STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2021AP1834-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ETTER L. HUGHES,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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Etter L. Hughes, by her attorney and pursuant to sections 809.62(1g)(a) and (b), *Stats.*, respectfully petitions this court to review the November 1, 2022 adverse decision of District I of the court of appeals, denying Ms. Hughes' request to overturn the final order of the Honorable J.D. Watts, Milwaukee County Circuit Court, denying her postconviction request to withdraw her plea in Milwaukee County Case Number 2016CF5396.

ISSUES PRESENTED

1. Did the court of appeals error in concluding that *State v. Cross,* 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, a holding involving the weighing of the value of misinformation in a *Bangert* claim when determining whether plea withdrawal is appropriate, was applicable in a *Nelson/Bentley* claim to support its conclusion that a defendant knowingly and voluntarily entered a plea despite receiving indisputably incorrect information regarding the value of a plea bargain – in this case that Ms. Hughes benefited from the dismissal of two Class F felony charges when those charges were multiplicitous and conviction would not have been legally possible?

The court of appeals held that Ms. Hughes' plea was knowing and voluntary despite the fact that she believed that she was receiving a benefit regarding the dismissal of two Class F felonies as part of the plea agreement when those charges were indisputably multiplicitous. The court opined that it was not satisfied that but for the error in permitting multiplicitous charges to be added in an amended information in the

days leading up to trial in response to Ms. Hughes making her intentions to proceed with trial clear, she would have rejected the plea offer and proceeded to trial instead.

In support of its position, the court of appeals relied upon *State v. Cross*, a case involving a *Bangert* claim where a defendant was informed by the judge during the colloquy of an incorrect and higher maximum possible penalty, where this court declined to grant plea withdrawal because the differences in potential exposure were not significant in the court's view. The court of appeals concluded that even though *Cross* did not involve a *Nelson/Bentley* claim challenging the knowing nature of the plea, the same logic applies.

Thus, it held that because Ms. Hughes received the benefit of a third charge being dismissed as part of the plea agreement, a first degree reckless homicide that had been added in the same amended information on the eve of trial, Ms. Hughes had the requisite understanding and knowledge of the benefits of the plea agreement. Therefore, the court concluded her pleas were knowing and voluntary as a matter of law.

The circuit court briefly concluded that the amendment was proper without specific detail because "[c]ounts three and four were based on the defendant's knowledge that Martinez was abusing TW and JW and her failure to act to prevent the abuse and counts five and six were based on the defendant's repeated abuse of TW and JW, either directly or as a party to a crime." Therefore, the court held there was no multiplicity issue.

2. Did the court of appeals err in concluding that trial counsel was not ineffective as a matter of law because Ms. Hughes failed to satisfy the prejudice prong, having previously concluded the errors of counsel did not result in her plea being knowing and voluntary?

The court of appeals held that because Ms. Hughes' plea remained knowing and voluntary despite the multiplicity issue (and it concluded there was no error in the addition of the third charge), trial counsel was not ineffective as a matter of law because no prejudice had occurred.

The circuit court held that because there was no prejudice caused by the filing of the amended information related to any of the three additional charges, trial counsel could not have been ineffective for failing to raise an objection.

CRITERIA FOR REVIEW

At issue in this petition is a question of whether the precedent created by *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, a case involving a faulty plea colloquy and *Bangert* claim, not a *Nelson/Bentley* claim that the plea was unknowing and involuntary, permits a reviewing court to assess the likelihood that a defendant would have still entered into a plea agreement following that individual receiving indisputably incorrect information about the benefits of the agreement such that they believed they were receiving a legal benefit that could never come to fruition. Here, the court of appeals, concluded that this precedent is applicable to *Nelson/Bentley* claims, citing *State v. Howell*, 2007 WI 75, ¶8, 301 Wis. 2d 350, 734

N.W.2d 4, to support its position ("[I]t has been recognized that the issues raised in [*Bangert* and *Nelson/Bentley*] claims may sometimes be interrelated." (Appeal No. 2021AP1834-CR, COA Decision, ¶40).

The court of appeals decision, however, is seemingly undermined by reference to the *Cross* case in the Wisconsin Supreme Court decision, *State v. Dillard*, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44.

In *Dillard*, this court weighed this very question in the footnotes, but did not specifically address the matter in the holding as both the State and defendant agreed that *Cross* was inapplicable. The Court wrote:

> The defect alleged in *Cross* was "insubstantial" misinformation about the penalty given to the defendant during the plea colloquy. In contrast, the plea colloquy in the present case correctly informed the defendant of the penalty for armed robbery without a penalty enhancer.
>
> In the present case, unlike in *Cross*, the defendant's acceptance of the State's proposed plea agreement and the defendant's entry of the plea of no-contest to armed robbery were inducted by "significant" misinformation the defendant received prior to the plea colloquy regarding the penalty he would fact if he did not accept the State's proposed plea agreement and enter a plea of no contest.

