STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2009AP3-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,
Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION
AND A POSTCONVICTION ORDER
ENTERED IN THE CIRCUIT COURT
FOR ST. CROIX COUNTY,
THE HONORABLE ERIC J. LUNDELL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The plea-withdrawal issue presented by Defendant Travis Vondell Cross appears to be controlled – in Cross's favor – by this court's decision in *State v. Harden*, 2005 WI App 252, 287 Wis. 2d 871, 707 N.W.2d 173. Moreover, this court is bound by its own published

precedent. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

Respectfully, however, for reasons outlined in the Argument section of this brief, the State disagrees with the *Harden* analysis. The State, therefore, presents its argument against plea withdrawal for two reasons: (1) to support a request for certification from this court; and (2) alternatively, to preserve the State's argument with an eye toward seeking review in the Wisconsin Supreme Court, whether by a petition for bypass or by a petition for review.

STATEMENT OF THE CASE AND RELEVANT FACTS

Original charge.

By criminal complaint filed December 8, 2005, in St. Croix County Case No. 2005-CF-614, Defendant Cross was charged with one count of first-degree sexual assault of a child, contrary to Wis. Stat. § 948.02(1) (2001-02) – a Class B felony under Part I of Truth-of-Sentencing ("TIS-I") legislation, carrying maximum imprisonment of sixty years, *see* Wis. Stat. § 939.50(3)(b) (2001-02), and maximum initial confinement of forty years. *See* Wis. Stat. § 973.01(2)(b)1. (2001-02).[1]

The criminal complaint alleges that "between December of 2002 to January of 2003," Cross had sexual contact with ten-year-old Alexandra D.F. (birth date of 5/12/92), at Cross's residence in North Hudson (1:1) – in effect, a TIS-I crime. Alexandra is Cross's great-

[1]Crimes committed after December 31, 1999, but before February 1, 2003, are subject to the penalties established by TIS-I legislation. *See State v. Cole*, 2003 WI 59, ¶ 4, 262 Wis. 2d 167, 663 N.W.2d 700. The 2001-02 Wisconsin Statutes book conveniently shows classifications and penalties for crimes under both TIS-I and TIS-II (Part II of Truth-in-Sentencing), with the TIS-I numbers appearing in a boldface note for each affected statute.

granddaughter (67:6). The complaint actually alleges two such incidents:

- an incident in December 2002, when Cross allegedly "put his hand on [Alexandra's] crotch on top of her pants" while Cross was seated at a table and Alexandra was sitting on his lap (1:1); and

- an incident on January 1, 2003, when Cross again allegedly "put his hand on [Alexandra's] crotch on top of her pants" and "then tried to put his hand down her underwear" while Cross was sitting in a rocking chair and Alexandra was sitting on his lap, covered by a blanket (1:1).

At a preliminary hearing on November 7, 2006, Alexandra, who by then was fourteen years old, recounted both of these alleged incidents and also alleged two other specific incidents of sexual contact by Cross (67:7-11). By information filed the same day, the State repeated the single charge set forth in the complaint (6).

Plea agreement.

On January 5, 2007, pursuant to a plea agreement with the State, Cross pled guilty to a reduced charge of second-degree sexual assault, contrary to Wis. Stat. § 948.02(2) (*see* 69:3-6, 15).[2]

The prosecutor had submitted a written plea offer to Cross by letter dated December 5, 2006 (54:Ex. 1). By letter dated the same day, Cross, through defense counsel, had submitted a counter plea offer (55:Ex. 2), which the prosecutor accepted (72:5-6).

The handwritten notes on the prosecutor's letter were not shared with the defense as part of the plea

[2]As discussed in the Argument section of this brief, violation of § 948.02(2) was a Class BC felony for TIS-I crimes and became a Class C felony for TIS-II crimes – that is, for crimes committed on or after February 1, 2003.

agreement (72:5-6). Rather, the terms of the plea agreement are embodied in defense counsel's letter (55:Ex. 2), as follows:

- Cross agreed to plead guilty to the reduced charge of second-degree sexual assault of a child under Wis. Stat. § 948.02(2);

- the State agreed to recommend imprisonment of "24 months," to be served concurrent with Cross's existing sentence in Minnesota; and

- Cross further agreed to have no contact with Alexandra or her family, to register as a sex offender, to make any restitution, and to be subject to "lifetime supervision" if he again resides or works in Wisconsin.

The foregoing terms of the plea agreement were set forth on the record of the plea hearing of January 5, 2007 (*see* 69:3-6). They also are included in an attachment to a plea questionnaire that Cross submitted at the plea hearing (13:2).

At the plea hearing, both the prosecutor and defense counsel referred to the reduced charge of second-degree sexual assault of a child as a "Class C felony" that carried maximum imprisonment of forty years, with maximum initial confinement of twenty-five years (69:4). The attachment to Cross's plea questionnaire likewise identified this reduced charge under Wis. Stat. § 948.02(2) as a "Class C Felony," with the same numerical breakdown for maximum imprisonment, initial confinement, and extended supervision (13:2).

After a plea colloquy with Cross, Judge Eric J. Lundell accepted Cross's guilty plea to second-degree sexual assault of a child, relying on the preliminary

hearing testimony and allegations of the complaint as factual bases for the guilty plea (69:15-16).[3]

Twice during the plea colloquy, Judge Lundell told Cross that if Cross pled guilty to second-degree sexual assault of a child, Cross faced maximum imprisonment of forty years, including maximum initial confinement of twenty-five years (69:8-9, 14-15).

Original sentencing and judgment.

On March 26, 2007, Judge Lundell sentenced Cross on one count of second-degree sexual assault of a child (as if it were a Class C felony under TIS-II) to twenty-five years' initial confinement and fifteen years' extended supervision (70:15). Judgment of conviction was filed March 28, 2007 (25).

Postconviction motion.

By postconviction motion filed October 9, 2007, Cross sought resentencing or sentence modification (31), and the prosecutor filed a responsive brief (37).

By supplemental motion filed January 3, 2008, and supporting memorandum filed January 28, 2008, Cross alternatively sought plea withdrawal or resentencing on grounds that his underlying crime arose under TIS-I, and that second-degree sexual assault of a child under TIS-I was a Class BC felony, punishable by thirty years' imprisonment, with maximum initial confinement of

[3]If plea withdrawal is granted and the case proceeds to trial, the prosecutor would have to choose one of Alexandra's alternative allegations of sexual assault as the basis for the single charge to ensure a unanimous verdict. *See, e.g., State v. Lomagro,* 113 Wis. 2d 582, 586-87, 335 N.W.2d 583 (1983). Alternatively, the prosecutor would have to amend the charging documents to add *more* counts of child sexual assault to avoid possible duplicity. As for Cross's guilty plea, Cross did not dispute committing any alleged acts of having sexual contact with Alexandra in December 2002 and January 2003.

twenty years (36; 41). The prosecutor filed a letter response (42), and Cross filed a letter reply (42a).

Cross's postconviction motion was addressed at an evidentiary hearing on January 3, 2008 (71). Cross's trial counsel (Attorney Julie Smith) testified that she mistakenly advised Cross that pleading guilty to second-degree sexual assault of a child was a Class C felony punishable by maximum imprisonment of forty years, including maximum initial confinement of twenty-five years (71:18). In his supplemental motion, Cross alleged that he "did not, in fact, otherwise correctly understand the applicable maximum penalties" of thirty years' imprisonment, including twenty years' initial confinement (36:2). Cross testified that in view of this mistake, he desired plea withdrawal (71:29-30).

By postconviction order filed April 15, 2008, Judge Lundell denied Cross's request for plea withdrawal, but ordered resentencing in view of the mistake about the maximum possible penalties (48).

Resentencing and new judgment.

On July 23, 2008, Judge Lundell resentenced Cross, reducing Cross's sentence to twenty years' initial confinement and ten years' extended supervision (72:14), the maximum possible sentence for second-degree sexual assault of a child as a Class BC felony under TIS-I. A new judgment of conviction was filed July 28, 2008 (58).

Appeal.

By notice of appeal filed December 26, 2008, Cross now appeals from both judgments of conviction and from the order denying his postconviction motion for plea withdrawal (62).

ARGUMENT

THE TRIAL COURT PROPERLY DENIED CROSS'S POST-SENTENCING MOTION FOR PLEA WITHDRAWAL.

A. Introduction.

Cross's claim for plea withdrawal. Cross seeks plea withdrawal on the ground that his guilty plea to second-degree sexual assault of a child was not made knowingly, voluntarily, and intelligently, in violation of his constitutional right to due process (Cross's brief at 5-8).

Cross asserts that when he agreed, pursuant to a plea agreement, to plead guilty to a reduced charge of second-degree sexual assault of a child, he mistakenly believed that he faced *greater* potential imprisonment than he actually faced (Cross's brief at 4-5, 7).

Specifically, Cross asserts that he mistakenly believed (and was mistakenly told by the trial court during the plea colloquy) that he faced maximum imprisonment of forty years, including maximum initial confinement of twenty-five years – when, in fact, he faced maximum imprisonment of thirty years, including maximum initial confinement of twenty years (Cross's brief at 4-5, 7). Cross claims that but for this mistaken understanding of maximum penalties, he would not have entered into the plea agreement (36:2; Cross's brief at 7).

Summary of State's position. As noted at the outset of this brief, this court's decision in *Harden* supports Cross's claim for plea withdrawal, and *Harden* is binding precedent on this court. *See* Argument Section B. below.

Respectfully, however, the State disagrees with the *Harden* analysis, because due process does *not* require that the defendant always know the *precise* maximum

potential punishment to tender a knowing, voluntary, and intelligent guilty plea. Rather, when, as in the present case, the defendant pleads guilty under a mistaken belief that he faces *greater* potential punishment than he actually faces, post-sentencing plea withdrawal is *not* automatic, but rather requires a showing of manifest injustice. In that situation, the defendant does, in fact, know that he could be sentenced to *at least as much as* the correct lesser maximum amount of imprisonment. *See* Argument Section C. below.

