STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP002401-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN A. ORTIZ-RODRIGUEZ,

Defendant-Appellant.

On appeal form a judgment of conviction and an order denying postconviction relief entered in the Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Mr. Ortiz-Rodriguez was entitled to a hearing on his motion for plea withdrawal.

Mr. Ortiz-Rodriguez alleged in his motion that his attorney's assurance that the State had agreed to recommend 5-8 years of initial confinement persuaded him to plead guilty where he would not otherwise have done so. The State, like the circuit court, faults Mr. Ortiz-Rodriguez for failing to allege "facts that explain how it was the alleged misinformation from counsel that led him to plead to the lesser charge." (Response Brief at 8).

What could those "facts" *possibly* be?

Mr. Ortiz-Rodriguez alleged that the offer he believed the State had made to recommend a moderate initial confinement term of 5-8 years was sufficiently attractive to him to lead him to plead, while he would never have done so if he had known the State would be free to up its recommendation to 20 years of initial confinement or more. (29:2) If this is not a sufficient explanation for his plea decision, what possible objective "facts" could he add?

If a motion that alleges that the defendant pled guilty because he was falsely led to believe that the State would be making a favorable prison recommendation is insufficient because the defendant

cannot allege some kind of additional "facts" that are not "conclusory" or "self-serving" to explain why a particular offer was sufficiently favorable to induce him to plead, while an offer to recommend lengthy prison up to the maximum would not have been, then a motion for plea withdrawal based on misadvice about the plea agreement simply cannot be sufficiently pled to secure a hearing. Ever.

Is that really where we are? That is not what is contemplated by *Hill v. Lockhart*, 474 U.S. 52 (1985). There, the habeas petition fell short because while it alleged that the petitioner was misinformed about his parole eligibility date, unlike Mr. Ortiz-Rodriguez, he did not allege that he would have insisted on a trial if he had been correctly informed. *Id*., at 60. The Court considered the question whether incorrect advice *about parole eligibility* could ever be constitutionally ineffective assistance of counsel. The Court decided it was unnecessary to answer that question because the petitioner had not alleged that the incorrect information had caused him to forego a trial and had not alleged "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Id*. In the absence of special circumstances, it is not facially apparent why the incorrect advice about parole eligibility would have any effect on the plea decision. But it is illogical to read *Hill* as requiring that when a defendant is grossly misinformed about the substance of the plea agreement and led to believe that the prosecutor will be making a prison confinement recommendation of

only one quarter to two fifths of the actual recommendation, some kind of "special circumstances" must be pled to explain why this mattered.

The State also asserts that the plea offer he believed the State had made cannot have induced Mr. Ortiz-Rodriguez to plead guilty because he knew that the sentencing court would not be bound by the State's recommendation. (Response Brief at 7). It is the worst sort of willful blindness to imagine that because defendants know courts are not *bound* by plea agreements, plea agreements cannot induce defendants to plead. Anyone with even a passing familiarity with our legal system understands the importance of plea agreements and the correlation between the State's recommendation and the likely outcome.

If one *believes* Mr. Ortiz-Rodriguez's assertion that he really did believe that the state would be recommending 5-8 years and he decided to accept that offer, it is easy to understand why the offer was attractive enough to cause him to plead. There is no mystery about that. There are no additional "facts" that are necessary to understand that a favorable plea offer is likely to induce a plea. *Of course* Mr. Ortiz-Rodriguez would take that offer even if he was otherwise determined to have a trial. Nor is it in any way surprising that he would reject a plea offer that was substantially less favorable (leaving the State free to make any recommendation it wished) and take his chances at trial even if it meant risking the 25-

year mandatory minimum. If he had known that even if he pled guilty the State would be recommending 20 years of initial confinement anyway, the amendment to the charge to avoid the 25-year mandatory minimum would have been substantially less of a benefit than he believed he was getting.

The magnitude of the misadvice and its likely effect on Mr. Ortiz-Rodriguez' plea decision is *easy* to understand. The problem is not that there were not sufficient "facts" in Mr. Ortiz-Rodriguez's motion to allow the court to assess his allegation of prejudice. The problem is that the circuit court simply did not believe his factual assertions. The State's repeated characterization of Mr. Ortiz-Rodriguez' allegations as "self-serving" indicates that the State does not believe him either. (Response Brief at 7, 9). But that does not matter. The circuit court was not permitted to evaluate Mr. Ortiz-Rodriguez' credibility without the benefit of his testimony. The court was required to assume the facts alleged in the motion to be true. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. "If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing." *Id.*, n. 6, *citing State v. Leitner,* 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony).

CONCLUSION

Mr. Ortiz-Rodriguez requests that the Court reverse the decision of the circuit court denying his motion for plea withdrawal and remand for a *Machner* hearing.

Dated this 18th day of June, 2019.

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 986 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 18th day of June, 2019.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender