STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP002258-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. FUGERE,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

Mr. Fugere was told by the court, state, and his own attorney, that he faced a maximum of 60 years of supervision. In fact, he faced up to 40 years of confinement in an institution. *See* Wis. Stats. §§ 948.02(1)(b), 971.17(1)(b), 973.01(2)(b). According to the state, Mr. Fugere, and others like him, need not know that they face any term of institutional confinement, let alone the correct one, at the time they enter an NGI plea[1]. Such a position, however, is contrary to the protections guaranteed by the Due Process Clause of the United States Constitution.

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468–69, 25 L. Ed. 2d 747 (1970). A defendant entering an NGI plea waives several constitutional rights, as he is admitting that, but for his lack of mental capacity, he committed all of the essential elements of the crime charged. *State v. Shegrud*, 131 Wis. 2d 133, 137, 389 N.W.2d 7 (1986); Wis. Stat. § 971.06(1)(d). In order for the waiver of those rights to be knowingly, intelligently, and voluntarily made, a defendant entering an NGI plea must have an understanding of both potential consequences he

[1] The phrase "NGI plea" refers to a plea of not guilty by reason of mental disease or defect entered on its own, without an accompanying plea of not guilty.

faces – the maximum sentence if convicted and the maximum confinement in an institution if found NGI.

I. Circuit courts should personally advise a defendant entering an NGI plea of the maximum term of confinement in an institution he faces.

The state's position that an NGI plea is bifurcated into two halves – the admission of guilt and the "mental responsibility portion" – is troubling for a number of reasons. (*See* Response Br. 12-13, 19-20, 23-24). First, it ignores the plain language of the statute, which provides that an NGI plea "admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged." Wis. Stat. § 971.06(1)(d). A defendant entering an NGI plea does not plead guilty or otherwise admit guilt. On the contrary, he is asserting that, while he committed acts which constitute a crime, he is not guilty of the crime because of his lack of mental capacity.

An NGI plea is not a bifurcated plea; it is not a plea of guilty combined with an affirmative defense of NGI. An NGI plea is a plea of its own. *See* Wis. Stat. § 971.06(1).

In *Shegrud* this court found that "a defendant entering a plea of not guilty by reason of mental disease or defect waives several constitutional rights." *Shegrud*, 131 Wis. 2d 133, 137, 389 N.W.2d 7 (1986). As a result, it held that Wis. Stat. § 971.08

and *Bangert*[2] apply to NGI pleas. *Id*. This court made no mention of a "guilt phase" and did not specify that the defendant need only be informed of the consequences that result if his NGI defense fails. Instead, it simply recognized that the defendant entering an NGI plea is waiving constitutional rights by entering that plea and, therefore, the plea must be knowingly, intelligently, and voluntarily made.

Additionally, this court's subsequent holdings – that a court is not required to conduct a colloquy when a defendant withdraws an NGI plea that was entered with a not guilty plea, or a colloquy regarding whether a defendant wants to testify during the mental responsibility phase of an NGI trial – do not support the state's position. (*See* Response Br. 20-21; *See also State v. Burton*, 2013 WI 61, 349 Wis. 2d 1, 832 N.W.2d 611; *State v. Lagrone*, 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636. Those situations are not analogous to entry of an NGI plea; in neither situation does the defendant admit to criminal conduct, waive constitutional rights, or subject himself to a deprivation of liberty.

Similarly, the state's assertion that no colloquy is required for other affirmative defenses fails. (*See* Response Br. 23). Defendants waive no constitutional rights when they have a trial and assert that they are not guilty due to an affirmative defense, such as involuntary intoxication. Accordingly, no colloquy is

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

necessary. An NGI plea, on the other hand, waives the same constitutional rights that a guilty plea waives and results in the defendant being sentenced or committed. *Id.*, at 137; Wis. Stats. §§ 971.165(3), 971.17. An NGI plea "is of an entirely different nature" than other affirmative defenses. *State v. Koput*, 142 Wis. 2d 370, 388, 418 N.W.2d 804 (1988). A defendant found NGI is not acquitted of the criminal charges brought against him. Rather, in addition to serious collateral consequences[3], a judgment of not guilty by reason of mental disease or defect and a commitment order are entered, and the defendant faces a significant period of institutional confinement. *See* Wis. Stats. §§ 971.165(3)(b), 971.17(1)(b).