Dillard, 2014 WI 123, fn. 22.

While Ms. Hughes contends that the "weighing" of the error supported by *Cross* in the assessment of whether plea withdrawal is necessary is simply not applicable to *Nelson/Bentley* claims where a defendant receives fundamentally incorrect legal advice about the benefits of a plea agreement, there is an argument that

the language of the footnote may leave the question open. Is it simply that *Cross* is inapplicable to *Dillard* because it is a different type of claim, that the decision to enter into the plea agreement was not an knowing and voluntary one"? Or is it that the error in *Cross* was "insubstantial" while that in *Dillard* was "substantial" due to the differences in the two maximum possible penalties involved? The answer is not entirely clear from the *Dillard* holding.

In the instant case, the court of appeals has concluded that absent other instructions on this issue, *Cross* permits a reviewing court to decide whether misinformation regarding a plea negotiation is "significant" enough for the decision to enter the plea to be held to one that is not knowing and voluntary as a matter of law. This conclusion, however, seems to run counter to the protections of the Sixth Amendment, which make the decision of whether to enter into a plea and relieve the State from its burden of proving the case beyond a reasonable doubt at trial a defendant's alone[1].

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[1] The U.S. Supreme Court has recently opined on the important of a client's autonomy regarding certain decisions including the entry of a guilty plea in *McCoy v. Louisiana*, 584 U.S. ___ , 6-7 (2018), holding:

> Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. *See Jones v. Barnes*, 463 U. S. 745, 751 (1983).
>
> Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own (continued)

As a result, guidance on this issue is necessary on this issue, as application of the court of appeal's interpretation of the applicability of the *Cross* holding to *Nelson/Bangert* claims will have widespread impact on the constitutional protections of criminal litigants of this state for years to come.

This holding in essence allows a reviewing court to step into the shoes of a defendant and decide whether that person should have entered into a plea agreement had they had the correct information. This process will without question invade the autonomy of the criminal defendant and supplants the defendant's interests and wishes for the court's preferences, a practice Ms. Hughes implores this court to halt.

As such, Ms. Hughes seeks review of the court of appeals decision in this case as it involves a real and significant question of both federal and state constitutional law, a question that appears to have been answered in *State v. Dillard* but is one that the court of

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> inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are. See *Weaver v. Massachusetts*, 582 U. S. ___, ___ (2017) (slip op., at 6) (2017) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State.").

appeals believes to still be unclear, and finally involves application of the *Cross* holding in a way that appears in direct conflict with the *Dillard* case. Wis. Stat. §809.62(1r)(a), (c), and (d).

STATEMENT OF THE CASE & FACTS

On December 3, 2016, Ms. Hughes was charged in the instant case in the original criminal complaint with four counts, as follows:

> Count One: Neglecting a Child, Causing Death, Party to a Crime, contrary to Wis. Stat. §§948.21(1)(d), 939.05;
>
> Count Two: Neglecting a Child, Causing Great Bodily Harm, Party to a Crime, contrary to Wis. Stat. §§948.21(1)(c), 939.05;
>
> Count Five: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b);
>
> Count Six: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b).

(1).

In support of the charges, the probable cause section of the criminal complaint in this case asserts that on the morning of November 29, 2016, Ms. Hughes, J.W. and L.F. awoke to find T.W., who was seven years old, struggling to breathe and in and out of consciousness. (1:6-8). At the time, Ms. Hughes, her son, L.F., and her two young cousins, J.W. and T.W., were residing at the home of the co-defendant, Mary Martinez. The complaint details the forensic interviews of child witnesses L.F. and J.W., which stated that Ms. Martinez

had physically assaulted T.W. the night prior, November 28, 2016, before they went to bed and while Ms. Hughes was not present. (1:7-8).

In the morning upon waking, it was discovered that T.W. was in a medical crisis and unresponsive. Ms. Hughes begged Ms. Martinez to call 911, but Ms. Martinez refused to do so, telling Ms. Hughes to go dump T.W.'s body in the woods. (1:6-8). Ms. Hughes, who had planned to move out of the residence that day with the children, was all packed to go. When Ms. Martinez prevented her from calling 911, Ms. Hughes loaded the children into the car to take T.W. to St. Luke's Hospital. (1:6-8). T.W. was unresponsive upon arrival and after transport to Children's Hospital, succumbed to his injuries inflicted upon him by Ms. Martinez that same day.

Ms. Hughes was taken into custody and interviewed about T.W.'s death. She denied causing the injuries to T.W., J.W., and L.T. were both subject to forensic interviews, as well. During the forensic interviews of J.W. and L.F., neither child alleged that Ms. Hughes had harmed T.W. or J.W. and both stated that it was Ms. Martinez would both physically assault the two brothers and withhold food from them and not Ms. Hughes. (1:6-8). As a result of the reports from J.W. and L.F., Ms. Martinez was also arrested within days of T.W.'s death and interviewed by police.

On December 12, 2016, after the filing of only the original four-count complaint, Ms. Hughes waived her right to a preliminary hearing. As a result, no testimony was taken and the bind over determination was made based solely upon the probable cause section of the criminal complaint. (42). That same day, the State filed

an information reflecting the identical four counts as those charged in the original criminal complaint. (106).

The case remained in a trial posture throughout the litigation, with a final pretrial and trial date set for May 26, 2017 and June 5, 2017, respectively. Throughout the process, it was clear that Ms. Hughes intended to dispute the allegations and go to trial on the matter. (93). At the final pretrial hearing one week before the jury trial was set to begin, the State filed a new information with the court, amending the charges as follows:

> Count One: First Degree Reckless Homicide, Party to a Crime, Wis. Stat. §§940.02(1), 939.05;
>
> Count Two: Neglecting a Child, Causing Great Bodily Harm, contrary to Wis. Stat. §948.21(1)(c);
>
> Count Three: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b);
>
> Count Four: Child Abuse, Failing to Prevent Harm, contrary to Wis. Stat. §948.03(4)(b);
>
> Count Five: Physical Abuse of a Child, Repeated Acts Causing Bodily Harm, Party to a Crime, contrary to Wis. Stat. §948.03(5)(a), 939.05.
>
> Count Six: Physical Abuse of a Child, Repeated Acts Causing Bodily Harm, Party to a Crime, contrary to Wis. Stat. §948.03(5)(a), 939.05.

(12).

The amendment increased Ms. Hughes' prison exposure by more than one hundred years. Additionally, at that hearing, the State filed a notice of expert testimony, a notice of intent to use J.W. and L.F.'s forensic interviews, and its witness list.

The court accepted the amended information and permitted the addition of the new homicide charge and upgrading of the remaining charges without any argument or supplementing of the factual basis from either party. (43). There was no objection by the defense at that time to the filing of the amended information. (43). The case continued in a trial posture at that time and the matter was set over for trial, which was scheduled to begin on June 6, 2017. (43).

The day before the trial was to start, Ms. Hughes' entered pleas of "no contest" to the four initial charges found in the original complaint and information, though the State moved to strike all party to a crime modifiers on those four counts. (40). The matter was set out for sentencing, and a presentence investigation report ordered by the court. (20; 32). On July 20, 2017, the Honorable M. Joseph Donald sentenced Ms. Hughes to a total sentence between all counts of 20 years initial confinement and 15 years of extended supervision. (30; 32).

On June 1, 2021, Ms. Hughes filed a postconviction motion asserting several claims related to the filing of the amended information, its timing and counsel's failure to object to the filing of the three additional charges. (87). Ms. Hughes alleged the following errors had occurred:

1. The amended information was filed by the State and accepted by the court in error

because the complaint and the record at the time of filing contained no factual basis supporting the addition of the three new counts filed against Ms. Hughes.

2. The amended information was filed by the State and accepted by the court in error because counts three and four were multiplicitous to counts five and six, and the legislature likewise specifically prohibited the charging of the multiple counts in section 948.03(5)(c), *Stats.*

3. Because the amended information was filed in error and Ms. Hughes was incorrectly led to believe her exposure had legally increased by more than one hundred years by the filing of the three new charges, a manifest injustice has occurred because her understanding of the plea agreement at the time she waived her right to trial was based on presumptions that were false.

4. Because of the late filing of the three new charges less than two weeks before trial, Ms. Hughes' counsel could not be properly prepared to defend her case, and this deprived her of right to effective assistance of counsel.

5. Trial counsel was ineffective as a matter of law for failing to object to the amended information and for providing Ms. Hughes with incorrect advice regarding the value of the final plea agreement.

(87).

On September 2, 2021, the circuit court issued a written decision denying all claims raised by Ms. Hughes in her postconviction motion. (100). Related to the previously stated five arguments of Ms. Hughes, the court concluded the following:

1. The amended information was properly filed because the new charges were related to the context of the initial investigation and the allegations that Ms. Hughes had personally physically abused J.W. and T.W., while not detailed throughout the complaint, were transactionally related to the facts in the complaint. (100:7-9).

2. The court briefly addressed the multiplicity argument, concluding there was no issue, because "[c]ounts three and four were based on the defendant's knowledge that Martinez was abusing TW and JW and her failure to prevent the abuse, and counts five and six were based on the defendant's repeated abuse of TW and JW, either directly or as a party to a crime." (100:9-10). Therefore, the court wrote, the "charges are plainly not identical in law or fact." (100:10).

3. Because the amended information was properly filed in the court's eyes and contained probable cause, there was no illusory plea bargain and the benefit Ms. Hughes' received was real and significant. (100:10).

4. Based on the supplemental information provided by the State regarding the advance notice to counsel of the forthcoming charges,

the court found that there was no issue with adequate notice that implicated Ms. Hughes' due process rights or her counsel's ability to defend against the new allegations. (100:10-12).

5. Because the court found that there was no prejudice regarding counsel's failure to object to the amended information (i.e., the amendment to the information and its subsequent acceptance by the court was proper), trial counsel was not ineffective as a matter of law. (100:12-13).

Ms. Hughes submitted a timely notice of appeal challenging the adverse decision of the circuit court. The parties submitted briefs on the issues and at the conclusion of the briefing period, the court of appeals requested additional submissions on the relevance of *State v. Cross*. (June 28, 2022 Court Order Requesting Parties to Submit Letter Briefs Addressing What, If Any, Impact *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, has on this case).

Both the State and Ms. Hughes asserted in their letter briefs that the *Cross* matter was inapposite of the issues before the court in the instant case. The State, for its part, asserted that "[t]he 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." (State's Response to CTO, 2). As this case does not involve a *Bangert* issue and was really a claim of ineffective assistance of counsel in the State's view, it concluded that *Cross* had little impact. (State's Response to CTO, 3).

In the defense response, Ms. Hughes asserted that the *Cross* holding was likewise not on point for the issue presented in this case. (Defendant's Response to CTO).

Following submissions, the court of appeals issued a decision denying Ms. Hughes request for plea withdrawal. Regarding the two issues presented in this petition for review, the court of appeals found that Ms. Hughes was correct that there was a multiplicity issue in this matter and that counsel was deficient for failing to move for dismissal of the two multiplicitous counts. (COA Decision, ¶¶29-32, ¶43). The court, however, concluded that Ms. Hughes was not entitled to relief.

The court held that *State v. Cross* was applicable in the *Nelson/Bentley* context and that the court could assess the significance of the misinformation provided regarding the benefits of the plea negotiation. The court concluded that the error in Ms. Hughes being informed that she was receiving a benefit of the dismissal of two additional charges when conviction on those offenses and two Class F felonies to which she pled was not legally permissible on multiplicity grounds was not a significant factor in her decision to enter into the plea agreement[2]. The court wrote:

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[2] Of note, the court of appeals assumes that the misunderstanding that Ms. Hughes had was that she faced an additional 12 years on the multiplicitous counts had she not accepted the plea bargain and was found guilty of all counts at trial. This is an incorrect view of what Ms. Hughes plainly believed the benefit of the plea bargain to be at the time that it was entered.

It was not twelve years that Ms. Hughes believed she was avoided by entering into the plea agreement – it was an additional **thirty** years of imprisonment. The dismissed counts, five and six,

(continued)

> We are not persuaded that the conceded error here—including the two counts of failure to prevent abuse together with the two counts of repeated physical abuse of a child in the amended information—affected Hughes' ability to reasonably evaluate the benefit of the plea offer presented by the State.

(COA Decision, ¶39).

On those same grounds, the court of appeals concluded that Ms. Hughes ineffective assistance of counsel claims failed. The court held that while Ms. Hughes had demonstrated deficiency in that her counsel failed to object to two charges being added to the amended information which were statutorily prohibited, no prejudice has ensued. (COA Decision, ¶43). While Ms. Hughes asserted that she would not have entered into the plea agreement had she had a correct understanding of the benefits of the plea offer, this was not enough according to the court. (COA Decision, ¶44). The court found that Mr. Hughes "has

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were both Class E felonies, with a maximum possible penalty of fifteen years on each count. To get this number down to the twelve years, the court of appeals assumes Ms. Hughes would have accepted a plea negotiation involving a plea to two Class E felonies rather than the two Class H felonies had there been a successful challenge to the multiplicitous charges. There is no reason to draw this conclusion (or a conclusion that the State would have required such a plea) and nothing to support that she would have accepted this theoretical plea agreement had the lesser offenses been struck. Therefore, the court of appeals reasoning that the "significance" of the misunderstanding here was not such that it impacted her decision-making regarding the plea is flawed. A thirty-year difference in maximum possible penalty is akin to the misunderstanding that occurred in ***Dillard***, where the difference was forty years.

not demonstrated that there was a reasonable probability of a different outcome. As a result, the court of appeals denied her claim for plea withdrawal. (COA Decision, ¶¶44-45).

Ms. Hughes now petitions this court for review of the matter.

ARGUMENT

I. This Court should grant review and hold that *State v. Cross* is inopposite with *Nelson/Bentley* claims and instead, that once a defedant has demonstrated that they entered into a plea agreement based upon fundamentally incorrect information material to the terms of the plea negotiation, that plea withdrawal must be permitted as it is not the place of a reviewing court to supplant the defendant's autonomy to make a decision to enter a plea with its own opinion and preference regarding that decision.

A. Legal principles and standard of review.

i. Plea Withdrawal, Manifest Injustice & the Benefit of a Plea Negotiation

"When a defendant seeks to withdraw a guilty or no contest plea after sentencing, he or she must prove by clear and convincing evidence that refusing to allow plea withdrawal would result in a 'manifest injustice.'" *State v. Douglas*, 2018 WI App 12, ¶10, 380 Wis. 2d 159, 908 N.W.2d 466, citing *State v. Finley*, 2016 WI 63, ¶58, 370 Wis. 2d 402, 882 N.W.2d 761. A manifest injustice has occurred and "a defendant has the right to withdraw a plea when, prior to deciding whether to accept the plea, the defendant is mistakenly advised

about his or her potential punishment" or the possibility of conviction on charges where dismissal is contemplated by the plea agreement if he or she proceeds to trial. *Douglas*, 2018 WI App 12, ¶10; *See also State v. Dillard*, 2014 WI 123, 358 Wis. 2d 543, 859 N.W.2d 44.

When a defendant has been provided misinformation about the consequences of the pending criminal charges, such as potentially being subject to a substantial additional criminal convictions or lengthy additional exposure, a "defendant's capacity to knowingly, intelligently, and voluntarily choose between accepting the State's plea offer and proceeding to trial" has been undermined. *See Douglas*, 2018 WI App 12, ¶16, citing *Dillard*, 2014 WI 123, ¶¶69-70. Under such circumstances, a manifest injustice has occurred, and a defendant is entitled to plea withdrawal accordingly. *Id.*

ii. Lesser-included offenses & the propriety of multiple convictions for the same conduct

Both the Fifth Amendment to the United States Constitution and Article 1, sec. 8 of the Wisconsin Constitution protect an individual from twice being placed in jeopardy for a single offense. Long-standing case law has established that this protection includes a prohibition against subjecting a defendant to multiple punishments for the same offense. *State v. Sauceda*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992); *State v. Grayson*, 172 Wis. 2d 156, 159, 493 N.W.2d 23 (1992) (Multiple convictions and punishments arising from a single criminal act "are impermissible because they violate the double jeopardy provisions of the Wisconsin and United States Constitutions.").

When assessing double jeopardy claims, Wisconsin courts have traditionally utilized a two-prong test. If the answer is "yes" to either of the following questions, the offenses are multiplicitous and conviction under both statutory provisions is barred:

> (1) Are the charged offenses identical in law and fact?
>
> (2) If the offenses are not identical in law and fact, did the legislature intend that the conduct underlying the multiple offenses be brought as a single count?

State v. Anderson, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 333 (1998).

Whether simultaneous convictions for multiple offenses violate a defendant's double jeopardy rights under the Wisconsin and U.S. Constitution is a question of law, and therefore, the standard of review is de novo. This Court need not give any deference to the holdings of the lower courts on this issue. *Sauceda*, 168 Wis. 2d at 492.

While the "general rule is that a guilty, no contest, or Alford plea 'waives all nonjurisdictional defects, including constitutional claims,'" a double jeopardy challenge may be raised postconviction if it can be resolved on the record as it existed at the time of the plea. *State v. Multaler*, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437; See *State v. Kelty*, 2006 WI 101, ¶¶ 24, 39, 294 Wis. 2d 62, 716 N.W.2d 886 ("We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that-judged on its face-the charge is one which the State may not constitutionally prosecute."). No party may supplement the factual basis on appeal to

justify the charging of potentially multiplicitous offenses, and the reviewing court is limited to considering only those facts and arguments known to the circuit court at the time of the plea. *See State v. Steinhardt,* 2017 WI 62, ¶16, 375 Wis. 2d 712, 896 N.W.2d 700, *citing e.g. State v. Kelty,* 2006 WI 101, ¶38 ("What this means is that a court will consider the merits of a defendant's double jeopardy challenge if it can be resolved on the record as it existed at the time the defendant pled."); *State v. Eisch,* 96 Wis. 2d 25, 27, 291 N.W. 800 (1980) ("Because we confront the case at the pleading stage, we are confined to the facts alleged in the complaint, information, and transcript of testimony of the witnesses at the preliminary examination.").

B. Counts three and four were multiplicitous and lesser-included offenses of counts five and six which were added in the amended information. Thus, conviction on all four was impossible.

Section 948.03(5)(c), *Stats.*, controls the charging of repeated acts of physical abuse of a child, a crime set forth in section 948.03(5)(a). The charging provision asserts that "[t]he state may not charge in the same action a defendant with a violation of [948.03(5)] and with a violation involving the same child under [948.03](2), (3), or (4), unless the other violation occurred outside of the" specified period of time related to the charging of crime of repeated acts of physical abuse against the same child. Sections 948.03(2), (3) and (4) prohibit individuals from intentionally causing bodily harm to a child, recklessly causing bodily harm to a child and failing to act to prevent another from causing bodily harm to a child, respectively.

