STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP001267-CR

EUGENE B. SANTIAGO,

Defendant-Appellant.

APPEAL FROM ORDERS DENYING POSTCONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06 AND MOTION TO CORRECT OR AMEND JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, HONORABLE STEPHEN A. SIMANEK (INTERIM JUDGE) AND HONORABLE ANTHONY MILISAUSKAS, RESPECTIVELY, PRESIDING

REPLY BRIEF AND APPENDIX
DEFENDANT-APPELLANT

Eugene B. Santiago
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Defendant-Appellant, Pro se
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Post Office Box 900
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A R G U M E N T

The State's brief is off-base and in the left field as to what this appeal is even about. Santiago never argued at any point anything about probation or post-probation revocation sentence. This has nothing to do with this appeal. Santiago is attacking the charging documents and his plea, as well as a clerical error in the Judgment of Conviction (JOC).

The State seems to attempt to misdirect this Court into making this appeal about an issue of dissatisfaction with a post-probation revocation sentence. It is not. It has further taken liberty in redefining Santiago's appeal in that in their caption, "Appeal from a Corrected Judgment of Conviction after Revocation of Probation, An Order Denying Post Conviction Relief and an Order Denying a Motion to Correct or Amend the Judgment of Conviction..." adding in another issue never raised. Santiago is not appealing "a Corrected [JOC] after Revocation of Probation." He has no issue with the corrections made to the JOC after the Department of Corrections (DOC) inquiry clarifying/correcting the statute of conviction or with the sentence rendered.

The DOC was correct in that the statute cited, Wis. Stat. § 948.02(1)(c), was an error and the court properly corrected the JOC to reflect the proper statute of 948.02(1).

The **only** issue Santiago has on appeal with regard to the JOC is the "Date of Offense" being incorrect. Santiago asks the Court to not be side-tracked by this added issue by the

State. It is Santiago's position that Sec. I of the State's Response Brief is not on appeal and is thus moot (R-Br. pp. 8-10). Santiago's caption and stated issues in his initial brief state what is on appeal with clarity.

Whether or not Santiago is guilty or innocent; or whether if he's a "deviant" or bad guy over 26 years ago is irrelevant. The State's rambling "Supplemental Statement of Case" serves to demonize Santiago, call him a few derogatory names using select quotes from transcripts drifting outside the spirit of Rule 809.19(1)(d) prerequisites to maintain procedural clarity. Their emotional ploy and shoddy persuasion scheme must be set aside for legal objectivity.

Probation revocations are distinct from underlying criminal proceedings, State ex rel. Cramer v. Wisc. Ct. of Appeals, 2000 WI 86, PP27-30, 236 Wis. 2d 473, 613 N.W. 2d 591, which Santiago's underlying conviction and plea are what is on appeal. Keeping it clear, simple and on-point:

1. Should Santiago be permitted to withdraw his plea because (a) the State charged Santiago with the correct offenses but incorrect penalties while being informed by all parties involved as to those erred penalties while also (b) improperly charging Santiago with erred penalty enhancers as it relates to Count 2? and,

2. Should the Judgment of Conviction reflect the proper, true and correct date of offense?

Very plain - very simple. Beginning with some plain objective facts on this appeal:

1. The State erred in (a) charging Santiago in 1996 with the wrong penalty statutes rather than the proper year of 1992; in addition, it erred in applying the wrong penalty enhancers as it relates to Count 2; and (b) the Judgment of Conviction reflects the wrong Date of Offense" of May 17, 1996 as opposed to the proper "between July, 1992 and November, 1992" which directly exposes Santiago to the provisions of Presumptive Mandatory Release (PMR) under Wis. Stat. § 302.11(1g)(am).

2. The State erred in using 1996 Wis. Stats. rather than 1992 Wis. Stats. in prosecuting this case.

3. While the offenses are the same in 1992 and 1996, the penalties for the offenses charged are different between 1992 and 1996.