After the court of appeals decision in this case, a defendant entering an NGI plea need only be informed of the maximum sentence he is facing if he is not found NGI and is convicted. He need not know that he is facing *any* confinement if his plea is successful and he is found NGI. Thus, a defendant entering an NGI plea, especially one in which the state is stipulating to a finding of NGI, may not know that he is placing his liberty at risk at all. After all, he is not pleading or admitting guilt. The fact that the length of commitment may be shorter than a prison sentence makes no difference if the defendant believes he is avoiding the only consequence of which he is informed. Comparing the length of commitment

[3] Some of the collateral consequences are listed on page 38 of Mr. Fugere's initial brief.

to the length of the sentence does not support the conclusion that a defendant need not be informed of both, equally possible outcomes. (*See* Response Br. 13, 23-24).

Because a defendant waives several constitutional rights and faces a significant deprivation of his liberty by entering an NGI plea, this court should exercise its superintending and administrative authority to require that, prior to accepting an NGI plea, circuit courts inform a defendant of both the maximum sentence he faces if convicted and the maximum confinement in an institution he faces if found NGI.

II. An NGI commitment is a direct consequence of an NGI plea.

Applying the intent-effects test reveals that an NGI commitment is punitive and, therefore, a direct consequence of which a defendant entering an NGI plea must be aware at the time his plea is entered. *See State v. Muldrow*, 2018 WI 52, ¶¶5-6, 17, 381 Wis. 2d 492, 912 N.W.2d 74.

The state asserts that only the first factor of the intent-effects test – whether the sanction involves an affirmative restraint – supports a finding that an NGI commitment is punitive. (Response Br. at 13, 30). It erroneously concludes that the NGI statutes do not apply to criminal behavior and that an NGI commitment is not excessive in relation to its non-punitive purpose. (Response Br. 32-34).

"[E]vidence of a crime … is essential" to a finding of NGI and therefore, renders the NGI commitment "more likely punitive." *See Muldrow*, 2018 WI 52, ¶56. The fact that the defendant is not ultimately convicted of a crime does not mean that his behavior is not criminal. On the contrary, an NGI commitment is triggered by criminal conduct; it cannot be imposed until the individual is charged with a crime and either admits to, or is found guilty of, committing that crime. Wis. Stats. §§ 971.06(1)(d), 971.165, 971.17(2)-(3); *See State v. Langenbach*, 2001 WI App 222, ¶19, 247 Wis. 2d 933, 634 N.W.2d 916. It is the imposition of an NGI commitment as a consequence for criminal conduct that distinguishes it from both Ch. 51 and Ch. 980 commitments and contributes to a finding that it is punitive.

An NGI commitment is also excessive in relation to its alternative, non-punitive purposes. The nature and length of an NGI commitment under § 971.17 is not determined by the defendant's diagnosis or the time needed to rehabilitate him. Rather, the maximum length of the commitment is tied to the specific offense that the individual committed, as well as any applicable penalty enhancers, and sentence credit. *See* Wis. Stat. § 971.17(1), (3)(a). None of which are instructive in terms of the length of time that is needed to treat the individual's mental illness and therefore protect him and society.

These factors, as well as those set forth in the initial brief, demonstrate by the "clearest proof" that an NGI commitment is tantamount to a criminal penalty and thus a direct consequence of an NGI plea. *See Muldrow*, 2018 WI 52, ¶49.

III. Mr. Fugere is entitled to plea withdrawal.

Mr. Fugere was informed by the court, the state, and trial counsel that he faced a maximum of 60 years of *supervision*, rather than the maximum of 40 years of *institutional confinement* he actually faced. (84:12-13; App. 103-104). As the difference between 60 years of supervision and 40 years of confinement in an institution is "substantial," and the record conclusively demonstrates that Mr. Fugere did not know the correct maximum penalty he faced, due process requires that his NGI plea be withdrawn.

A. This court should reject the state's proposed harmless-error rule.

The state asks this court to stray from its long-standing and well-established standard for plea withdrawal, incorrectly asserting that two recent cases – *Reyes Fuerte* and *Taylor* – raise a question of whether the traditional harmless-error analysis applies to plea withdrawal claims based on plea colloquy defects. (Response Br. 14, 35, 37). Mr. Fugere asks that this court reject the state's proposed change and maintain *Bangert's* knowing, intelligent, and voluntary analysis.

This court should reject the state's argument because it was not raised in the court of appeals or in the state's response to the petition for review[4]. *See State v. Margaret H.*, 2000 WI 42, ¶37, n.5, 234 Wis. 2d 606, 610 N.W.2d 475. In fact, in the state's response to the petition for review it relied on *Bangert* and acknowledged that "the legal principles for post-disposition plea withdrawal are well-established." (Response to PFR 12-15).

Even if the state's argument that the traditional harmless-error analysis applies was not forfeited, it still fails. The *Bangert* standard for plea withdrawal based on a defect in the plea colloquy is longstanding and the state has failed to present a persuasive argument for upsetting the well-established test.

The harm with which the court is concerned under the *Bangert* analysis is the unknowing, unintelligent, and involuntary entry of a plea. *See State v. Brown*, 2006 WI 100, ¶23, 63, 293 Wis. 2d 594, 716 N.W.2d 906 (explaining that the duties imposed on circuit courts are "designed to ensure that a defendant's plea is knowing, intelligent and voluntary."). Both this court and the court of appeals have recognized that *Bangert* employs a limited harmless-error test – a plea colloquy defect is harmless, and therefore does not warrant plea

[4] The state did request this court to adopt a but-for test related specifically to withdrawal of NGI pleas. (Response to PFR 16).

withdrawal, if the defendant knew the information that was erroneously omitted. *See Id.*, ¶63; *See also Oneida County Department of Social Services v. Therese S.*, 2008 WI App 159, ¶¶18-19, 314 Wis. 2d 493, 762 N.W.2d 122 (finding that "harmless error analysis is essentially built into the *Bangert* analysis," in that the error in the plea colloquy is harmless if the parent doesn't allege a failure to understand or the state meets its burden of proving the plea was knowingly entered.).

This court's decisions in *Taylor* and *Reyes Fuerte* are not in tension with *Bangert*, or each other, and do not call for the radical departure from *Bangert* that the state proposes. Rather, in *Taylor*, this court rejected the state's call for a traditional harmless-error test, applying *Bangert's* knowing, intelligent, and voluntary analysis in denying the defendant's motion for plea withdrawal. *State v. Taylor*, 2013 WI 34, ¶¶28, 32-33, 40 347 Wis. 2d 30, 829 N.W.2d 482. In that case, the circuit court failed to inform the defendant of the two additional years of confinement he faced as a result of the allegation that he was a repeater. *Id.*, ¶2. This court nevertheless found that the defendant's plea was knowingly, intelligently, and voluntarily entered because the record made clear that the defendant knew the actual maximum penalty that could be imposed. *Id.*, ¶¶28, 34-35.