Without question, counts three and four were multiplicitous and lesser included offenses of counts five and six, and the legislature specifically prohibited the charging of both the individual acts of physical abuse of a child and repeated acts of physical abuse of a child for conduct occurred in the identical time frame in section 948.03(5)(c), *Stats.*

To be charged with repeated acts of physical abuse of a child, one must have completed at least three violations of sections 948.03(2), (3) or (4), *Stats.,* during a specified time frame – here September 1, 2016 through November 29, 2016 (this is the same time period for all charged offenses in the amended information). (12). Those three subsections prohibit the following conduct: intentional causation of bodily harm to a child (948.03(2)), reckless causation of bodily harm to a child (948.03(3)) and failing to act to prevent bodily harm to a child (948.03(4)). The criminal complaint details only allegations of the third form of physical abuse of a child, failing to act to prevent bodily harm.

Here, the error is clear – Ms. Hughes was charged contrary to the provision guiding these prosecutions found in 948.03(5)(c), as she was plainly charged with two violations of 948.03(5) and also two violations of 948.03(4). Those allegations indisputably involved the same children and identical time frames, and as a result, the amended charges were accepted in error and should never have been permitted to be added in the amended criminal complaint.

C. The court of appeals erred in concluding that a manifest injustice has not occurred because the misunderstanding was not of "significance" in the court's view,

> incorrectly applying the holding of *State v. Cross* to this case.

The court of appeals decision in the instant case declined to strictly follow the precedent set in *Dillard*, where this court concluded that when a defendant has been provided misinformation about the consequences of the pending criminal charges, such as potentially being subject to a substantial additional criminal convictions or lengthy additional exposure, a "defendant's capacity to knowingly, intelligently, and voluntarily choose between accepting the State's plea offer and proceeding to trial" has been undermined. *Dillard*, 2014 WI 123, ¶¶69-70.

Instead, the court of appeals found that it can weight the perceived "significance[3]" of the error or

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[3] As detailed in a footnote above, the court of appeals incorrectly stated the misinformation Ms. Hughes received. The court wrote:

> This twelve-year difference in the maximum sentence presented to Hughes is significantly dissimilar from the forty-to-sixty year differential in Douglas, 380 Wis. 2d 159, ¶¶11-12, and the disparity between a mandatory life sentence and a fifty year maximum sentence in Dillard, 358 Wis. 2d 543, ¶6.

(COA Decision, ¶39). Ms. Hughes, however, believed that she was getting a benefit of a dismissal of two Class E felonies, totaling a maximum of **thirty** years of exposure. That the court of appeals opines about that this really amounts to an additional twelve years assumes that Ms. Hughes would have accepted a plea to the Class E felonies in lieu of the Class H felonies. There is no reason to make such assumptions and there is nothing in the record to support that this would have been the case. This discrepancy is just the reason that it is inappropriate for the reviewing court to (continued)

misunderstanding that occurred in the plea process to determine whether it rises to the level of "manifest injustice." In doing so, the court pointed to *State v. Cross*, 2010 WI 70, ¶37, 326 Wis. 2d 492, 786 N.W.2d 64, in support of this position. Ms. Hughes asserts that *Cross* is inapposite to this case and not applicable to matters involving *Nelson/Bentley* claims where a defendant demonstrates they relied in part of fundamentally incorrect information when entering into a plea agreement and forgoing their constitutionally-protected right to trial. It is the entry of a plea while relying upon a fundamental misunderstanding of the plea's benefits that is the manifest injustice, not the court's view of the significance of the benefit that makes an unknowing plea constitutionally defective.

A review of *State v. Cross* plainly illustrates why the holding cannot be appropriately applied to this line of cases. As a general matter, the *Cross* Court held that, where the sentence communicated to the defendant is higher, but not substantially higher, than that authorized by law, the court has not violated the plea colloquy requirements outlined in Wis. Stat. §971.08 and the *Bangert* line of cases.

Cross entered into a plea agreement with the state in which the state agreed to file an information amending the sole count of the complaint, first-degree sexual assault of a child charge, to one count of second-degree sexual assault of a child. *Cross*, 326 Wis. 2d 492,

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weigh the pros and cons of the potential plea agreement when deciding whether a defendant was harmed in its acceptance.

The harm is that the choice itself was taken away from the defendant – not the difference in potential exposure.

¶ 7. At the time of his plea, Cross was under the mistaken impression that he faced a maximum penalty of 40 years imprisonment. During the plea hearing, counsel and the court both stated that Cross faced a maximum penalty of 40 years. Cross actually faced a maximum penalty of 30 years imprisonment.