4. Defense counsel, the State and the circuit court did mistakenly inform Santiago he was facing 75 years imprisonment under the 1995 statutes rather than the true and correct 50 years imprisonment throughout the entire procedural history of the case.

5. The erred Criminal Complaint, Amended Criminal Complaint, Information and Judgment of Conviction continue to stand **in error** as inaccurate records requiring correction.

6. Defense counsel's, the State's and circuit court's responsibility is to ensure the documents, charges and penalties were proper and correct.

7. It is defense counsel's and the circuit court's responsibility to inform Santiago of the charges and proper

penalty exposures.

8. Defense counsel Cavaile improperly and mistakenly provided misinformation to Santiago regarding the charges and penalties.

9. The State, in error, exposed Santiago to 75 years (rather than the proper 50 years) incarceration.

10. Santiago accepted a plea offer under this mistaken belief he was exposed to 75 years imprisonment.

11. It is defense counsel's responsibility to properly research and develop the case on behalf of Santiago.

12. The record unequivocally demonstrates that Santiago was misinformed as to the total penalty by Defense Counsel Cavaile, the State, and the circuit court.

13. The "Date of Offense" as recorded on the Judgment of Conviction is incorrect.

This beckons to ask:

1. Would there have been a different outcome in this case had the State properly charged Santiago under the proper 1992 statutes (offenses and subsequent penalties)?

2. Did the improper 75 year 1996 penalty exposure unduly influence Santiago in deciding to accept a plea offer and forego trial?

3. If the State had presented the proper 1992 statutes (offenses and penalties), would have plea negotiations produced a different result?

4. Is it legally permissible by statute to permit an erred JOC to govern where it is more likely than not

its continued existence will result in menifest injustice?

I. DID THE TRIAL COURT ERR IN DENYING DEFENDANT-APPELLANTS MOTION FOR POST CONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06?

Erred Penalty Exposure

As it relates to Santiago's Wis. Stat. § 974.06 Motion, the State attempts to present that Santiago is arguing that the "State improperly charged him with first-degree sexual assault of a child under the version of Wis. Stats. § 948.02(1) that was in effect at the time of his conviction in 1996..." (R-Br., p.10). The facts are that in 1992 and 1996 the **offenses** are identical but the **penalties** are different. The issues is with the penalties asserted by the State; not offense charged (with the exception of the erred penalty enhancers charged on Count 2).

The State relies on State v. James, 176 Wis. 2d 230, 237, 500 N.W. 2d N.W. 2d 345 (Ct. App. 1993) in that "manifest injustice also occurs if the plea is 'entered without knowledge of the charge or that the sentence actually imposed could be imposed.'" (R-Br., p.11). However, there are two issues Santiago has with James: (a) this is a probation revocation case which takes issue with a post-revocation sentence; and (b) in context, the Court of Appeals actually wrote: "A manifest injustice occurs where a defendant makes a plea involuntary or without knowledge of the consequences of the plea - or where the plea is entered without knowledge of the charge or that the sentence actually imposed could

be imposed." Id. (quotation and citations omitted) (emphasis added). It is interesting the State would omit the emphasized portion of this opinion. Nevertheless, a manifest injustice is "[a] direct, obvious, and observable error in a trial court, such as the defendant's guilty plea that is involuntary or based on a plea agreement that prosecution has rescinded." **Black's Law Dictionary**, Tenth Edition, p. 1107.

James and the line of cases therein deal with a court informing a defendant of the maximum penalty **if his probation is revoked**. Id., 176 Wis. 2d at 233. James knew the maximum penalty exposure from the initial charging document through sentencing, and post-revocation of probation sentencing. Id., 176 Wis. 2d 243. In this case at bar, Santiago did not knwo the true penalty exposure at any point during the pendency of this case. Santiago does not make any argument that even remotely parallels James' argument on appeal; the State has missed the mark as it relates to this appeal. James is sorely misplaced and easily distinguishable from this case at bar.

