STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2006AP001744-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JORDAN A. DENK,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN PEPIN COUNTY, THE HONORABLE DANE F. MOREY AND THE HONORABLE JAMES J. DUVALL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN FINDING THE WARRANTLESS SEARCH OF MR. DENK'S EYEGLASS CASE LAWFUL WHERE THERE WAS NO CONSENT TO SEARCH THE CASE, MR. DENK WAS NOT UNDER ARREST, AND THE ITEM WAS IDENTIFIED AS BELONGING TO MR. DENK AND WAS LOCATED OUTSIDE OF THE VEHICLE?

The trial court denied Mr. Denk's motion to suppress, stating that the search was incident to another

individual's arrest and that Mr. Denk gave consent to the search.

II. WAS MR. DENK'S PLEA BARGAIN ILLUSORY WHERE ACCORDING TO THE RECORD, ALL PARTIES AND THE COURT BELIEVED THAT AS PART OF THE AGREEMENT, THE STATE WOULD MOVE TO DISMISS THE MOST SERIOUS CHARGE, WHERE IT IS ALSO CLEAR FROM THE RECORD THAT AS MATTER OF LAW THERE WAS NO FACTUAL BASIS FOR THAT CHARGE?

The trial court did not examine the record to determine whether the dismissed count was properly charged. Instead, the court stated that, because the charge was dismissed, Mr. Denk received the benefit of his bargain.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

STATEMENT OF THE CASE

Mr. Denk was a passenger in a vehicle subject to a lawful traffic stop (38:9-10). During the course of the investigation, the officer arrested the driver (38:14). After the arrest, the officer saw an eyeglass case on the ground near Mr. Denk, identified it as belonging to Mr. Denk, and then searched the case without Mr. Denk's consent (38:15-16, 22-23). In the case was a pipe used to smoke methamphetamine (1:4; 38:17-18; App.110). Eventually, after detaining Mr. Denk for possessing the pipe, the officer also found a small amount of marijuana, marijuana pipes, and methamphetamine (38:16-17, 20, 23).

A complaint was filed charging Mr. Denk in connection with the above contraband (1). Following a preliminary hearing, an information was filed alleging a wholly new charge, possession of drug paraphernalia, namely a pipe used to "convert" methamphetamine (8; App.109). This new charge was alleged to be a Class H felony, carrying a greater penalty than any of the other charges against Mr. Denk.

Mr. Denk filed a motion to suppress evidence and statements (9). Following a hearing on Denk's motion to suppress, the court denied the motion from the bench (38:24; App. 111-12). Mr. Denk then entered a plea to the possession of methamphetamine charge. The purportedly more serious, paraphernalia charge was dismissed.

Following conviction, Mr. Denk filed a postconviction motion alleging that his plea bargain was illusory and that therefore, he should be allowed to withdraw his plea (28; 29). By order entered July 7, 2006, the trial court denied defendant's postconviction motion (48; App.105).

Mr. Denk filed a timely notice of appeal from the judgment of conviction and the order denying postconviction relief. In his brief, Mr. Denk argued that the trial court erred both in denying his suppression motion and in refusing his postconviction request to withdraw his plea.

On January 31, 2008, the Wisconsin Court of Appeals, District IV, certified this appeal to the Wisconsin Supreme Court. The certification posed the following question:

> Whether the police may search the personal belongings of a passenger that are found outside a motor vehicle incident to the arrest of the driver based on the reasoning of ***State v. Pallone***, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568.

Though the above question appeared to be the central focus of the Court of Appeals' certification, it also posed the following:

> [W]hat inquiry should be made when a passenger's personal belongings are found outside a motor vehicle? Must the circuit court make a factual finding as to how the passenger's property ended up outside the vehicle? May the police officer draw an inference that Denk tossed the case from the car or that it fell out of the car, and was thus subject to search? Should the police officer draw an inference that the case fell out of Denk's pocket, and this was not subject to search? Because the State carries the burden, does the State's failure to show how the eyeglass case got out of the car require an inference that it was on Denk's person and then fell to the ground, thus resulting in suppression of the evidence?

(Certification by COA, App.101-04). By order dated March 18, 2008, this Court accepted certification of Mr. Denk's appeal. This Court's order explains that the appeal is accepted for consideration of all issues raised before the court of appeals. Thus, in addition to the search and seizure issue certified by the court of appeals, Mr. Denk again asserts that the trial court erred in denying his postconviction motion for plea withdrawal.

STATEMENT OF FACTS

In November of 2004, Deputy Jeff Hahn of the Pepin County Sheriff's Department was on patrol when he saw a car parked on the side of the road (38:4-5). Officer Hahn stopped "to make sure that he wasn't broken down" and approached the driver (38:5-6). After confirming that the driver did not need assistance, Officer Hahn returned to his squad whereupon he noticed that the license plate had an expired tag (38:6). Officer Hahn ran a check on the license-plate number and discovered that the plates were registered to a different vehicle (38:7).

Officer Hahn re-approached the driver, who was identified as Christopher Pickering (38:8). Pickering explained that he had just purchased the vehicle from a local dealer and had filed for transfer of title (38:8). There was also a passenger in the front of the car who was later identified as Jordan Denk (38:9-10).

According to Officer Hahn, at that point he smelled the odor of marijuana (38:9). He asked Mr. Pickering "if he had been smoking marijuana at any time" and "why [he] would be able to smell that odor" (38:10). Officer Hahn requested identification from Mr. Denk, who provided him with a Minnesota State identification card (38:10). According to Officer Hahn, when asked about the smell of marijuana, Mr. Denk told him he had recently been released from a "treatment facility" (38:11).

Officer Hahn requested permission from Pickering to search the vehicle, and Pickering consented (38:11). Officer Hahn told both men to step out of the car and as they exited, he noticed that Pickering's front sweatshirt pocket was "bulged out very heavy" (38:11-12). Officer Hahn told Pickering to empty out the pocket and he "[p]artially" complied (38:12).

Officer Hahn aimed a flashlight on Pickering as he emptied his pocket (38:13). According to Hahn, as Pickering was removing items from his pocket, the officer saw "what [he] believed to be drug paraphernalia in the pocket" (38:13).

At that point, Officer Hahn either removed the pipe himself or told Pickering to remove it (38:13-14). The officer continued to ask Pickering whether he had any narcotics and Pickering said he had "weed" (38:14). Hahn then placed Pickering in handcuffs and began to remove items from the pocket (38:14). In Pickering's pocket, Officer Hahn found marijuana, a scale, and a pipe used for smoking marijuana (38:14-15).

Officer Hahn then walked over to Mr. Denk, who had been standing outside the vehicle near the passenger door (38:15). Hahn noticed an eyeglass case lying on the ground, near the passenger door (38:15). Hahn asked Denk if the case was his and Denk said that it was (38:22). Hahn told Denk to retrieve the case and Denk placed it on the car (38:15, 22). Officer Hahn then opened the case and found a glass pipe and "some cleaning tools" (38:16, 23). The pipe was a "methamphetamine pipe" (37:17-18). The officer again asked Denk to whom the case belonged, and Denk said it was his, "but nothing inside of it was" (38:23).

The officer then placed Denk in handcuffs and searched his person, finding a baggie of marijuana and another baggie containing a white, powdery residue (38:16-17, 23). In Denk's jacket, police found two marijuana pipes (38:20). The officer asked Denk to identify the residue, and Denk said it was methamphetamine (38:17). Denk was eventually transported to the jail, read his Miranda rights and interrogated. He admitted ownership of "the methamphetamine, the pipe, the baggie containing the methamphetamine, and the marijuana" (38:20).

Subsequently, a criminal complaint was filed charging Mr. Denk with two felonies and two misdemeanors (1). The felony charges were possession with intent to deliver THC and simple possession of methamphetamine. The two misdemeanors were possession of THC and possession of drug paraphernalia. With regard to the misdemeanor paraphernalia charge, the complaint alleged that Mr. Denk possessed a "[m]araujauna pipe (sic) to inhale a controlled substance" (1:1). In support of probable cause, Officer Hahn's police reports detailing the search and seizure were attached (1:3-5).