The Court held that "a defendant who has been told a maximum punishment higher, but not substantially higher, than that authorized by law, has not necessarily made a prima facie case that the requirements of § 971.08 and our case law have been violated." *Id.*, ¶30. In support, the Court cited precedent from the U.S. Supreme Court to explain that "a plea based on an understanding of the precise maximum penalties that ultimately proves incorrect is not *necessarily* a violation of due process." *Id.*, ¶29 (citing *Brady v. United States*, 397 U.S. 742 (1970))(emphasis added). It reasoned that "a defendant who believes he is subject to a greater punishment is obviously aware that he may receive the lesser punishment." *Id.*, ¶31. The Court reasoned that "a defendant's decision to represent in open court that he committed the crimes he is charged with is [not] likely to be affected by insubstantial differences in possible *punishments*." *Id.* (emphasis added). The Court also found that "requiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights." *Id.*, ¶32. The Court cited similar decisions from other states. *Id.*, ¶33.

The *Cross* court also relied on Wis. Stat. §973.13, which states that the remedy for sentences that exceed the maximum penalty is "commutation of that portion of the sentence imposed in excess of the actual maximum permitted." *Id.*, ¶¶34-35. The Court's final

reason for finding that "a defendant's due process rights are not *necessarily* violated when he is incorrectly informed of the maximum potential imprisonment" during the plea colloquy is an analogy to the Federal Rules of Criminal Procedure. *Id*., ¶¶36-37. Like Fed.R.Crim.P. 11(h), which states that variant explanation of the maximum penalties "is harmless error if it does not affect substantial rights," stating a higher maximum penalty than is allowed by statute is not "per se violation of the defendant's due process rights" and should be "subject to a harmless error test." *Id*., ¶36.

In short, the Court rejected Cross's argument that the misadvice he received from the court and from counsel prior to entering his plea established a per se basis to withdraw his plea. *Id*., ¶11. Instead, the Court said that, if the maximum sentence communicated to the defendant is higher than that authorized by law, a harmless error must be applied before determining whether the court has violated the plea colloquy requirements in violation of *Bangert*. *Id*., ¶4. Applying its rationale to Cross, the Court found that "[t]he only flaw Cross points to is that the plea was made with a misunderstanding of the precise maximum sentence." *Id*., ¶42. Thus, the Court found that Cross did understand the range of punishments, and that his plea was made knowingly, voluntarily, and intelligently. *Id*., ¶41. It also found that Cross failed to show that plea withdrawal was necessary to correct a manifest injustice. *Id*., ¶42.

There are two substantial differences between *Cross* and this case that render *Cross* inapposite. In *Cross*, the Court conducted a *Bangert* analysis, while this case does not involve a *Bangert* claim. If the defendant establishes a prima facie *Bangert* claim, the court *must*

hold a postconviction evidentiary hearing. *State v. Brown*, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906. The burden then shifts to the state to show by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified inadequacy of the plea colloquy. *Id*.

A *Bangert* claim shifts the burden from the defendant to the state in order to encourage the state to ensure the court is meeting its section 971.08, *Stats.*, and other expressed obligations. *State v. Bangert*, 131 Wis. 2d 246, 275, 389 N.W.2d 12 (1986). Because this is a *Nelson/Bentley* claim, there is no benefit from shifting the burden from the defense to the state. A defendant making such a claim is "entitled to an evidentiary hearing only if his postconviction motion alleges facts that, if true, would entitle him to relief." *Brown*, 293 Wis. 2d 594, ¶ 42. The analysis in *Cross*, then, is not the same analysis that Ms. Hughes's claim calls for.

In addition, Ms. Hughes's claim involves more than the mere "misunderstanding of the precise maximum sentence," it involves two felony charges that should never have been filed and were such that she could not have found herself convicted of both those charges and the two to which she pled. Counsel's advice to Ms. Hughes regarding the plea offer is tainted by this fact, and Ms. Hughes did not receive the full benefit for which she bargained because the plea bargain was illusory.

Even if this court imports, from *Cross*, the principle that communicating a higher penalty than is authorized by law to the defendant is not a due process violation as long as the penalty is not "substantially higher," the error in Ms. Hughes's case should receive more weight because it does not simply involve a

misunderstanding of the maximum sentence, but the state's ability to charge two additional felonies related to child abuse. The plea agreement for which she bargained was illusory, and that issue is not addressed in *Cross*.

II. Trial counsel was ineffective as a matter of law by failing to object to the amended information filed by the State and for providing Ms. Hughes with incorrect advice about the value of the plea agreement, and Ms. Hughes suffered substantial prejudice as a result. While this is not necessarily a novel issue, Ms. Hughes wishes to preserve the issue in the event this court grants her petition for review.