In the present case, plea withdrawal is *not* warranted to correct a manifest injustice to Cross. Cross achieved a highly favorable plea agreement that, in Cross's understanding, reduced his potential punishment from sixty years' imprisonment (including forty years' initial confinement) to forty years' imprisonment (including twenty-five years' initial confinement). Moreover, the prosecutor agreed to recommend two years' imprisonment, to be served concurrently with Cross's existing Minnesota sentence, and the prosecutor could have charged additional counts of first-degree sexual assault. Because the plea agreement subjected Cross to even less potential punishment (thirty years' imprisonment, including twenty years' initial confinement) than Cross understood when he pled guilty, the plea agreement *was even more favorable than Cross understood it to have been*. *See* Argument Section D. below.

B. *State v. Harden* supports Cross's claim of plea withdrawal.

The State does not dispute that *Harden* supports Cross's claim for plea withdrawal.

In *Harden*, 287 Wis. 2d 871, ¶ 1, the defendant pled no contest to charges of delivering cocaine and THC (marijuana). At the time of his no-contest pleas, the defendant mistakenly believed (and the trial court

mistakenly informed the defendant during the plea colloquy) that the defendant faced "nineteen years' and six months' imprisonment," when "[t]he correct potential prison exposure was sixteen years." *Id.*, ¶ 2.

The defendant in *Harden* (like Cross in the present case) claimed "that he would not have accepted the plea agreement if he had known the correct maximum prison exposure was . . . less than he was told." *Id.*, ¶ 3. The trial court in *Harden* disbelieved the defendant and denied plea withdrawal. *Id.*

On appeal in *Harden*, this court reversed, reasoning in part as follows:

> In this case, the State must prove that Harden knew the correct maximum sentence despite being given erroneous information at every stage of this proceeding. The State presented no evidence that Harden knew the correct maximum sentences the court could impose. Instead, it persuaded the trial court that Harden was required to show that his plea decisions were affected by the misinformation. This argument was specifically rejected in *State v. Bartelt*, 112 Wis. 2d 467, 484, 334 N.W.2d 91 (1983). While some language in *Bartelt* was subsequently withdrawn in [*State v.*] *Bangert*, [131 Wis. 2d 246, 256, 260, 389 N.W.2d 12 (1986)], the holding that a defendant need not show that the misinformation "caused" the plea has never been withdrawn. The precedent is binding on this court.

Harden, 287 Wis. 2d 871, ¶ 5 (brackets added; footnote omitted). En route to the foregoing conclusion, this court also concluded that contrary language by the court of appeals in *State v. Quiroz*, 2002 WI App 52, 251 Wis. 2d 245, 641 N.W.2d 715, was dicta that must give way to the Wisconsin Supreme Court's decision in *State v. Bartelt*, 112 Wis. 2d 467, 484, 334 N.W.2d 91 (1983). *See Harden*, 287 Wis. 2d 871, ¶ 6.

In relevant part, the facts of *Harden* appear indistinguishable from the present case. Like the defendant in *Harden*, when Cross entered into the plea

agreement, he misunderstood (and the trial court misinformed him) that he actually faced *less* maximum potential punishment than he believed. *Harden*, therefore, appears controlling, and because *Harden* is published precedent of the court of appeals, it is binding on this court under *Cook v. Cook*, 208 Wis. 2d at 189-90.[4]

C. Respectfully, the State disagrees with the *Harden* analysis.

1. Introduction.

Respectfully, the State disagrees with the *Harden* analysis, because due process does *not* require that the defendant always know the *precise* maximum potential punishment to tender a knowing, voluntary, and intelligent guilty plea.

Rather, when, as in the present case, the defendant pleads guilty under a mistaken belief that he faces *greater* potential punishment than he actually faces, post-sentencing plea withdrawal is *not* automatic, but rather requires a showing of manifest injustice. In that situation, the defendant does, in fact, know that he could be sentenced to *at least as much as* the correct lesser maximum amount of imprisonment.

In conjunction, the Wisconsin Supreme Court's decision in *Bartelt* is distinguishable.

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[4]A similar result accrued in *State v. Lis*, 2008 WI App 82, 311 Wis. 2d 691, 751 N.W.2d 891. In *Lis*, *id.*, ¶¶3-4, the defendant apparently was misinformed that the maximum potential punishment was greater than it actually was, because the defendant's crime had ended sooner than the court mistakenly believed. The State apparently "concede[d] that if [the defendant's] crimes ended by the end of 2000 [before the advent of TIS-II], he was misinformed on the applicable penalty and is entitled to withdraw his guilty pleas." *Id.*, ¶ 16 (brackets added).

Before developing this argument below with supporting rationales and case law, the State first outlines the basic principles governing post-sentencing motions for plea withdrawal in Wisconsin.

2. The legal framework for post-sentencing motions for plea withdrawal.

Manifest injustice. When a defendant, like Cross, moves to withdraw a guilty plea after sentencing, the defendant "'carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a "manifest injustice."'" *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citations omitted).

