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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP199-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

KASEY ANN GOMOLLA,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

This Court should deny Kasey Ann Gomolla's petition for review. In a decision recommended for publication, the court of appeals applied settled precedent, namely *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, in a straight-forward and logical manner when it affirmed the circuit court's denial of Gomolla's motion for plea withdrawal. *State v. Gomolla*, No. 2022AP199-CR, 2024 WL 446008 (Wis. Ct. App. Feb. 6, 2024). Gomolla now seeks to upend almost fifteen years of precedent and asks this Court to "revisit" *Cross* and its progeny merely because she is dissatisfied with the outcome of her appeal. Gomolla does not present this Court with a compelling argument that would overcome *stare decisis* and warrant overruling *Cross* and its progeny.

THIS COURT SHOULD DENY GOMOLLA'S PETITION FOR REVIEW BECAUSE IT DOES NOT MEET THE CRITERIA SET FORTH IN WIS. STAT. § (RULE) 809.62(1R).

Gomolla was convicted of conspiracy to deliver methamphetamine after she pleaded no contest. Gomolla moved for post-sentence plea withdrawal, arguing that a *Bangert*[1] violation occurred and that she received ineffective assistance of counsel during her plea proceedings. The upshot of Gomolla's argument was that the circuit court failed to inform her of the potential range of punishment during her plea colloquy, resulting in the *Bangert* violation. She further argued that that trial counsel conveyed an inaccurate potential range of punishment because counsel informed Gomolla that she faced a maximum of 46 years when she faced a maximum of only 40 years, resulting in ineffective assistance of counsel.

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

The circuit court held a combined *Bangert/Bentley*[2] hearing and denied her motion to withdraw her plea. The circuit court concluded that the State met its burden under *Bangert* to prove that Gomolla understood the requisite information to make her plea knowing, intelligent, and voluntary. The circuit court also concluded that Gomolla did not receive ineffective assistance of counsel.

Gomolla abandoned her ineffective assistance claim, appealing on only the *Bangert* decision, and the court of appeals affirmed. The court of appeals divided Gomolla's arguments into two distinct issues: (1) whether the State met its burden to prove that Gomolla's plea was knowing, intelligent, and voluntary despite the inadequate plea colloquy and (2) whether trial counsel's mistake in communicating the potential range of punishment rendered her plea ineffectual. *Gomolla*, 2024 WL 446008, ¶¶ 19, 20, 27.

The court of appeals answered the first question in the affirmative, applying *Bangert* and its progeny. *Id.* ¶¶ 20–26. The court of appeals looked to the totality of the circumstances including counsel's testimony, Gomolla's testimony, and Gomolla's plea questionnaire to conclude that the State met its burden under *Bangert*. *Id.* According to the court of appeals, "[t]he [circuit] court properly determined, based on the entire record and the testimony of Gomolla and defense counsel, that Gomolla was aware of and understood the '[potential punishment] to which [she was] subjecting [her]self by entering a plea,' despite the [circuit] court's failure to address the issue during the plea colloquy." *Id.* ¶ 26 (third, fourth, and fifth alterations in original). That conclusion is unremarkable, and it is a correct application of *Bangert*.

[2] *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

The court of appeals answered the second question—i.e., whether defense counsel's communication of a potential punishment that is higher, but not substantially higher, than that allowable by law rendered Gomolla's plea ineffectual—in the negative. *Id.* ¶¶ 27–46. On the second question, the court of appeals applied this Court's decision in *Cross* and concluded that *Cross*'s rule applied to Gomolla's unique situation where it was defense counsel, instead of the circuit court, that informed Gomolla of the incorrect potential range of punishment that was higher, but not substantially higher, than that allowed. *Id.* ¶ 41. It is this straight-forward application of *Cross* that gives rise to Gomolla's petition for review.

I. There is no need to "revisit" *Cross* and its progeny.

Despite Gomolla's misgivings with *Cross* and its progeny, she has not presented this Court with a compelling reason to, as she puts it, "revisit" *Cross*. (Pet. 10.) Gomolla opens her argument with two questions that she contends *Cross* left opened. Indeed, she alleges that *Cross* "creat[ed] more questions than it answer[ed]." (Pet. 10.) But neither question that Gomolla presents justifies departing from *Cross*.

First, Gomolla asks what higher, but not substantially higher means in this context. (Pet. 10–11.) This Court explicitly stated in *Cross* that "the determination of when a difference is 'substantial' will depend on the facts of the case." *Cross*, 326 Wis. 2d 492, ¶ 41. There, "Cross was informed of a punishment *greater than* what the law provided—25 years of initial confinement and 15 years of extended supervision, instead of 20 years of initial confinement followed by 10 years of extended supervision." *Id.* In that context the six-year difference between what Gomolla was told, 46 years, and what she actually faced, 40 years, is higher, but not

substantially higher. Because Gomolla's case falls well within the ambit of *Cross*'s rule, this Court would have no basis to opine on whether different amounts, not applicable here, meet or do not meet *Cross*'s standard.

