STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP000049-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RUSSELL L. WILSON,

Defendant-Appellant.

Appeal Of An Amended Judgment Of Conviction And
An Order Denying Postconviction Relief
Entered In Washburn County Circuit Court,
The Hon. Eugene Harrington Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The State Failed To Meet Its Burden Of Proving By Clear and Convincing Evidence That Wilson's Plea Was Knowing, Intelligent, And Voluntary.

A. *A sentence of life imprisonment without the possibility of release is "substantially higher" than 25 years of initial confinement.*

The only argument in the State's response that is germane to Wilson's *Bangert*[1] claim is that for a 49-year-old man, a sentence of life imprisonment without the possibility of release is not "substantially higher" than 25 years of initial confinement. State Br. at 12-13 (*quoting State v. Cross*, 2010 WI 70, ¶38, 326 Wis. 2d 492, 786 N.W.2d 64). As discussed below, much of the State's brief responds to plea withdrawal arguments not made by Wilson.

But first, the State's only pertinent argument just does not hold water. There may be situations where the maximum amount of initial confinement is effectively a life sentence for a defendant. This is not one of them. After 25 years of initial confinement, Wilson would be 74 years old upon release[2] – 5 years

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

[2] Wilson was born on November 29, 1966. (99). Wilson was arrested around his 49th birthday, and on December 1, 2015, was given a $25,000 cash bond that he never posted. (1, 89). Because Wilson is entitled to credit for pre-sentence

younger than the current Chief Justice of the Wisconsin Supreme Court.[3]

In fact, because Wilson was convicted of a Class C felony, he would be eligible for sentence adjustment when he served 85% of his 25 years of initial confinement, or 21.25 years. Wis. Stat. § 973.195. He would thus be around age 70 upon release. As the State points out, Wilson's *average* life expectancy is about 80 years of age. State Br. at 13. Certainly, even with a maximum sentence of 25 years initial confinement, Wilson could expect to enjoy at least 5-10 of his final years out in society rather than confined to a prison cell.

However, Wilson would have no expectation or hope of ever being free again if he were sentenced to life without the possibility of parole or extended supervision. A sentence of "life without" is the harshest sentence Wisconsin law allows. Wilson would be precluded from seeking sentence adjustment. Wis. Stat. §§ 302.114(1) and 973.014(1g)(a)3. It is Wisconsin's version of the death penalty; it is condemning the defendant to die in prison. The United States Supreme Court has recognized the unique psychological impact of such sentences.

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custody from at least December 1, 2015 forward, this is the effective start date of his sentence. Wis. Stat. § 973.155.

[3] https://en.wikipedia.org/wiki/Patience_D._Roggensack (accessed September 2, 2019)

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. … [The] sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.

Graham v. Florida, 560 U.S. 48, 69–70 (2010) (quotation marks and citations omitted).

A sentence of "life without" means that the final chapter of Wilson's life has been written out. It would only be a matter of time before he would die in prison. A sentence of 25 years of initial confinement, however, would give him reason to care for his body and soul, in preparation for the time he is allowed to rejoin society. A sentence of "life without" would deprive Wilson of all hope, and it is this fundamental aspect of a "life without" sentence that makes it "substantially higher" than a sentence of 25 years initial confinement. *Cross*, 2010 WI 70, ¶38.

B. *The State relies on arguments irrelevant to a Bangert claim.*

Because Wilson made his prima facie *Bangert* claim, the burden shifted to the state to "prove by

clear and convincing evidence that the defendant's plea was knowing, voluntary, and intelligent despite the deficiencies in the plea hearing." *Cross*, 2010 WI 70, ¶20. When the defect is a failure to advise a defendant of the correct range of punishments, the State must prove that the defendant actually knew the correct range of punishments. *State v. Finley*, 2016 WI 63, ¶95, 370 Wis. 2d 402, 439, 882 N.W.2d 761, 780. Since it is undisputed that Wilson did not know that he not actually subject to a sentence of "life without," he is entitled to withdraw his plea.

To think of it another way, while there are various grounds for withdrawing a plea, *Bangert* and its progeny set out the process for establishing one ground: when the plea colloquy fails to demonstrate that a plea is knowing, intelligent, and voluntary. Defendants have a "fundamental due process" right to knowingly, intelligently, and voluntarily enter a guilty plea. *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577, 582 (1997) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). A defendant cannot make an intelligent decision to waive all of their constitutional trial rights if they do not know what those rights are, what the state has to prove to convict the defendant, or the range of punishments the defendant faces if the state is successful. *Id*. If a defendant's plea is not entered knowingly, intelligently, and voluntarily, the defendant's due process rights have been violated, and plea withdrawal is necessary to avoid a manifest injustice.

The statutes and the courts require judges to advise defendants of certain information before accepting a plea to help ensure that the plea is indeed knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶ 35, 293 Wis. 2d 594, 616, 716 N.W.2d 906, 917. To protect the defendant and motivate the plea court to fulfill these duties, when the plea judge fails to provide the requisite information the burden shifts to the state to prove that the defendant knew the necessary information despite the errors in the plea colloquy. *Id.* at ¶ 40. Because the state failed to meet its burden, Wilson is entitled to withdraw his plea.

The supreme court explained in *State v. Taylor*, how *Bangert* provides one method, but not the only, of establishing a manifest injustice that allows plea withdrawal. "Showing that a plea was not entered knowingly, intelligently, and voluntarily is one way to prove a manifest injustice. The defendant can otherwise establish a manifest injustice by showing that there has been a serious flaw in the fundamental integrity of the plea." *State v. Taylor*, 2013 WI 34, ¶ 49, 347 Wis. 2d 30, 62, 829 N.W.2d 482, 497. (quotation marks and citation omitted).

Thus, the State's suggestion that other considerations besides the *Bangert* violation prevents Wilson from withdrawing his plea is incorrect. State Br. at 17-18. For example, the State cites *Cross* for the proposition that the favorability of a plea deal and the defendant's admissions counsel against plea

withdraw. State Br. at 17 (*Citing Cross*, 326 Wis. 2d 492, ¶ 43).

However, the State is citing to the portion of the *Cross* opinions where the Court had already concluded that there was no *Bangert* violation, and the supreme court was rejecting Cross's more general "manifest injustice" argument. The *Cross* court first states "[w]e conclude that Cross has not made a prima facie showing that the circuit court failed to comply with § 971.08 or the requirements outlined in *Brown* and *Bangert* [.]" *Id*. at ¶ 41. Then, in the following paragraph, the court states "[w]e *also* conclude that Cross has not shown plea withdrawal is necessary to correct a manifest injustice." *Id*. at ¶ 42 (emphasis supplied). The court then addresses the factors raised by the State here. The court was not suggesting that these were *additional* factors that a defendant had to establish on top of the *Bangert* claim. Nonetheless, it is worth noting that trial counsel testified that the possibility of serving life without extended supervision was a "significant factor" in Wilson's decision to enter the plea and not take the case to trial. (98:28; App. 128).

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In sum, it is undisputed that when Wilson entered his plea he believed that he could be sentenced to life without the possibility of parole or extended supervision. This is substantially higher than the 25 years of initial confinement he actually faced. His plea was thus not knowing, intelligent, and

voluntary, and was in violation of his due process rights. He is thus entitled to withdraw his plea to avoid a manifest injustice.

CONCLUSION

For the reasons stated above and his opening brief, Wilson is entitled to withdraw his plea.

Dated this 3rd day of September, 2019.

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 1,491 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.

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.

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 3rd day of September, 2019.

Signed:

THOMAS B. AQUINO
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