The State theorizes that Santiago's allegations that he would not have agreed to the no-contest plea had he been appraised of the proper penalties only amounts to mere speculation (R-Br., pp. 13-14). If hindsight is 20/20, it is fair to assert that Santiago factually knows what he would have done in 1996 concerning this convoluted case as it proceeded through the judicial system. Assuredly the Satte is not trying to suggest that they know what Santiago

would have done in 1996 better than Santiago himself.

Before a trial court must grant an evidentiary hearing, a defendant must allege sufficient facts in their motion to raise a question of fact for the court. State v. Toliver, 187 Wis. 2d 346, 359, 523 N.W. 2d 113 (Ct. App. 1994). A court must accept the allegations in a defendant's postconviction motion as true for the purposes of determining whether he is entitled to a Machner [State v. Machner, 92 Wis. 2d 797, 285 N.W. 2d 835 (Ct. App. 1979)] hearing. State v. Allen, 2004 WI 106, P9, 274 Wis. 2d 568, 682 N.W. 2d 433.

In State v. Klessig, 211 Wis. 2d 194, 564 N.W. 2d 716 (1997), the Supreme Court did not require precise knowledge of possible possible penalties, but rather an awareness of "the general range of penalties that could have been imposed." Id., 211 Wis. 2d at 206. A 25 year deviation is significantly more than a "general range". In State v. Cross, 2010 WI 70, 326 Wis. 2d 492, 786 N.W. 2d 64, the court demonstrates that a knowledge in excess of 10 years is **more** than "general range" of knowledge of penalties a defendant is exposed to (see, A-Br., p.14).

A valid attack on a please requires that the defendant set forth facts that he "did not know or understand information which should have been provided." State v. Ernst, 2005 WI 107, P25, 283 Wis. 2d 300, 699 N.W. 2d 92. If the defendant makes a prima facie showing, such as the case here, the burden shifts to the state to show by clear and convincing

evidence, that the defendant's plea was knowing, intelligent, and voluntary. Id.

Santiago has clearly demonstrated with the record alone that he was unaware of the possible penalties and the penalties he was informed he faced were in excess of 25 years and thus cannot be considered a "general range" of penalties. The record in and of itself is clear and convincing of this factor (See, R1, 9, 15, 72:2, 11, 18, 73:3, 4, 32, 33). He has further demonstrated by the record alone that the State erred in applying the wrong penalty enhancer statutes as to Count 2 (See, R1, 9, 15, 21, 22, 28, 33 and 64). The State fails to show Santiago's plea was knowing, intelligent, and voluntary by clear and convincing evidence.

Erred Penalty Enhancer as to Count 2

The State would utilize the wrong peanlty enhancer as it relates to Count 2. This case in general is so procedurally substandard that this Court should vacate the conviction forcing the State to start from the preliminary stage of the judicial process and prosecute this case with proper due process Santiago is entitled to.

Summary

Santiago has established facts in his motion to raise a question of face for the court. The facts and violations Santiago claims are all clearly set-forth in the record without the testimony of then Defense Counsel Caviale. The fact is that the circuit court shirked dealing with this issue directly. The circuit court admits it was torn (R74:16;

05/25/16 Motion Tr. 16:12). the court would then further admit to "pass[ing] the buck" and allow the Court of Appeals to deal with the issue (R74:17; 05/25/16 Motion Tr. 17:2-5), maybe getting Santiago on the public defender track.

II. ERRED JUDGMENT OF CONVICTION

The DOC had requested clarification as to the statute Santiago was convicted under (A-Appx. 101). It **did not** make any inquiry as it rleates to the "Date of Offense" as the State would attempt to mislead this Court into believing.

The State again would omit crucial information in their citation by omitting sub. (6) of Wis. Stat. § 972.13 in quoting the statute (R-Br., p.20). Sub. (6) allows the court to enter the "Date of Offense" (Appx. 131-136; 1992 and 2016 Wis. Stat. 972.13). This cannot be any date the court and/or state desires. It plainly requires the court to enter the "Date of Offense" which in this case is "Between July, 1992 & November, 1992" (A-Br., Appx. 112). There os no other option or interpretation. The State is right on one thing -- **plain language governs** (R-Br., p.20).

It is factual that the DOC relies on the information in the JOC to make determinations such as whether or not a defendant falls under certain statutory constructs such as PMR. The State's own exhibits further illustrate that the DOC is under the impression that Santiago is under PMR (R-App 102 [see notation by DOC/RCI representative "EN" and "DS" in the left column of the document exhibit - "PMR (VOP)

2 96CF138 Ct. 1"]).

The Judgment of Convictions dated July 3, 1996 (R19) reflects the proper date of offense. The Judgment of Conviction shall reflect the proper "Date of Offense" as "Between July, 1992 and November, 1992" and not the date of revocation or any other misleading erred date. This is what is statutorily proper. See, Wis. Stat. § 972.13(6).

The current offense date on the JOC subjects Santiago to the provisions of PMR. See Wis. Stat. § 302.11(1g)(am) (any offense committed on or after July 21, 1994 through December 31, 1999 is subject to PMR). With the current error in the JOC reflecting an offense date of May 17, 1996, a serious prejudicial problem arises. The DOC is under the impression that Count 1 offense was committed "on or after July 21, 1994 through December 31, 1999 (i.e. May 17, 1996) and can thus further incarcerate Santiago beyond his mandatory release subjecting him to the provisions of PMR. The State asserts "the **record as a whole** accurately reflects that date Santiago committed the crime..." (R-Br., p.20)(emphasis added). Very true!

However, the DOC doesn't rely on the "record as a whole" or anything other than the authenticated JOC when determining if an offender is subject to PMR as evinced by Santiago and the State's own exhibit (R-App. 102). Does the court allow plain error to stand and only address it when and if Santiago is held under PMR past his mandatory release (MR)? The JOC does not comply with Wis. Stat. § 972.13. The JOC as it stands

is flawed and necessitates amendment reflecting the proper and correct "Date of Offense".

C O N C L U S I O N

The State botched this case from the very first filing. There is no possible way to remedy the errors without prejuding the defendant as it relates to the erred penanlty exposure and erred penalty enhancers charges on Count 2. To permit this case to stand as is would be to purport sloppy litigation, insult the entire criminal judicial process, and most importantly, permit the State to violate constitutional rights of a criminal defendant without any liability or accountability.

Whether rolling the dice on a trial or making an assessment as it relates to plea negotiations, a 25 year deviation plays a substantial role in assessing and subsequently decising one's own fate. We are not talking about 10 or less years as demonstrated in the Cross line of cases. This is the type of litigation that places the criminal judicial process and integrity in question.

The State clearly erred. Defense counsel was clearly ineffective as the record demonstrates. The circuit court further provided misinformation (whether or not it was misinformed). Santiago, as demonstrated by the record alone, was substantially misadvised as to the penalties and total penalty exposure he faced. This mandates rectification as this is a significant due process violation at issue here.

The JOC is flawed and the circuit court is required to amend the JOC reflecting the proper "Date of Offense" of "Between July, 1992 and November, 1992".

It is truly a sad day when errors such as these contained in this case, that are so obvious and egregious, exist and the State cannot simply admit it's own errors or concede, and work with a defendant to correct said errors. It would rather waste time, money, ink and trees felled in the name of litigation.

Dated this 29th day of November, 2016.

Respectfully,

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CERTIFICATION

I certify that this brief meets the requirements of Rule 809.19(8)(b) and (c) in that it is monospaced font, 1.5 inch margin on the left side and one-inch margin on all other sides. The length of the brief is 13 pages in length.

Dated this 29th day of November, 2016.

Respectfully,

Eugene Santiago

Eugene B. Santiago
Defendant-Appellant, Pro se

A P P E N D I X