Following a preliminary hearing, an information was filed. Like the complaint, the information charged

Mr. Denk with possession of methamphetamine, a class I felony. However, the information did not charge possession with intent to deliver marijuana[1]. Instead, the information charged Mr. Denk with a wholly new felony, possession of methamphetamine-related drug paraphernalia (8; App. 109). This count alleged that Mr. Denk possessed a "[m]ethamphetamine pipe to convert methamphetamine" (8; App. 109). This new felony was charged as a Class H felony which carried a maximum sentence of $10,000 and 6 years imprisonment, a more severe penalty than any of the other charges[2]. At arraignment, Judge Morey recited the charges and their potential penalties as alleged in the Information, stating that "as to Count 2, the maximum penalty is a fine of not more than $10,000 or imprisonment for not more than six years, or both" (41:3).

Mr. Denk filed a motion to suppress and a hearing was held in front of Judge Morey (9). At the hearing, Officer Hahn admitted that at the time he approached Mr. Denk he was not under arrest and that any search would have been for his own safety (38:21-22).

At the close of the evidence, Judge Morey did not allow time for the parties to argue the motion. He simply denied the defendant's motion, stating that after the

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[1] Presumably, this charge was dropped because all of the information in the police reports and all evidence adduced at the preliminary hearing demonstrated that the marijuana in question and all of the items indicating delivery belonged to and were possessed solely by Mr. Pickering (1:3-5; 37:16, 20-21, 22, 26, 31; 38:15).

[2] Wis. Stat. § 961.573 criminalizes the possession of drug paraphernalia. The first subsection, 961.573(1), is most general and penalizes the possession of drug paraphernalia as an unclassified misdemeanor, punishable by 30 days and/or $500. The third subsection, 961.573(3) penalizes the possession of certain types of methamphetamine-related paraphernalia as a Class H felony. The difference between the subsections will be discussed at length, later in this brief.

officer discovered that "the wrong plates [were] on the wrong car... he had a right to arrest for a violation of the traffic laws and to search incidental to arrest" (38:24). The court went on to state the following:

> Plus, there was a consent to the search of the vehicle. And there was a consent to the search of the person of Mr. Denk.

(38:24; App.111-12).

Following the denial of the defendant's motion, on August 2, 2005, defense counsel sent a letter to Mr. Denk "confirming" their telephone conversation from earlier in the day (31; App. 106). The letter set forth the state's plea offer as follows:

> This offer requires you to plead guilty or no contest to the felony possession of methamphetamine. The State would then dismiss the **possession of drug paraphernalia *felony* charge.** ...

(emphasis added) (31; App. 106) The plea agreement contemplated preparation of a presentence investigation report and did not promise any sentencing concessions (*id.*)

On September 20, 2005, a plea hearing was held in front of a new judge, the Honorable James J. Duvall. The state recited the parties' plea agreement as follows:

> In exchange for that guilty plea to that Class "I" felony, the State will dismiss Count 2 in the Information, which is possession of drug paraphernalia related to methamphetamine, which was found at the same time and place as the methamphetamine, as this is the subject of Count 1.

(44:3). The state also noted that it would move to dismiss any misdemeanor counts in the original criminal complaint. Pursuant to the agreement, Mr. Denk pled "no contest" to count 1, possession of methamphetamine (44:9). The court accepted his plea and dismissed outstanding charges, including "[c]ount 2 of the

Information, possession of paraphernalia, ***methamphetamine- related***" (emphasis added) (44:10). At a sentencing hearing, the court withheld sentence and placed Mr. Denk on three years of probation (43:15-6).

Mr. Denk filed a postconviction motion requesting permission to withdraw his plea on the ground that his plea bargain was illusory and that therefore, his plea was not knowingly entered (29). At a hearing on the motion, Mr. Denk argued that there was no factual basis for count 2, possession of methamphetamine-related paraphernalia because the legislature did not intend that this subsection be applied to a glass smoking pipe of the sort found near Mr. Denk (45:3-5; App. 113-33). Mr. Denk argued that because there was no factual basis for this charge his plea bargain was illusory and his plea unknowing.

The state said that it could not "remember exactly" why it had chosen to charge "'convert' as opposed to what would seem to be the more obvious use of a methamphetamine pipe, you know, to smoke or use" (45:7; App. 119). However, said the state, the fact that it may have been a "bad charge" did not render the bargain illusory, because Mr. Denk still received the benefit of "having it dismissed" (45:7). Specifically, the state asserted:

> If it was a bad charge, it was a bad charge. But the state still has the option to charge a bad charge. And if it's a poor charge, you're going to lose at trial...