A. Legal principles and standard of review.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith*, 207 Wis. 2d at 273. To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id.*

To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted). The prejudice prong requires a

showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694). In the context of a plea withdrawal case, a defendant is required to establish that there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

B. Trial counsel erred by failing to object to the filing of the amended information as counts three and four were lesser-included offenses of counts five and six and should have been struck.

As detailed above, the amended information included two charges that were multiplicitous of counts that were already charged in the original criminal complaint and information. For brevity's sake, those detailed arguments need not be repeated here.

What is plain is that trial counsel should have identified the defects in the amended information and made the appropriate legal challenges contemporaneously via an objection to the court's acceptance of the amended information. Trial counsel plainly and indisputably failed to wage such an objection. The issues at hand are certainly not novel and counsel clearly did not and could not have permitted multiple baseless charges to be filed against his client. Instead, counsel's error falls outside of the realm of reasonable, effective representation. For these reasons, Ms. Hughes has satisfied the first prong of the *Strickland* test. *Strickland*, 466 U.S. 668; *See also Smith*, 207 Wis. 2d at 273.

C. Trial counsel's failure to object to the filing of the amended information caused Ms. Hughes prejudice.

Throughout this case and even during her allocution during sentencing, Ms. Hughes maintained her innocence regarding the charges of neglect and harming J.W. and T.W. (1; 32). Even within the State's supplemental emails provided postconviction, it is clear that Ms. Hughes had a stated intent to go to trial on the allegations against her from the outset of the proceedings. (91-93). There is ample evidence to support this throughout the record, including the fact that Ms. Hughes maintained a trial posture until the day before the jury was set to be sworn and entered "no contest" pleas only after the State dramatically upgraded the charges against her.

Moreover, at the March 17, 2017 bail hearing, the State mentioned that it had intended only to file the upgraded charges if Ms. Hughes proceeded to trial. (39). The filing of the charges at the final pretrial and the continuation of the matter to the trial date following that hearing further supports her position that she would have gone to trial absent the filing of the upgraded charges. (12; 40; 43).

The record plainly demonstrates that Ms. Hughes' trial counsel did not object to the filing of the amended information and made no argument that the new charges in the complaint lacked probable cause. (43). As set forth in detail in the previous section, there was not a factual basis in the complaint supporting the addition of the three charges. Thus, had trial counsel properly objected to the filing of the amended information and had the court denied the State's motion to enhance the charges against her, Ms. Hughes would

have taken her case to trial. Therefore, she was prejudiced as a result of counsel's failure to object.

Additionally, trial counsel failed to object to the amendment on the basis that the filing of the new charges prejudiced Ms. Hughes in that she made the decision to waive her statutory right to preliminary hearing based upon the understanding that the allegations that she was facing were set forth in the probable cause section of the complaint and those allegations did not involve any claims that she personally physically assaulted or harmed J.W. or T.W. As a result, when Ms. Hughes agreed to waive preliminary hearing, she was doing so based on a very different picture of the accusations being made against her and without any knowledge that in the coming months, the narrative against her would be dramatically different and far more serious.

With the filing of new charges, those that lacked any support in the criminal complaint, it created a situation in which Ms. Hughes had effectively given up her statutory rights to challenge the complaint against her long before those accusations were made and months before the new charges were filed. Accordingly, Ms. Hughes' decision to waive her preliminary hearing was fundamentally not knowing and voluntary and she was prejudiced accordingly.

Instead, because of her counsel's failure to object to the filing of the amended information, Ms. Hughes entered a plea without a full and proper understanding of the benefit of the plea bargain and without adequate notice or time to prepare to fight the new charges, and therefore, she was substantially prejudiced. *See Hill v. Lockhart*, 474 U.S. 52, 59. On this basis and due to her counsel's deficient representation, Ms. Hughes asks this

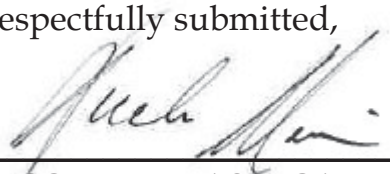
court to conclude that trial counsel erred as a matter of law, to permit plea withdrawal and to remand this case back to the circuit court for further proceedings.

CONCLUSION

For the reasons set forth above, the defendant-appellant-petitioner, Ms. Hughes, asks this court to accept the petition for review and to hold that *State v. Cross,* 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, is inapposite and therefore inapplicable to *Nelson/Bentley* claims, granting Ms. Hughes' request for plea withdrawal.

Dated this 1st day of December, 2022.

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 7,808 words.

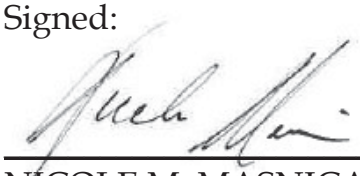
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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 1st day of December, 2022.

Signed:



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CERTIFICATION AS TO APPENDIX

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.

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