The "manifest injustice" standard requires the defendant to show "'a serious flaw in the fundamental integrity of the plea.'" *Id.* (citation omitted).

"The rationale for a higher standard [for plea withdrawal] after sentencing [than before sentencing] is that it deters a defendant from 'testing the waters' and then moving to withdraw a guilty or no contest plea if disappointed in the sentence imposed.'" *State v. Shimek*, 230 Wis. 2d 730, 740-41, 601 N.W.2d 865 (Ct. App. 1999) (brackets added; citation omitted).

Due process. Nevertheless, a defendant who establishes the denial of a constitutional right relevant to the plea decision has established a manifest injustice and is entitled to plea withdrawal as a matter of right. *See State v. Bangert*, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986). This presents a question of "constitutional fact," subject to independent review. *See Bangert*, 131 Wis. 2d at 283.

Under the Fourteenth Amendment guarantee of due process, a state trial court may accept a plea of guilty or no contest only when it has been made knowingly, voluntarily, and intelligently. *See Brady v. United States*, 397 U.S. 742, 747 (1970); *Bangert*, 131 Wis. 2d at 257-61. In relevant part, this means that at the time of the plea, the defendant must be aware of the nature of the crime charged, the constitutional rights being waived, and "'the direct consequences'" of the plea. *Brady*, 397 U.S. at 755 (citation omitted); *Bangert*, 131 Wis. 2d at 260, 265-66.

To ensure that a plea of guilty or no contest satisfies this constitutional standard, a trial court in Wisconsin must address the defendant personally concerning the defendant's understanding of the nature of the charges, the constitutional rights being waived, and "the range of [potential] punishments." *Bangert*, 131 Wis. 2d at 266-68 (brackets added); *see also* Wis. Stat. § 971.08(1)(a). A trial court also must "advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and, concomitantly, ascertain whether the defendant understands this information." *State v. Hampton*, 2004 WI 107, ¶ 35, 274 Wis. 2d 379, 683 N.W.2d 14.

In *Bangert*, the Wisconsin Supreme Court established a two-step, burden-shifting procedure for evaluating a defendant's challenge to the constitutional validity of a plea of guilty or no contest stemming from an alleged defect in the plea colloquy:

> The initial burden rests with the defendant to make a *prima facie* showing that his [or her] plea was accepted without the trial court's conformance with sec. 971.08 or other mandatory procedures as stated herein. . . . Where the defendant has shown a *prima facie* violation of sec. 971.08(1)(a) or other mandatory duties, and alleges that he [or she] in fact did not know or understand the information which should have been provided at the plea hearing, the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea

> was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance.

Bangert, 131 Wis. 2d at 274 (citations omitted). To meet its burden under the second step of this analysis, the State may use the entire record and "may examine the defendant [and] defendant's counsel to shed light on the defendant's understanding or knowledge of information necessary for [the defendant] to enter a voluntary and intelligent plea." *Id.* at 275 (brackets added).

In effect, a trial court's omission or error in carrying out a requisite duty in a plea colloquy is not a violation of due process (and plea withdrawal for such an omission is not warranted) unless the State cannot show that the defendant's plea was knowingly, voluntarily, and intelligently tendered, despite the omission or error in the colloquy. *See also id.* at 261 n.3.

Within the foregoing framework, the question in the present case is whether a defendant's mistaken belief that he faces *greater* potential punishment than he actually faces renders the defendant's guilty plea unknowing, involuntary or unintelligent so as to automatically require plea withdrawal. This analysis follows.

3. When, as in the present case, the defendant pleads guilty under a mistaken belief that he faces *greater* potential punishment than he actually faces, post-sentencing plea withdrawal is *not* automatic, but rather requires a showing of manifest injustice.

As a threshold matter, the State respectfully disputes the statement in *Harden*, 287 Wis. 2d 871, ¶ 5, that a criminal defendant always must "kn[o]w the correct maximum sentence" before the defendant's plea of guilty or no contest is made knowingly, voluntarily, and intelligently as a matter of due process.

Rather, the following authorities support the proposition that when, as in the present case, the defendant pleads guilty under a mistaken belief that he faces *greater* potential punishment than he actually faces, post-sentencing plea withdrawal is *not* automatic, but rather requires a showing of manifest injustice. That is because the defendant does, in fact, know that he could be sentenced to *at least as much as* the correct lesser maximum amount of imprisonment.

In *Brady*, 397 U.S. at 743-44, 756, defense counsel advised the defendant that a particular federal conviction of kidnapping carried the prospect of the death penalty, but subsequent decisions showed this advice to be erroneous, finding the death-penalty provision unconstitutional. A unanimous Supreme Court held that the defendant's plea nevertheless was constitutionally sound, observing:

> We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act

> with which he is charged simply because it later develops . . . that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id. at 757.

In relevant part, Federal Rule of Criminal Procedure 11(c)(1) requires a federal trial court to inform a defendant pleading guilty of "the maximum possible penalty provided by law including the effect of any special parole or supervised release term." Nevertheless, Rule 11(h), which is entitled "Harmless Error," provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." As one example of harmless error, the 1983 Advisory Committee Notes to Rule 11(h) cite the situation in which "the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings." The implication is that a defendant's understanding of the *precise* maximum possible penalty is not a due process prerequisite for a knowing, voluntary, and intelligent guilty plea. *See, e.g., United States v. Raineri*, 42 F.3d 36, 40-42 (1st Cir. 1994) (finding harmless error – in effect, no due process violation – when the defendant was misinformed that he faced potential imprisonment of thirty-five years when he actually faced potential imprisonment of forty-five years, with a minimum of twenty years, and was sentenced to ten years' imprisonment and five years' supervised release).

The absence of a due process violation requiring plea withdrawal has commonly been found in situations, like the present case, where, at the time of a guilty plea pursuant to a plea agreement, the defendant misunderstood (and was misinformed by the trial court) that he faced a *greater* potential term of imprisonment than he actually faced. The following examples are illustrative.

- In *Commonwealth v. Sherman*, 864 N.E.2d 1241, 1247 (Mass. App. Ct. 2007), the defendant misunderstood (and was misinformed by the trial court)

that he faced life in prison when, in fact, the defendant, who had pled guilty under a plea agreement to a lesser offense, faced a maximum of twenty years' imprisonment. The parties had jointly recommended "a sentence of six to ten years in prison, with six months to be served, and the balance of the sentence suspended for a three-year probationary period," a recommendation that the trial court would adopt. *Id.* at 1242. The appellate court held that the defendant was not entitled to plea withdrawal, stating:

> In these circumstances, such a misstatement [that is, overstatement of the maximum potential sentence] is not the type that warrants the determination that justice was not done and that a new trial is warranted. Indeed, the favorable sentencing consequences [and recommendation] of the defendant's plea bargain render insignificant any deviation.

Id. at 1247.

- In *Barton v. United States*, 458 F.2d 537, 541 (5th Cir. 1972), the two defendants misunderstood from defense counsel and the district court that they faced 140 years' imprisonment, when, in fact, they apparently faced fifty years' imprisonment. The appellate court concluded, however, that this misunderstanding did not destroy "the essential ingredient of voluntariness" of the defendants' guilty pleas, *id.*, observing: "The probability that such a belief [of each defendant that he faced 140 years' imprisonment due to pyramiding maximum sentences on the multiple counts of the indictments] would encourage a defendant to plead "not guilty" outweighs the possibility that it might cause him to plead guilty." *Id.* at 541-42 (brackets added).

- In *Grant v. State*, 585 N.E.2d 284, 285-86 (Ind. Ct. App. 1992), the defendant misunderstood, based on the trial court's remarks, that he faced ninety years' imprisonment when, in fact, he faced a maximum of sixty years' imprisonment. In exchange for his guilty plea to one of three counts of burglary, the defendant had

negotiated a sentence recommendation of between ten and twenty years and was sentenced to ten years' imprisonment with eight years suspended. *Id.* at 288. Under these circumstances, the appellate court "f[ou]nd it incredible" that if the defendant had correctly understood the lesser maximum term of imprisonment, he "would have rejected the plea [agreement] and would have chanced acquittal or conviction on all three counts." *Id.* The appellate court placed the burden on the defendant to show that his misunderstanding of the maximum possible sentence "render[ed] his decision to plead guilty pursuant to the plea agreement involuntary and unintelligent." *Id.*

- In *Schofield v. United States*, 441 F.2d 1219, 1220 (7th Cir. 1971), the defendant misunderstood, based on the district court's remarks, that he faced forty-five years' imprisonment when, in fact, he faced a maximum of twenty-five years' imprisonment. Both defense counsel and prosecutor shared the misunderstanding. *Id.* at 1221. The defendant had pled guilty after apparently negotiating a government recommendation that the defendant's sentence "run concurrently with a sentence then being served" in another state. *Id.* at 1220. The appellate court found no due process violation warranting plea withdrawal, explaining:

> The fact that everyone seems to have misapprehended the possible penalties that could be imposed does not, in our opinion, render Schofield's plea unintelligent or involuntary. The situation here was not that of inducing a plea of guilty on the basis that the sentence which *would* be imposed would be substantially less than that which *could* be imposed by a jury trial. . . .
>
> If [Schofield] were of the opinion that he could be sentenced to up to forty-five years on a plea of guilty, we do not see that he was thereby induced to plead guilty in this posture to any greater extent than if he had been correctly informed that on a guilty plea the maximum sentence he could receive would be only twenty-five years. The maximum possible sentence on a guilty plea was no less (and

> no greater) than it would have been on trial as contraseted to those cases of alleged inducement.

Id. at 1221 (emphasis added).

- In *Brooks v. State*, 606 So.2d 615, 616 (Ala. Crim. App. 1991), the defendant pled guilty to selling marijuana with the misunderstanding, elicited both from counsel and trial court, that she faced two to thirty years' imprisonment when, if fact, she faced two to fifteen years' imprisonment. In rejecting the defendant's motion for plea withdrawal, the appellate court concluded: "[I]t is difficult to imagine that the appellant would voluntarily submit herself to a possible 30-year sentence but she would have gone to trial on the chance that she may be acquitted if she had known that the maximum punishment would be only 15 years." *Id.* at 617. The appellate court also noted that between the time of her guilty plea and sentencing, the defendant had eluded authorities for twelve years, surmising that the defendant more likely sought plea withdrawal, because "she believed it would be difficult to obtain a conviction in a case that was 12 years old." *Id.*

- In *United States v. Molina*, 469 F.3d 408, 410-12 (5th Cir. 2006), the defendant pled guilty to five charges, three of which carried a maximum term of life imprisonment. The defendant misunderstood from the district court's remarks, however, that he faced twenty years' imprisonment on one of the charges when, in fact, he faced only five years' imprisonment. *Id.* at 411. In rejecting the defendant's motion for plea withdrawal, the appellate court concluded that the defendant "has not demonstrated a reasonable probability that he would not have pleaded guilty but for the proper admonition."

- In *Allen v. United States*, 634 F.2d 316, 317 (5th Cir. 1981), the defendant misunderstood, based on the district court's remarks, that he faced thirty-five years' imprisonment when, in fact, he faced a maximum of twenty-five years' imprisonment. In rejecting the

defendant's motion for plea withdrawal, the appellate court concluded that such error constituted "neither a fundamental defect in the guilty plea proceedings nor any prejudice to" the defendant. *Id.*

- In *Long v. United States*, 883 F.2d 966, 968 (11th Cir. 1989), the defendant misunderstood, based on the district court's remarks, that he faced twenty years' imprisonment when, in fact, he faced a maximum of ten years' imprisonment. Under a plea agreement, one of three counts of an indictment would be dismissed if the district court withheld sentence in favor of probation, which the court did, imposing a five-year term of probation. *Id.* at 967. In rejecting the defendant's ensuing claim for plea withdrawal, the appellate court held that the defendant had to show that the misunderstanding about maximum imprisonment "was a material factor in his decision to plead guilty" and had failed to do so, explaining:

> The maximum penalty [that the defendant] could receive was not an important element in [his] decision to plead guilty; prior to and at the plea hearing, he indicated that he wanted to plead guilty as long as he was placed on probation. Surely, he would not have changed his mind had the court informed him that if his probation were revoked he could be sentenced to ten, not twenty, years in prison.

Id. at 969 (brackets added).

- In *United States v. Fuller*, 769 F.2d 1095, 1096 (5th Cir. 1985), the defendant misunderstood from both his counsel and the district court that he faced fifteen years' imprisonment when, in fact, he faced a maximum of five years' imprisonment. The appellate court concluded that "[e]rroneous advice from counsel or the court that the maximum sentence was greater than that allowed by the statute does not necessarily prejudice a defendant unless the facts demonstrate that the error was likely to have altered the defendant's decision to plead guilty." *Id.* at 1098. In the case before it, the appellate

court concluded that plea withdrawal was not warranted, because the defendant knew the evidence of guilt was overwhelming and that his only hope for leniency was to plead guilty. *Id.* The appellate court also noted that the defendant "was not led to believe that a guilty plea would reduce his potential maximum sentence." *Id.* at 1099.

State v. Quiroz. In *Quiroz*, 251 Wis. 2d 245, ¶¶ 8, 11, the defendant sought plea withdrawal in part on a claim that at the time of his guilty pleas under a plea agreement, the trial court wrongly informed him that on one of the charges, he faced maximum imprisonment of fourteen years, when the correct maximum was thirteen years' imprisonment. The court of appeals concluded, however, that fourteen years was the correct maximum imprisonment and that even if the defendant, therefore, misunderstood the correct maximum imprisonment, he was not entitled to plea withdrawal. The court of appeals explained:

> Furthermore, even if the maximum penalty had been overcalculated, which we have determined it was not, Quiroz *fails to establish that a plea withdrawal would correct a manifest injustice.* Quiroz was sentenced to twelve years in prison, less than the fourteen-year maximum correctly calculated by the court and less than the thirteen-year maximum incorrectly calculated by Quiroz. . . . Furthermore, Quiroz willingly pled guilty to a crime with a fourteen-year maximum penalty; he cannot credibly argue that he would not have so pled had he been informed that the maximum was thirteen years.

Id., ¶ 16 (emphasis added). Respectfully, the foregoing conclusion in *Quiroz* does not constitute dicta, because the defendant actually misunderstood the correct maximum imprisonment, but nevertheless was not automatically entitled to plea withdrawal. *Harden* and *Quiroz*, therefore, stand in conflict on whether a defendant's actual misunderstanding of the *precise* maximum imprisonment automatically entitles the defendant to plea withdrawal. *Harden* says yes; *Quiroz* says no.

State v. Bartelt. Lastly, the Wisconsin Supreme Court's decision in *Bartelt*, upon which *Harden* relies, *see Harden,* 287 Wis. 2d 871, ¶ 5, does not resolve the apparent conflict between *Harden* and *Quiroz*.

In *Bartelt*, 112 Wis. 2d at 469-70, the defendant pled guilty to forging a check and agreed to plead guilty in exchange for a prosecutorial recommendation of probation. After sentencing, on a collateral postconviction motion, the defendant sought plea withdrawal on multiple grounds, claiming a violation of due process:

> The [plea-withdrawal] motion was founded on the allegation that the trial court, at the time of taking the plea, failed to advise the defendant of the penalty which could be imposed and that his attorney did not inform him of the maximum penalty. In addition, it was claimed that the trial court failed to tell [the defendant] that his guilty plea waived the fifth and sixth amendment rights to remain silent and to confront his accusers.

Id. at 472-73 (brackets added).

In concluding that the defendant's guilty plea in *Bartelt* "was involuntary as a matter of law," *id.* at 469, the supreme court observed that during the plea colloquy, the defendant "was not informed that his guilty plea would waive the right against self-incrimination and the right to cross-examine state witnesses; nor was he told at the time of the guilty plea what the maximum penalty could be. *Id.* at 473-74. Additionally, the supreme court noted that the defendant was not advised that the trial court was not bound to carry out the prosecutor's sentencing recommendation of probation. *Id.* at 477. Nor did the trial court determine "the extent of the defendant's education or general comprehension" or "whether any promises or threats were made to" the defendant, other than the prosecutor's sentence recommendation. *Id.* at 476.

In view of the foregoing deficiencies relevant to the defendant's guilty plea, the supreme court concluded that

"a violation of due process" had occurred, automatically requiring plea withdrawal, regardless of whether the defendant could show that the deficiencies "'caused' the defendant to plead guilty." *Id.* at 484.

Bartelt is distinguishable from *Harden*, *Quiroz*, and the present case in at least two significant respects. First, in *Bartelt*, the defendant apparently *was not advised at all* about the potential maximum punishment – unlike the defendants in *Harden*, *Quiroz*, and the present case. Second, unlike the situation in *Harden*, *Quiroz*, and the present case, the defendant's plea in *Bartelt* was beset by several additional shortcomings at the plea hearing – including failure to advise the defendant of the trial rights that he was waiving and failure to advise the defendant that the trial court was not bound by the prosecutor's sentencing recommendation.[5]

In short, *Bartelt* does *not* undermine the proposition that if a defendant pleads guilty under a mistaken belief that he faces *greater* potential punishment than he actually faces, due process does *not* automatically require plea withdrawal. Rather, in cases of post-sentencing plea withdrawal, like the present case, the

[5]Such other defects in a plea colloquy – relating to the nature of the charge, the factual basis for the charge, the trial rights being waived, a complete lack of awareness of the maximum potential imprisonment, or the non-binding effect on a trial court of a negotiated sentence recommendation from the prosecutor – when coupled with a showing that the defendant did not otherwise actually know and understand this information, will invariably constitute due process violations. For the reasons set forth, they are of a different quality than a defendant's mistaken belief that that he faces *greater* potential punishment than he actually faces.

defendant must show that plea withdrawal is necessary to correct a manifest injustice.[6]

D. In the present case, plea withdrawal is *not* warranted to correct a manifest injustice to Cross.

If the State is correct that Cross is not automatically entitled to plea withdrawal based on a mistaken belief that he faced *greater* potential punishment than he actually faced, then Cross must show "a manifest injustice" to obtain plea withdrawal on his post-sentencing motion.

Considerations relevant to determining "manifest injustice" in this context necessarily will resemble the "harmless error" considerations that apply when a defendant seeks plea withdrawal for other reasons external to the plea colloquy itself, such as, for example: "the relative strength and weakness of the State's case and the defendant's case" to that point in the record; "the reasons, if any, expressed by the defendant for choosing to plead guilty" or no contest; and "the benefits obtained by the defendant in exchange for the plea." *State v. Sturgeon*, 231 Wis. 2d 487, 504, 605 N.W.2d 589 (Ct. App. 1999).

In the present case, plea withdrawal is *not* warranted to correct a manifest injustice to Cross for several reasons.

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[6]In cases of a defendant's *pre-sentencing* motion for plea withdrawal based on an alleged misunderstanding of the maximum possible imprisonment, the defendant must show that such misunderstanding constitutes "a fair and just reason" for plea withdrawal, a lighter burden than in cases of post-sentencing motions for plea withdrawal, like Cross's case. *Cf. Thomas*, 232 Wis. 2d 714, ¶ 15 (articulating the general "fair and just reason" standard for pre-sentencing motions for plea withdrawal in cases where no constitutional violation relevant to the plea decision has occurred).

- First, at the time of his guilty plea to a reduced charge of second-degree sexual assault of a child, Cross believed that he faced maximum potential imprisonment of forty years (including twenty-five years' initial confinement), which means he knew that he faced imprisonment *at least as much as* the correct lesser maximum imprisonment of thirty years (including twenty years' initial confinement). *Cf. State v. Martin*, 162 Wis. 2d 883, 900-01, 470 N.W.2d 900 (1991) ("[w]hen the defendant is asked to plead, he is entitled to know the *extent* of his punishment of the alleged crime, which he cannot know if he is not then informed that his prior convictions may be used to *enhance* the punishment" (original emphasis omitted; new emphasis added).

- Second, Cross achieved a highly favorable plea agreement that, in Cross's understanding, reduced his maximum potential imprisonment from sixty years (including forty years' initial confinement) to forty years (including twenty-five years' initial confinement). In reality, the plea agreement was even more beneficial to Cross, because it reduced his maximum exposure from sixty years' imprisonment to thirty years' imprisonment (including twenty years' initial confinement). The following observation is apropos:

> It is inherently incredible that a person would voluntarily submit himself to a possible thirty-five year sentence [or, in Cross's case, to a forty-year sentence] but would take his chances on getting an acquittal if he [knew] he faced only [a] twenty-five year sentence [or, in Cross's case, a thirty-year sentence].

Allen, 634 F.2d at 317 (brackets added).

- Third, Cross's plea agreement also was highly desirable, because the prosecutor agreed to recommend only two years' imprisonment, to be served concurrently with Cross's existing Minnesota sentence (69:3-4).

- Fourth, as both the criminal complaint and preliminary hearing reflect, the complainant, Alexandra, alleged that Cross had sexual contact with her on *multiple* occasions (1:1; 67:7-11). Thus, when Cross achieved his plea agreement, Cross knew that the prosecutor could have charged him with additional counts of first-degree sexual assault.

- Fifth, Cross also presumably would have known and considered the prospect that the State's case against him would be enhanced if the trial court were to grant the State's pending motion to introduce evidence that Cross engaged in similar other acts of sexual touching (9). Such proffered "other acts" includes evidence that Cross "touch[ed] two granddaughters through their pants in the genital area and also put[] his hand inside their pants in the genital area" (9:7), which apparently resulted in Cross's convictions in Minnesota (9:5). It also includes evidence that Cross had sexual contact with Alexandra "on three occasions at her home in Georgia and two occasions in . . . Oklahoma" (9:7).

- Sixth, when the trial court corrected Cross's sentence from the impermissible forty years (for a TIS-II crime of second degree sexual assault of a child) to the permissible thirty years (for a TIS-I crime of second degree sexual assault of a child), Cross received a sentence (thirty years) that was *less than* the potential sentence (forty years) that he believed was possible when he pled guilty. *Cf. State v. Brown*, 2006 WI 100, ¶ 78, 293 Wis. 2d 594, 716 N.W.2d 906 (trial court's failure to tell the defendant during plea colloquy that sentences on multiple counts could be imposed to run consecutive is harmless error where the "total sentence did not reach the maximum on even one of" the multiple counts). A different situation is presented when a defendant receives a sentence greater than what he believed was possible when he pled guilty. *See United States v. Pogue*, 865 F.2d 226, 228 (10th Cir. 1989).

- Seventh, a more plausible explanation for Cross's *post-sentencing* motion for plea withdrawal than his misunderstanding of the maximum potential sentence is his post-sentencing realization that the trial court likely would sentence him to maximum imprisonment, regardless of whether he went to trial on the original charge (or additional charges) or let stand his existing plea to the lesser charge. *Cf. State v. Leitner*, 2001 WI App 172, ¶ 24, 247 Wis. 2d 195, 633 N.W.2d 207 (trial court could reasonably infer that because the defendant did not pursue plea withdrawal until after seeing the adverse presentence report, the "true reason for seeking plea withdrawal was his fear of a harsh sentence due to the presentence report"), *aff'd on other grounds*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341.

- Finally, concern for the victim is a significant consideration in assessing a defendant's proffered grounds for reversing a conviction. *See State v. Grant*, 139 Wis. 2d 45, 55, 406 N.W.2d 744 (1987); *see also Morris v. Slappy*, 461 U.S. 1, 14 (1982) ("in the administration of criminal justice, courts may not ignore the concerns of victims" and the potential "ordeal" of a trial when deciding whether a conviction should be reversed). This concern is particularly acute when, as in the present case, the defendant effectively seeks to force a child sexual-assault complainant "to relive the humiliating and degrading experience of [the alleged] sexual assault." *Grant*, 139 Wis. 2d at 55.

For all of the foregoing reasons, plea withdrawal is *not* warranted to correct a manifest injustice to Cross.

CONCLUSION

The State recognizes that this court may be bound to reverse Cross's conviction under *State v. Harden*. Nevertheless, if the present case cannot be distinguished from *Harden*, then for the reasons set forth, including the asserted conflict between *Harden* and *State v. Quiroz*, the State respectfully asks this court to consider certifying this appeal to the Wisconsin Supreme Court.

Dated at Madison, Wisconsin: April 30, 2009.

Respectfully submitted,

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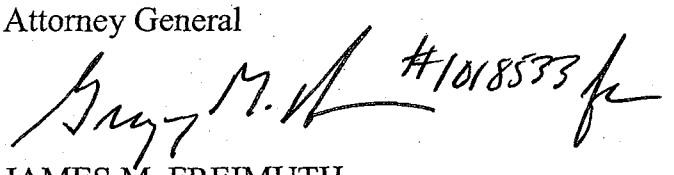

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 6,852 words.

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