the plea, *id.* ¶¶ 41–43.

*Taylor* is also relevant. In that case, the circuit court had slightly *understated* the maximum possible sentence the defendant could receive because the court did not realize that the defendant was subject to a two-year penalty enhancement. *See* 2013 WI 34, ¶ 34. This Court rejected the plea-withdrawal claim in part because Taylor actually received a sentence within the range he was told. *Id.* ¶¶ 34, 52. As in *Taylor*, Fugere "was verbally informed at the plea hearing of the [commitment] that he [actually] received." *Id.* ¶ 55. Fugere and the State jointly agreed to a 30-year commitment, and the circuit court accepted that recommendation. *Supra* p. 6.

In *Cross*, this Court left open the possibility that a "substantial" overstatement of the maximum possible sentence could in some future case warrant plea withdrawal, so Fugere argues that the error here *was* "substantial" because the court was off by 20 years, compared to 10 in *Cross*. Opening Br. 39–

44; *Cross*, 2010 WI 70, ¶ 38. As a threshold matter, this case is hardly a proper one to invoke *Cross*' hypothetical because, as explained above, the primary consideration here was Fugere's avoidance of prison entirely, not the maximum term of confinement that the circuit court could have imposed. In any event, there is an important difference between commitment and incarceration. A NGI committee can petition for and receive conditional release at any time if he is no longer dangerous, *supra* p. 33, so the maximum possible commitment is much less significant than the maximum possible term of incarceration.

3. The fact that the circuit court misstated the possible length of commitment (rather than saying nothing about it) does not change the analysis. Although this Court and the Court of Appeals have occasionally allowed plea withdrawal where the circuit court misinformed the defendant about a collateral consequence, the misinformation in those cases was a significant "inducement" for the pleas. *See Riekkoff*, 112 Wis. 2d at 128–29; *Brown*, 2004 WI App 179, ¶¶ 10–11, 13. In *Riekkoff*, the defendant was promised that he would preserve appellate review of an issue when he in fact would not, 112 Wis. 2d at 128, and in *Brown*, the defendant was misinformed that he would not be required "to register as a sex offender or be subject to post-incarceration commitment under [chapter] 980," when the entire plea agreement had been "purposefully crafted" to avoid those consequences, 2004 WI App 179, ¶ 13. Here, on the other hand, there is no indication in the record

that the possible length of commitment was a significant factor motivating Fugere's plea, and regardless, the possible consequences were *better* than he anticipated.

## CONCLUSION

This Court should affirm the Court of Appeals' decision.

Dated: December 3, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

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

TIFFANY M. WINTER
Assistant Attorney General

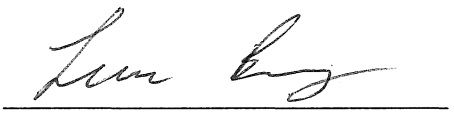
Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3056
*bergln@doj.state.wi.us*

Attorneys for the State of Wisconsin

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,269 words.

Dated: December 3, 2018.



LUKE N. BERG
Deputy Solicitor General

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Dated: December 3, 2018.

LUKE N. BERG
Deputy Solicitor General