(45:7) The state further noted that had trial counsel successfully moved to have the charge dismissed, "then she would have improved her bargaining position with the charges that were remaining" (45:8).

The court agreed with the state, saying that Mr. Denk was not misled because "he was told [the state] will dismiss a felony paraphernalia charge if you plead to Count 1. And that's exactly what happened" (45:9). The

court noted that "there was a probable cause bindover without exclusion of that charge at the preliminary hearing" and that at trial, the state "may have been able to show a factual foundation for the charge" (45:15). [3]

In the end, the court stated that, because the state used the word "convert" rather than "inhale" in the charge, it could not find from the record that there was not a factual basis for the charge (45:13). The court stated as follows:

> If it said inhale, for example, and that was not one of the available options under sub.3—and that would assume that inhale is different from convert—then I think that's fine. But the charged offense was "convert". That's a proper option under that. Whether the State could have proven that at trial is something I can't decide.... And, in fact, I note that there was a probable cause bindover without exclusion of that charge at the preliminary hearing.

(45:14) Mr. Denk appeals.

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[3] There was not actually a "bindover without exclusion of that charge," because the felony paraphernalia charge was not contained in the criminal complaint. It was charged for the first time in the information, after the preliminary hearing.

ARGUMENT

I. THE SEARCH OF MR. DENK'S EYEGLASS CASE WAS UNCONSTITUTIONAL BECAUSE IT WAS PERFORMED WITHOUT A WARRANT AND WAS NOT PURSUANT TO ANY ACCEPTED EXCEPTION TO THE WARRANT REQUIREMENT.

A. Overview of Arguments and Standard of Review.

In order to minimize confusion, because of the complexity and sometimes contradictory nature of Fourth Amendment jurisprudence, as well as its fact-specific inquiries, Mr. Denk wishes to provide an overview of his arguments.

First, Mr. Denk argues that the search was performed without his valid consent. Mr. Denk addresses this warrant exception because it was relied upon by the trial court.

Second, Mr. Denk argues that the search was not valid as incident to the driver's arrest. This argument is broken down as follows:

- Pursuant to ***Wyoming v. Houghton*** and despite ***State v. Pallone***, an officer cannot search a non-arrestee's belongings already identified as such incident to a driver's arrest;

- In the alternative, if there does exist a *per se* rule authorizing a search of passenger belongings incident to a driver's arrest, this bright-line rule is inapplicable here, where the item was found *outside* the car.

Third, Mr. Denk addresses the automobile "probable-cause" exception to the warrant requirement. Here, Mr. Denk acknowledges that pursuant to ***Houghton*** and ***Pallone***, an officer is permitted to perform a search of a vehicle and its containers, including a passenger's containers therein, where there is probable cause to believe that the container conceals sought-after evidence. As to the bright-line rule created by ***Houghton*** and ***Pallone***, Mr. Denk asserts that it does not apply to the present case, where Mr. Denk claimed ownership of the item and it was found *outside* of Pickering's vehicle.

Finally, Mr. Denk will explain why, given the trial court's findings and the evidence of record, the state has not met its burden to demonstrate that the search of Mr. Denk's eyeglass case was performed pursuant to a valid exception to the warrant requirement.

Whether evidence should be suppressed is a question of constitutional fact. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. A finding of constitutional fact consists of both the trial court's findings of historical fact and also the application of those historical facts to the applicable constitutional principles. ***Id.*** On appeal, the trial court's findings of historical fact may not be overturned unless they are clearly erroneous, but the ultimate determination whether a constitutional violation occurred is reviewed independently. ***Id.***

B. The Trial Court Erred in Finding That the Search of Mr. Denk Was Consensual.

The trial court justified the search of Mr. Denk's eyeglass case by finding that "there was a consent to the search of the person of Mr. Denk" (38:24; App. 111-12). The facts of record do not support this finding.

First, it is clear that Mr. Denk never consented to a search of either his eyeglass case or his person. The

testimony at the suppression hearing was that the officer asked Mr. Denk if the case was his, had him "retrieve it," and then looked inside the case (38:15). The officer never requested, and Denk never provided, such permission.

Similarly, there is no indication that Officer Hahn asked Denk if he could search his person. Rather, the officer testified that, after discovering contraband in the eyeglass case, he hand-cuffed Mr. Denk, escorted him to his squad car and then searched his person (38:16)[4].

In the court of appeals, the state asserted that perhaps the search was pursuant to Pickering's consent (state's court of appeals' brief at 12-13, relying on ***State v. Matejka***, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891). First of all, at the point the officer searched Denk, the search had evolved from one of consent to one justified by Pickering's arrest. The discovery of contraband on Pickering's person and his subsequent arrest changed the character and scope of any search.

Additionally, the ***Matejka*** decision characterizes the issue presented as "whether, under the consent exception to the Fourth Amendment's warrant requirement, a driver's consent to a police officer's search of a vehicle extends to a passenger's jacket ***left in the vehicle at the time of the search***." ***Id.***, 2001 WI 5, ¶1 (emphasis added). The court acknowledged that "[a] consent search is subject to certain limitations in scope that do not apply to a probable cause search." ***Id.*** at ¶37. Just as Pickering could not authorize the search of Denk's person, so his consent could not be construed to cover Denk's eyeglass case discovered by his person, outside the car.

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[4] Though the officer characterized the search as a "pat down," he admitted that he actually "went inside of [Mr. Denk's] coat pockets and found the baggies" (38:17, 23).

C. The Search of Mr. Denk's Eyeglass Case Exceeded the Permissible Scope of a Search Incident to the Arrest of Mr. Pickering, the driver.

1. The applicable law.

Wisconsin Statute § 968.11 provides, in relevant part, as follows:

> **968.11 Scope of search incident to lawful arrest.** When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:
>
> **(1)** Protecting the officer from attack;
>
> **(2)** Preventing the person from escaping;
>
> **(3)** Discovering and seizing the fruits of the crime; or
>
> **(4)** Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

Both the federal and state constitutions guarantee that citizens shall be free from unreasonable searches and seizures. U.S. CONST. Amend. IV; WIS. CONST. Art. I, § 11. Section 968.11 is consistent with the bright-line rule announced in ***New York v. Belton***[5] and ***State v. Fry***.[6] ***Belton*** declared that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Belton***, 453 U.S. at 460.

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[5] ***New York v. Belton***, 453 U.S. 454, 101 S. Ct. 2860 (1981).

[6] ***State v. Fry***, 131 Wis. 2d 153, 166-68, 388 N.W.2d 565 (1986), *cert. den.* 479 U.S. 989 (1986).

Two relevant cases have dealt with the issue of whether, with probable cause, an officer can search a non-arrested passenger's belongings. *See* ***Wyoming v. Houghton***, 526 U.S. 295, 303, 119 S. Ct. 1297 (1999); ***State v. Pallone***, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568. Mr. Denk cites these cases only to eschew their application in the present context which involves a search justified as incident to an arrest. Mr. Denk believes this is necessary because it appears that the probable cause and search- incident exceptions are easily conflated and, as a result, ***Houghton*** is sometimes read as pertaining to the latter exception, too. Denk's brief-in-chief (though not his reply brief) conflated the two and treated ***Houghton*** as applying seamlessly to situations involving search incident to arrest (*see* Denk's opening brief in court of appeals, pp. 13-15). The Court of Appeals' certification, too, seemed to treat the two exceptions as interchangeable (*see* Certification at 2-4).

With regard to ***Pallone***, its holding has been interpreted as a bright-line rule applicable in the context of a search incident to arrest.[7] Mr. Denk submits that ***Pallone*** was really a case about probable cause. To the extent that ***Pallone*** establishes a bright-line rule permitting a search of identified passenger belongings in a vehicle as incident to a driver's arrest, Mr. Denk believes that this runs afoul of ***Wyoming v. Houghton*** in violation of the Supremacy Clause.[8]

As stated above, ***Wyoming v. Houghton*** held that where officers have probable cause to search a vehicle,

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[7] *See, e.g.*, Wayne R. LaFave, ***Search and Seizure, A Treatise on the Fourth Amendment***, Vol. 3, § 7.1, p. 522 n. 104 (2004).