In *Reyes Fuerte*, this court held that harmless-error analysis applies to some plea withdrawal claims. *State v. Reyes Fuerte*, 2017 WI 104, ¶¶2-3, 378 Wis. 2d 504, 904 N.W.2d 773. However, the decision

was specific to claims for plea withdrawal under Wis. Stat. § 971.08(2). *Id.*, ¶¶19, 32. This is important because a claim under § 971.08(2) is not a due process, *Bangert* claim; that statute does not require the defendant to allege that he did not know the information that the court was supposed to provide during the plea colloquy. *See* Wis. Stat. § 971.08(2). Rather, § 971.08(2) requires only that the defendant allege that the court failed to give the warning required by § 971.08(1)(c) and that the plea is likely to result in immigration consequences. Wis. Stat. § 971.08(2); *Reyes Fuerte*, 2017 WI 104, ¶21.

Further, the harmless-error test adopted by this court in *Reyes Fuerte* is no more demanding than the limited harmless-error analysis that exists in the *Bangert* test. The court found that the plea colloquy defect in *Reyes Fuerte* was harmless because the defendant "had actual knowledge of the potential immigration consequences." *Id.*, ¶¶38-41. Thus, there was no error because the plea was knowingly made. This court made no reference to a requirement that the defendant allege that he would not have entered his plea if he had known the information the court was required to provide – the test the state is proposing.

There has been no implication from this court that the traditional harmless-error analysis now applies to *Bangert* motions and Mr. Fugere contends that this court should reject the state's request that it make such a ruling in this case. If, however, the court adopts the state's new rule, Mr. Fugere requests that

the case be remanded to the circuit court for an evidentiary hearing where both parties have the opportunity to present evidence relevant to any new standard.

B. Mr. Fugere's 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 misinformed of by the court and both parties. Consequently, Mr. Fugere is entitled to plea withdrawal as a matter of right.

To support its claim that Mr. Fugere is not entitled to plea withdrawal, the state repeatedly states – without any record citation – that Mr. Fugere "pleaded to avoid a lengthy prison term entirely." (Response Br. 14, 38-40). According to the state, Mr. Fugere would have entered his plea had he known the actual maximum commitment he faced. (Response Br. 38). That argument is purely speculative. There was no postdisposition evidentiary hearing in this case and the record contains no evidence regarding the factors that were important to Mr. Fugere's decision to enter his NGI plea.

The state also argues that the difference between a 60 year commitment and a 40 year commitment is not "substantial." In doing so, it fails to address, and thus concedes, that the difference between the 60 years of *supervision* Mr. Fugere was told he faced, and the 40 years of *institutional*

confinement he actually faced, is substantial and warrants plea withdrawal.

Further, Mr. Fugere did not get "exactly what he bargained for." (*See* Response Br. 39). Rather than reducing his exposure by half – 30 years – he only reduced it by one-fourth – 10 years.

More importantly, the outcome of the case cannot render Mr. Fugere's plea knowing, intelligent, and voluntary as required by the Due Process Clause. This court considered a similar argument in *Finley*, rejecting the state's argument that sentence reduction could be an adequate remedy to a *Bangert* violation and affirming that, if the defendant demonstrates that the plea colloquy was deficient and that he did not know or understand the information that should have been provided, he is entitled to plea withdrawal. *State v. Finley*, 2016 WI 63, ¶¶86, 92-94, 370 Wis. 2d 402, 882 N.W.2d 761. The harm that *Bangert* seeks to avoid is the unknowing waiver of constitutional rights and acceptance of legal consequences; the fact that a defendant ultimately receives the sentence he "bargained for" does not cure that harm.

The difference between the 40 years of confinement in an institution that Mr. Fugere faced and the 60 years of supervision of which he was informed is substantial and rendered Mr. Fugere's plea unknowingly, unintelligent, and involuntary.

CONCLUSION

For the reasons stated above, and in the initial brief, Mr. Fugere respectfully requests that this court establish the rule set forth in his briefs and grant him plea withdrawal.

Dated this 13th day of December, 2018.

Respectfully submitted,

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CERTIFICATIONS

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 2,881 words.

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 13th day of December, 2018.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender