STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 3

Case No. 2009AP3-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS VONDELL CROSS,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

THE TRIAL COURT ERRED IN DENYING CROSS'S POST-SENTENCING MOTION TO WITHDRAW HIS GUILTY PLEA.

A. The Relevant Statute and Applicable General Principles of Law, and the Standard of Review.

The parties are not in dispute about the applicable principles of existing law.

B. Cross's Plea Was Not Entered Knowingly and Intelligently Because He Had Been Affirmatively Misinformed About the Potential Penalties.

The state concedes that this appeal must be resolved in Cross's favor pursuant to the Court of Appeals' previous decision in ***State v. Harden***, 2005 WI App 252, 287 Wis. 2d 871, 707 N.W.2d 173, a precedent which the court is not authorized to overrule (respondent's brief, at 1-2, 7, 8-10).

Nevertheless, the Attorney General goes on to present an imaginative but contorted argument to the effect that existing Wisconsin law should be changed (respondent's brief, at 7-8, 10, 14-26). In doing so, however, the dispositive legal objections are conveniently overlooked.

First, the controlling legal authority is not just the Court of Appeals' prior decision in ***State v. Harden***, *supra*, together with the Wisconsin Supreme Court's own decisions in ***State v. Van Camp***, 213 Wis. 2d 131, 569 N.W.2d 577 (1997), and ***State v. Bartelt***, 112 Wis. 2d 467, 334 N.W.2d 91 (1983). The courts are equally bound by Wis. Stat. § 971.08(1)(a), which mandates that a guilty plea cannot be accepted unless the plea was made "with understanding of. . .the potential punishment if convicted."

The state's appellate brief gives no sensible explanation as to how a defendant's erroneous information about the maximum punishment could satisfy this statutory requirement.

Second, the Wisconsin courts are also constrained by the Fourteenth Amendment of the United States Constitution, which represents the supreme law of the land. U.S. CONST., Art. VI; ***State v. Jennings***,

2002 WI 44, ¶18, 252 Wis. 2d 228, 237-38, 647 N.W.2d 142.

In applying the Due Process Clause, the United States Supreme Court has previously determined that a valid guilty plea requires that the defendant be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel." ***Mabry v. Johnson***, 467 U.S. 504, 509 (1984); ***Brady v. United States***, 397 U.S. 742, 755 (1970).

Here, again, the Attorney General offers no real answer how a defendant could be "fully aware" of both the direct consequences of conviction and also "the actual value" of the plea bargain if he or she was affirmatively misinformed about the maximum penalties.

Third, the state's argument is founded on impermissible speculation.

Thus, it is impossible for the courts to meaningfully gauge the strength of the prosecutor's case or the strength of the theory of defense in the absence of a full trial record.

More importantly, it is impossible to determine whether the defendant would have decided to enter a guilty plea, anyway, even if he or she had not been misinformed about the applicable penalties. The United States Supreme Court has expressly ruled that testimony on this point is merely "hypothetical," and that any corresponding judicial "assumption" is "an insufficient predicate for a conviction" under the federal constitution. ***Henderson v. Morgan***, 426 U.S. 637, n. 12 at 643-45 (1976). *Cf. also* ***State v. Smith***, 207 Wis. 2d 258, 280, 558 N.W.2d 379 (1997) (refusing to speculate about whether a different sentencing decision would

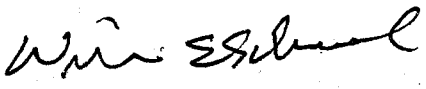
have been made if the prosecutor had not erroneously breached the plea bargain).

CONCLUSION

For the reasons set forth above, Cross respectfully requests the Court of Appeals to enter an order reversing the trial court's duplicate orders denying post-conviction relief and vacating the original judgment of conviction and the superceding judgment of conviction after re-sentencing, with leave for Cross to withdraw his guilty plea together with the reinstatement of the original charge.

Dated this 8th day of May, 2009.

Respectfully submitted,



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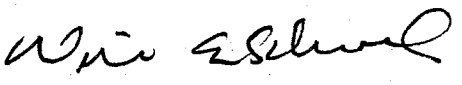
CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 626 words.

Dated this 8th day of May, 2009.

Signed:



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