STATE OF WISCONSIN

SUPREME COURT

Case No. 2022AP000199 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KASEY ANN GOMOLLA,

Defendant-Appellant.

PETITION FOR REVIEW

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ISSUES PRESENTED

Because a defendant who pleads guilty gives up a host of constitutional rights, both statute and case law mandate that judges conduct a personal, on-the-record colloquy before accepting such a plea. A judge must, among other things, advise the defendant of the penalties she'll face upon pleading.

Under the *Bangert*[1] line of cases, a defendant makes a prima facie case for plea withdrawal by identifying a colloquy defect and alleging that she didn't understand the information the judge was supposed to, but did not, provide. A defendant who makes this showing is entitled to an evidentiary hearing at which the State bears the burden of proving the plea knowing, intelligent, and voluntary despite the judge's error.

The judge who took Kasey Ann Gomolla's plea did not inform her of the applicable penalties. She later moved for plea withdrawal, noting the judge's silence on this key topic, and alleging that she was in fact unaware of the penalties she faced when she entered her plea. An evidentiary hearing followed. The State elicited testimony from trial counsel that she discussed the maximum penalties with Ms. Gomolla—but got them wrong. Counsel advised Ms. Gomolla of a maximum sentence six years longer than the one she actually faced.

The facts pertinent to Ms. Gomolla's plea withdrawal claim are thus straightforward. There is no dispute that the judge failed to address the applicable penalties before accepting Ms. Gomolla's plea. There is

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

no dispute that Ms. Gomolla was misadvised by trial counsel about those penalties. And there is no dispute that Ms. Gomolla was ignorant of the true maximum penalties she faced when she entered her plea.

But the governing law is less straightforward. In *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, this Court held that a plea colloquy is not defective (and thus that the burden never shifts to the State) when a judge recites a maximum penalty that is "higher, but not substantially higher," than the law allows. *Id.*, ¶4. Here, both lower courts relied on *Cross*. Even if Ms. Gomolla's colloquy was defective, they held, the State met its burden of proving her plea valid by establishing that trial counsel advised her of a maximum penalty that was higher, but not substantially higher, than the law allows.

There are two questions presented:

1. Was *Cross* wrongly decided?

This issue was not presented below, as neither the circuit court nor the court of appeals have authority to overrule decisions of this Court.

2. If *Cross* remains good law, does it apply beyond the context of assessing a colloquy's adequacy (when the defendant bears the burden of proof) to the context of assessing a plea's validity despite a colloquy defect (when the State bears the burden of proof)?

No prior case has addressed this question. Both lower courts answered, "Yes."

CRITERIA FOR REVIEW

Done right, a plea colloquy helps ensure that a defendant's plea is knowing, intelligent, and voluntary—and that the record shows it. They thus serve the critical dual purpose of protecting individual constitutional rights and preventing manipulation of the system.

Given their important role, it's unsurprising that an array of authorities make plea colloquies mandatory: state statute (Wis. Stat. § 971.08(1)), federal constitutional case law (starting with *Boykin v. Alabama*, 395 U.S. 238 (1969)), and a whole body of Wisconsin precedent (*see, e.g., State v. Brown*, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906). But for the past decade-plus, Wisconsin cases have increasingly undercut these authorities, upholding pleas entered by defendants with a partial or inaccurate understanding of the pleas' direct consequences and condoning colloquies in which judges misstate or omit significant information.

Cross is one such case. Almost nothing is more fundamental to a defendant's plea-or-trial decision-making than the penalties she'll face. Penalties are the quintessence of the direct consequences a defendant must grasp to enter a knowing, intelligent, and voluntary plea. But *Cross* says a circuit court's misstatement of the applicable penalties isn't always a problem; it won't necessarily render a colloquy defective, let alone undermine the validity of the resulting plea.

Cross is counterintuitive. Statute and case law mandate that judges provide information about certain topics during a colloquy; what is a defective colloquy if not one where a judge provides *mis*information on one of

those mandatory topics? *Cross* also created a gray area in what used to be a black-and-white analysis: now plea colloquies are deemed valid if a judge's misstatement of the penalties isn't "substantially" off, but what does "substantially" mean in this context?

Together, these issues with the *Cross* Court's reasoning laid the groundwork for a more extensive degradation of the plea colloquy requirement—and the instant case picks up where *Cross* left off. *Cross* takes a "close enough" approach to a judge's colloquy responsibilities; the court of appeals' decision here takes that "close enough" approach and applies it to a defendant's understanding of the direct consequences of her plea.

