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DEPARTMENT OF JUSTICE

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Sheila T. Reiff
Wisconsin Court of Appeals
110 East Main Street
P.O. Box 1688
Madison, WI 53701

Re: *State of Wisconsin v. Etter L. Hughes*
Case No. 2021AP1834-CR
Dist. I

Dear Ms. Reiff:

Pursuant to this Court's June 28, 2022 order, the State provides this response addressing the impact of *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, on the above-entitled matter.

Relevant Factual Background

The State charged Hughes with four child neglect and failure to prevent harm felonies related to the death of a 7-year-old boy in her care and severe abuse of the boy's brother, ostensibly at the hands of Hughes's roommate. After learning from the surviving boy that Hughes directly participated in the abuse as well, the State amended the charges to reflect Hughes's involvement and charged her with first-degree reckless homicide as a party to a crime, child neglect causing great bodily harm, two counts of failure to prevent bodily harm to a child, and two counts of repeated acts of physical abuse of a child as party to a crime.

Hughes reached a plea agreement with the State that she would plead no contest to the original charges and the State would recommend substantial prison time. She received a total sentence of 20 years of initial confinement and 15 years of extended supervision. Hughes then filed a postconviction motion seeking to withdraw her plea on grounds of ineffective assistance of counsel and that the plea was not knowingly, intelligently, and voluntarily entered because she was not correctly informed of the maximum penalties she would face if she went to trial on the amended

charges. This was so, Hughes alleged, because she did not know that Wis. Stat. § 948.03(5)(c) prohibits charging a person with both repeated physical abuse of a child and with failure to prevent bodily harm to that same child over the same time period, and therefore Hughes thought she was facing a longer prison sentence than she actually was because two of the charges would have been dismissed, if challenged.

The circuit court denied Hughes's postconviction motion without a *Machner* hearing, and Hughes appealed. After briefing concluded, this Court requested information from the parties regarding whether *Cross* impacts the analysis of this case. The State submits this letter in response.

Analysis

The State believes the facts in *Cross* are too far afield from the facts of this case for *Cross* to have much impact on the analysis here. *Cross* dealt with a defect in a plea colloquy where the court gave the defendant incorrect information about the maximum sentence that could be imposed on the charges to which the defendant was pleading guilty and told Cross that the potential maximum was 10 years higher than the maximum he actually faced. *Cross*, 326 Wis. 2d 492, ¶¶ 8–12. The question was whether a *Bangert*[1] hearing to address a defective plea colloquy was necessary under those circumstances. *Id.* ¶ 15. The supreme court held that if a defendant is incorrectly told during the plea colloquy that he is facing a sentence higher, but not substantially higher, than the maximum authorized by law, no *Bangert* hearing is necessary. *Id.*

But the only reason that *Cross* was worthy of the supreme court's attention was due to the requirements imposed by the *Bangert* decision itself and its progeny. Those decisions hold that if a defendant shows that the circuit court fails to perform one of its mandatory duties during the plea colloquy and asserts that he did not know or understand the information that should have been provided by the court, he is entitled to an evidentiary hearing at which the burden switches to the State to disprove the defendant's claim and show that the plea was nevertheless intelligently entered. *Cross*, 326 Wis. 2d 492, ¶¶ 19–20. There was no dispute between the parties that Cross was given incorrect information and that he did not know the correct information. *Id.* ¶¶ 20–21. The dispute in *Cross* was whether such a minor mistake during the colloquy was sufficient to amount to a *Bangert* violation and trigger the hearing process. *Id.* ¶¶ 22–28. The supreme court recognized that a defendant who is informed that they face a higher punishment than authorized is certainly aware that they also face a lesser amount of punishment, and held that "requiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy

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

is simply not necessary for the protection of a defendant's constitutional rights." *Id.* ¶¶ 31–32.

That is a very different scenario than what is at issue in this case. Contrary to the defendant in *Cross*, Hughes is not alleging that she was misinformed of and did not understand the potential maximum sentences of the charges to which she was pleading. Hughes was informed of the correct maximum penalties during the plea colloquy for those charges. And she is not alleging any defect with the plea colloquy, so there is no *Bangert* question. Rather, Hughes is claiming that she did not understand the potential maximum prison term she faced if she went to trial on a *different* set of charges, because her counsel could have successfully moved to dismiss two of the amended charges but did not. Hughes is raising a *Nelson/Bentley*[2] claim that something external to the plea process—alleged ineffective assistance of counsel—rendered her plea not intelligently entered because her counsel did not advise her that, if she went to trial on the charges in the amended information, she could not be convicted of the two failure-to-prevent-harm charges.

So, unlike the thorny *Bangert* procedural question at issue in *Cross*, Hughes's claim is really a straightforward ineffective assistance of counsel claim: did counsel perform deficiently in both failing to move to dismiss the two failure-to-prevent-harm charges and advising Hughes to take the plea, and if so, is there a reasonable probability that Hughes would have opted to go to trial on the remaining four charges in the amended information instead of accepting the deal to plead no contest to the original charges? And contrary to the mandatory hearing procedure established by *Bangert*, courts are not required to hold hearings on ineffective assistance of counsel claims if the defendant cannot make a sufficient showing of either deficient performance or prejudice. The State will not here rehash its response brief, but in short, even assuming that counsel's failure to move to dismiss the two failure-to-protect charges was deficient, Hughes cannot show that counsel's advice to plead to the original charges was deficient or prejudicial because the evidence against Hughes was overwhelming, and the original charges carried less than half the potential sentencing exposure than what the four remaining charges in the amended information would have carried.

To the extent that *Cross* could be considered relevant to the issue in this case, though, it supports the circuit court's decision to deny Hughes's motion to withdraw her plea. The charges in the amended information as filed carried a maximum potential sentencing exposure of 114 years and 6 months imprisonment. Had counsel moved to dismiss the two failure-to-protect charges, the maximum potential sentence

[2] *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972); *State v. Bentley*, 201 Wis. 2d 303, 313–14, 548 N.W.2d 50 (1996).

Hughes could have received on the remaining charges would have been 102 years and six months of imprisonment. That is a discrepancy of a mere 12 years; 114 years is not substantially higher than 102 years. And, like in *Cross*, if Hughes was told she was facing 114 years she was certainly also aware that she could have been sentenced to 102 years of imprisonment. *Cross*, 326 Wis. 2d 492, ¶ 31. Even assuming that Hughes believed she was facing 114 years of exposure on the amended charges, that is not a substantial difference from the 102 years of exposure she would have faced on the remaining charges. There is no reasonable probability that Hughes would have opted for trial if told she was actually facing 102 years instead of taking the plea that exposed her to only 49.5 years.

Sincerely,

Electronically signed by:

Lisa E.F. Kumfer
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Assistant Attorney General

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