Second, Gomolla claims that it is unclear from *Cross* whether its "reasoning is specific to the first phase of a *Bangert* proceeding or carries over to the second." (Pet. 11.) But it is obvious why *Cross* didn't answer that question. The *Cross* court limited itself to the facts at bar in that case and concluded that the circuit court need not hold a *Bangert* hearing if the circuit court informs a defendant of a potential range of punishment that is higher but not substantially higher than that allowed. *Cross*, 326 Wis. 2d 492, ¶ 40. This Court not answering a question that was not relevant to the case is not a reason to abandon *stare decisis* and overrule *Cross*.

Gomolla next argues that *Cross*'s "harmless-error style analysis of plea colloquy defects . . . 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." (Pet. 11.) The State certainly agrees that a defendant's autonomy in deciding whether to plead or take her case to trial is an essential component of our system.

However, nothing in *Cross* or its progeny purports to take that autonomy away. *Cross* does not stand for the proposition that defendants may enter pleas *without* information—instead, it stands for the "common sense" principle that "not all small deviations from the requirements in our *Bangert* line of cases equate to a *Bangert* violation."[3]

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[3] Gomolla's reliance on *Lee* and *Frye* is misplaced for two reasons. (Pet. 12.) First, in each of those cases defendants moved forward with their pleas with either patently incorrect legal advice

Cross, 326 Wis. 2d 492, ¶ 38. *Cross* reasoned that it is unlikely that "a defendant's decision to represent in open court that he [or she] committed the crimes he [or she] is charged with is . . . affected by insubstantial differences in possible punishments." *Id.* ¶ 31. This is due in no small part to the fact that "a defendant who believes he [or she] is subject to a greater punishment is obviously aware that he [or she] may receive the lesser punishment." *Id.*

In short, Gomolla appears to simply dislike *Cross* and its progeny. But that disdain, without any meaningful *stare decisis* analysis, is not a reason to depart from, revisit, or overrule *Cross*. *Cross* remains good law, and this Court should decline Gomolla's invitation to change that.

II. The court of appeals reasonably extended *Cross* to the unique facts of this case.

Gomolla next asks this Court to accept review in order to determine whether *Cross* applies to only the first half of the *Bangert* test or whether it can extend to the second. (Pet. 13–15.) But that question overstates the court of appeals' holding and, much like Gomolla's appellate brief, muddies the issues

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or missing some piece of requisite information entirely. *Lee v. United States*, 582 U.S. 357, 360 (2017) (counsel told defendant he would not be deported if he pleaded guilty despite facing *mandatory* deportation); *Missouri v. Frye*, 566 U.S. 134, 139 (2012) (counsel failed to inform defendant of the State's plea offers and the defendant proceeded to plead guilty without an offer in place). Second, they are both ineffective assistance of counsel cases that are rendered inapposite by Gomolla's decision to abandon her ineffective assistance claim. Perhaps those cases would be more on point if Gomolla's trial attorney had not told her *anything* about the potential range of punishment, but that is not what occurred here. Gomolla's reliance on *Sprang* is equally misplaced because it is not a plea withdrawal case at all; instead, Sprang was entitled to resentencing due to the State's breach of the plea agreement and counsel's ineffective representation. *State v. Sprang*, 2004 WI App 121, ¶ 30, 274 Wis. 2d 784, 683 N.W.2d 522.

and conflates two distinct questions. On the second half of the *Bangert* test, the court of appeals,

> considering the question purely from the posture of the plea colloquy defect—that being, the court's failure to address the maximum statutory penalty with Gomolla— . . . conclude[d] that the State met its burden. The court properly determined, based on the entire record and the testimony of Gomolla and defense counsel, that Gomolla was aware of and understood the "[potential punishment] to which [she was] subjecting [her]self by entering a plea," despite the court's failure to address the issue during the plea colloquy.

Gomolla, 2024 WL 446008, ¶ 26 (third, fourth, and fifth alterations in original). It further concluded that "absent the fact that defense counsel informed Gomolla of the wrong maximum statutory penalty, our review would end here." *Id.*

The court of appeals, rather than framing the question as whether *Cross* applies to the second half of the *Bangert* test, asked "what impact does the fact that Gomolla was told the incorrect potential punishment have on Gomolla's claim that her plea was not knowingly, voluntarily, and intelligently made?" *Id.* ¶ 27. In other words, and because Gomolla abandoned her ineffective assistance claim, the court of appeals answered the only question it could: whether Gomolla was entitled to withdraw her plea solely because she was informed of a potential range of punishment that is higher, but not substantially higher, than that allowable by law. Under *Cross*, that answer is clearly no. Accordingly, the court of appeals' decision was not the novel expansion of *Cross* beyond its holding that Gomolla claims it to be. Instead, the court of appeals' decision represents a well-reasoned and logical *application* of *Cross* to the claim that Gomolla chose to raise. Because the court of appeals did nothing more than logically apply *Cross* to the facts of the case and the claim Gomolla chose to raise, there is no need for this Court's review.

CONCLUSION

This Court should deny Gomolla's petition for review.

Dated this 15th day of March 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
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(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,846 words.

Dated this 15th day of March 2024.

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of March 2024.

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General