A defendant needs full information about the direct consequences of her plea to intelligently enter it. A judge is required to put a plea's direct consequences on the record—and make sure the defendant understands them—before accepting it. No case has eliminated these baseline principles, but many (including *Cross* and the published court of appeals' decision here) have chipped away at them. This Court should get the case law in this realm back on track by granting review, reconsidering *Cross*, and reversing the decision below. *See* Wis. Stat. § 809.62(1r)(a), (c), (e).

STATEMENT OF THE CASE AND FACTS

This case stems from drug trafficking that went far beyond Ms. Gomolla. (*See* 1:2-17). Because her case resolved with a plea deal (*see* 92:2; App. 78), and because the complaint's probable cause statement is unusually

convoluted (*see* 1:2-17), some details regarding her role in the trafficking scheme remain elusive. For purposes of appeal, however, those details are irrelevant. What matters is this: before entering her no-contest plea, Ms. Gomolla did not understand the maximum penalty she faced. Her lawyer misadvised her of that penalty, and the circuit court failed to discuss penalties at all.

Ms. Gomolla was charged with two drug crimes, both with second-or-subsequent offense enhancers attached. (1:1-2). Nearly three years later, the parties reached a deal under which Ms. Gomolla pleaded no contest to Count 1 (conspiracy to delivery more than 50 grams of methamphetamine). (*See* 78; App. 83-86).

Confusion about the remaining terms of the agreement pervaded this case through sentencing. Early on, the State provided the defense with an offer memo. (*See* 163). The memo says, among other things, that the State would drop the enhancer. (163:1). The plea questionnaire, on the other hand, says Ms. Gomolla would plead no contest to Count 1 with the enhancer intact. (78:1; App. 83). It lists the maximum prison sentence as 46 years: 40 because Count 1 is a Class C felony, and an extra six based on the enhancer. (78:1; App. 83). *See also* Wis. Stat. §§ 939.50(3)(c), 961.48(1)(a).

At the plea hearing, all agreed that Ms. Gomolla would be pleading no contest to Count 1, but there was still confusion regarding the enhancer. When the circuit court announced that it would accept Ms. Gomolla's plea to Count 1 with the enhancer attached, the State interjected, saying it believed the enhancer "was going to

be dismissed." (92:5; App. 81). Defense counsel agreed, so the circuit court dismissed it. (92:5-6; App. 81-82).

As for the maximum penalty Ms. Gomolla faced, the circuit court commented that the applicable penalties were "attached" to the plea questionnaire and that Ms. Gomolla "had enough time to go over this plea form." (92:4-5; App. 80-81). It did not set forth the maximum penalties on the record or inquire whether Ms. Gomolla understood them.

After accepting Ms. Gomolla's no-contest plea, the circuit court ordered a pre-sentence investigation (PSI). (92:9). The PSI writer wrongly believed that Ms. Gomolla entered a plea to Count 1 with the enhancer in place, and thus that she faced a maximum penalty of 46 years of imprisonment. (82:33-34).

The circuit court sentenced Ms. Gomolla to 27 years of imprisonment: 12 years of confinement and 15 years of supervision. (102:1). Postconviction, she moved for resentencing, or, if the circuit court denied that relief, plea withdrawal. (*See* 151:1). This appeal pertains only to her request for plea withdrawal.

Ms. Gomolla's postconviction motion alleged that the circuit court failed to advise her of the maximum penalty she faced before it accepted her plea, and that she did not have that information. (151:7). The circuit court held an evidentiary hearing so the State could try to disprove these allegations. (*See* 166:2). Both trial counsel and Ms. Gomolla testified. (*See* 166:2). Trial counsel said she believed Ms. Gomolla understood the plea questionnaire's contents but conceded that she mistakenly "included the enhancer" when calculating

the penalties she faced. (166:22, 30; App. 57, 65). Ms. Gomolla testified that trial counsel hurried through the questionnaire and never "properly" reviewed it with her. (166:33; App. 68). She also said she was unaware of the maximum penalty she faced. (166:34-35; App. 69-70).

The circuit court denied relief in a written decision. (167; App. 27-41). It acknowledged trial counsel's error in the plea questionnaire. (167:7; App. 33). It did not dispute that it had failed to address the maximum penalty during Ms. Gomolla's plea colloquy. Still, it held its colloquy "satisfactory" to show that her plea was valid. (167:11; App. 37). It further held that, "if one would find that the plea colloquy was defective," then the State met its burden of proving that the plea was nevertheless knowing, intelligent, and voluntary. (167:11; App. 37).

On appeal, the State agreed that Ms. Gomolla's colloquy was defective; the circuit court had gotten that wrong. But it argued that her plea was still valid since trial counsel advised her of a maximum term of imprisonment that was higher, but not substantially higher, than the one she faced. The court of appeals, relying heavily on *Cross,* agreed. *State v. Gomolla*, No. 2022AP199-CR, slip op. (Wis. Ct. App. Feb. 6, 2024) (recommended for publication); (App. 3-26).

Ms. Gomolla now asks this Court to grant review, reconsider *Cross*, reverse the court of appeals' decision whether it upholds *Cross* or not, and then remand the matter to the circuit court with instructions to permit plea withdrawal.

ARGUMENT

I. This Court should grant review to reconsider *Cross*.

There are two basic problems with *Cross*. First, its holding is illogical and fuzzy, creating more questions than it answers. And second, its harmless error-style analysis overlooks the highly personal, idiosyncratic plea-or-trial decisionmaking process that the cases governing plea negotiations, plea agreements, and plea withdrawal are all designed to protect. For both reasons, nearly 15 years after this Court released its opinion in *Cross,* the time has come to revisit it.

A. With its counterintuitive holding and indeterminate "not substantially higher" standard, *Cross* raised more questions than it answered.

The concurring opinion in *Cross* is a useful starting point for understanding the drawbacks and ambiguities in its "not substantially higher" rule. The concurrence explains: "The *Bangert* line of cases sets down simple, relatively 'bright-line' rules in this area of the law," while the *Cross* majority "unnecessarily open[s] a judicially crafted gray area." *Cross*, 326 Wis. 2d 492, ¶¶47, 54 (Abrahamson, C.J., concurring). Per the majority, "one set of rules" applies to "cases in which misinformation about punishment is 'not substantially higher' than the statutory punishment," while "another set of rules" applies to "cases in which misinformation about punishment" *is* substantially higher. *Id.*, ¶54 (Abrahamson, C.J., concurring). But what does

"substantially higher" mean in this context? How wrong is wrong enough—when you're talking about years of a person's liberty—to qualify as a colloquy defect? *Cross* left that question unanswered and subsequent cases have not resolved it.

Beyond the ambiguity of the "not substantially higher" test, it's unclear from *Cross* whether its reasoning is specific to the first phase of a *Bangert* proceeding or carries over to the second. If we don't mind a judge misunderstanding the applicable penalties and thus misadvising the defendant, are we also unbothered by a defendant misunderstanding the penalties when she enters her plea? And if we uphold pleas entered by individuals unaware of the penalties those pleas carry, what does it mean to require that pleas are knowing, intelligent, and voluntary?

In short, *Cross* muddies the due process right at stake. Reconsidering its analysis will enable the Court to refocus the inquiry in *Bangert* proceedings back on what constitutionally matters: a defendant's grasp of the direct consequences of her plea.

B. *Cross* engages in a harmless error-style analysis of plea colloquy defects that overlooks the reason defendants are entitled to accurate information in the first place: so they can make up their *own* minds about what matters and what they should do.

Whether to plead guilty is a decision reserved purely for the defendant; a reviewing court's opinion about the wisdom of a plea is irrelevant, as is trial counsel's view as to the best approach. *McCoy v.*

Louisiana, 584 U.S. 414, 422 (2018). Foregoing a trial and pleading guilty aren't "strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*." *Id.*

Multiple bodies of precedent beyond the *Bangert* context honor the defendant's autonomy in this realm. Consider that a defense attorney must communicate plea offers to the client for her consideration, no matter how bad counsel may consider a particular offer to be. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Consider that misadvice from defense counsel about the direct consequences of a plea will undermine the validity of that plea if it's reasonably probable the defendant would otherwise have gone to trial. *Lee v. United States*, 582 U.S. 357, 368-71 (2017). That's true whether or not the defendant would have had a defense at trial or any real chance at securing an acquittal. *Id.* It's "a defendant's decisionmaking" that matters, which "may not turn solely on the likelihood of conviction after trial." *Id.* at 367. Finally, consider that defense counsel must object to a plea breach by the State absent express permission from the client to stay silent. *State v. Sprang*, 2004 WI App 121, ¶¶26-29, 274 Wis. 2d 784, 683 N.W.2d 522. Regardless of the strategic wisdom of letting a breach pass by unmentioned, doing so is the client's prerogative. *Id.*

The *Bangert* line of cases was originally in accord with this focus on autonomy, and some recent cases—most notably *State v. Finley*, 2016 WI 63, 370 Wis. 2d 402, 882 N.W.2d 761—remain so. But if the due process right at stake is to full information about the direct consequences of a plea, combined with the freedom to decide whether to enter it, then how can *less* than full

information be harmless? Information is the crux of the right, and the decision is the defendant's alone to make.

While the lower courts didn't use the phrase "harmless" here, that was their essential holding: the inaccurate information underlying Ms. Gomolla's plea wasn't inaccurate enough to matter. And in reaching that conclusion, they relied almost exclusively on *Cross*, which similarly holds that the inaccurate information the defendant received wasn't inaccurate enough to matter. This reasoning runs counter to the emphasis on autonomy—on ensuring the defendant gets to decide what matters and what doesn't—that has predominated in plea-related case law for decades.

Cross represents a wrong turn. This Court should grant review and hold that *Cross* got it wrong: a judge's error or omission regarding the maximum penalties constitutes a plea colloquy defect, period.

II. If this Court grants review but upholds *Cross*, it should clarify whether the *Cross* principle extends from the first phase of a *Bangert* proceeding (when the defendant bears the burden of establishing a colloquy defect) to the second (when the State bears the burden of proving a plea valid despite a colloquy defect).

Even if this Court upholds *Cross*, the question remains whether *Cross*'s harmlessness-style analysis can carry over from the first *Bangert* inquiry (whether the defendant has established a colloquy defect) to the second (whether the State has proven a plea valid despite a colloquy defect). The court of appeals' published

decision in this case answered, "Yes." But there are problems with its novel application of *Cross*.

As a reminder, the issue with Ms. Gomolla's plea colloquy wasn't that the circuit court overstated the penalties (as in *Cross*); it didn't set them forth at all. The court of appeals nevertheless applied *Cross*'s "not substantially higher" test in denying Ms. Gomolla relief. Acknowledging that the circuit court did not advise Ms. Gomolla of the applicable penalties and that trial counsel misadvised her, the court of appeals asked whether Ms. Gomolla ultimately believed she faced penalties "higher, but not substantially higher," than those the law allowed. After answering that question in the affirmative, the court of appeals upheld her plea.

The first issue with the court of appeals' approach is that the State bears the burden in the second phase of a *Bangert* proceeding. What is the point of this burden shift if the State need not introduce *any evidence* that the defendant was advised of, or knew, the actual maximum penalties she faced? *See Finley*, 370 Wis. 2d 402, ¶¶85, 95. And what is the State required to prove if not that the defendant understood the direct consequences of her plea when she entered it, despite the judge's failure to convey the same? Taking the *Cross* principle and applying it to a defendant's misunderstanding of the direct consequences of her plea renders the purpose of a *Bangert* hearing, and the State's basic task, unclear.

What's more, it appears that *Cross*'s "not substantially higher" test is an objective one—which makes sense, as the first phase of a *Bangert* proceeding

involves a record-based review of the judge's actions. But the defendant's *subjective* mindset is what matters in assessing the constitutional validity of her plea during the second phase of a *Bangert* proceeding. This mismatch is problematic. Again, swaths of constitutional case law emphasize that the decision whether to plead or go to trial is for the defendant alone to make. A defendant has the right to full information about the direct consequences of her plea so that *she* can decide whether those consequences make pleading the better option. Importing an objective "not substantially higher" test into the subjective phase of a *Bangert* proceeding ignores the autonomy component of the due process right such proceedings are meant to protect.

No prior case extends *Cross*'s reasoning to the second phase of a *Bangert* proceeding. No prior case holds that, even though a defendant misunderstood the penalties she faced, and even though that misunderstanding stemmed from misadvice from the circuit court and trial counsel, the defendant's plea was still knowing, intelligent, and voluntary plea. *See id.*, ¶95. The instant case reaches just that conclusion—and it does so by taking *Cross* too far. Even if this Court upholds *Cross*, it should grant review to clarify that *Cross*'s "not substantially higher" test governs the adequacy of plea colloquies—not the adequacy of a defendant's grasp of the direct consequences of her plea. For that reason, it should also reverse the court of appeals' decision and remand the matter with instructions to permit plea withdrawal.

CONCLUSION

Kasey Ann Gomolla respectfully requests that this Court grant review, reconsider *Cross*, reverse the court of appeals' decision whether it upholds *Cross* or not, and then remand the matter to the circuit court with instructions to permit plea withdrawal.

Dated this 19th day of February, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b) and (c) for a brief. The length of this brief is 3,267 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 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.

Dated and filed this 19th day of February, 2024.

Signed:

Electronically signed by
Megan Sanders

Megan Sanders