[8] The rights guaranteed under the federal constitution are the supreme law of the land, and are binding on all state courts. U.S. CONST., Art. VI.

they can search a passenger's belongings inside of that vehicle that are capable of concealing the object of the search. *See* 526 U.S. 295, 197. *See* Wayne R. LaFave, ***Search and Seizure, A Treatise on the Fourth Amendment***, Vol. 3, § 7.1, p. 523 (2004) (noting that the United States Supreme Court has never held that the ***Belton*** bright-line rule applies to passenger belongings and that the question "remains open not withstanding ***Wyoming v. Houghton***").

Similarly, Denk asserts that the ***Pallone*** court did not grant officers a blanket right to search a non-arrestee's belongings incident to a driver's arrest. Instead, when speaking of the search-incident-to-arrest exception, the ***Pallone*** decision took pains to engage in a fact-specific inquiry regarding the historical justifications for a search incident to arrest:

> Under [the search incident to arrest] exception, we consider: (1) whether there was an arrest as the bright-line rule of ***Knowles*** requires, and (2) whether a heightened threat to officer safety or a need to discover or preserve evidence justified the warrantless search.

Pallone, 2000 WI 77, ¶42. It was only after the court determined that the officer reasonably feared for his safety that the search was found to be legal. The court plainly stated that it was "declin[ing] to exclude passenger property from the search incident to arrest exception *under the facts of this case.*" ***Id.*** at ¶55 (emphasis added).

In sum, ***Houghton*** governs passenger belongings searched pursuant to probable cause, and does not address the scope of a search performed incident to arrest. ***Pallone***, too, may be read to create a bright-line rule only in the context of searches based on probable cause. Denk asserts that to read ***Pallone*** broadly – as always allowing a search of passenger belongings incident to a driver's

arrest without individualized suspicion – runs afoul of ***Houghton***.

Given this analysis and in line with cases from other jurisdictions, Mr. Denk asks this Court to hold that police officers are not automatically permitted to search a non-arrested passenger's belongings *incident to a driver's arrest* when the items are clearly identified as belonging to the passenger and there is no particularized suspicion. Wayne R. LaFave, ***Search and Seizure, A Treatise on the Fourth Amendment***, Vol. 3, § 7.1, p. 523 (2004). A number of jurisdictions have disallowed the search of passenger belonging incident to a driver's arrest without some additional justification. ***Id.*** at n. 105. Of those jurisdictions that have allowed these searches, many have made it clear that police cannot search passenger belongings that are either on a passenger's person, are carried out of the vehicle by the passenger, or that are left in the car by the passengers under police order. *See id.* at 523 n. 106.[9]

2. Even if Houghton and/or Pallone create a bright-line rule authorizing the search of a passenger's belongings incident the arrest of a driver, such a rule does not permit a search of Mr. Denk's eyeglass case because it was located outside of the arrestee's vehicle.

Even assuming that ***Pallone*** and ***Houghton*** permit the search of passenger belongings incident to a driver's

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[9] *See, e.g.*, ***State v. Boyd***, 275 Kan. 271, 64 P.3d 419 (2003); ***State v. Tognotti***, 663 N.W.2d 642 (N.D.2003); ***State v. Newsom***, 132 Idaho 698, 979 P.2d 100 (1998); ***Commonwealth v. Shiflet***, 543 Pa. 164, 670 A.2d 128 (1995). ***LaFave*** at 523-34, n. 105-106.

arrest, these bright-line rules do not apply where, as here, the passenger's item is outside of the vehicle.

No Wisconsin case extends the ***Belton*** bright-line rule to a passenger's belongings located outside the arrestee's vehicle. The ***Pallone*** court repeatedly framed the issue before it as whether a driver's arrest justified "a warrantless search of the passenger compartment and any containers, open or closed, *located in that compartment.*" (*emphasis added*) ***Pallone***, 2000 WI 77, ¶42 (*see also* ¶54, stating that the officer was "authorized to conduct a search of the passenger compartment and any containers situated in that compartment"; ¶55, wherein the court states the holding as "[p]olice may search the compartment of a motor vehicle when an 'occupant' is under arrest ... [along with] 'any containers' situated in the compartment").

While it is true that ***Belton*** created a bright-line rule justifying broad automobile searches incident to an arrest, its logic has been sharply criticized. *See, e.g,* ***Thornton v. United States***, 541 U.S. 615 (2004) (*majority, concurrence and dissenting* opinions); LaFave, ***Search and Seizure,*** Vol. 3, § 7.1(c), pp. 523 *et seq*; Myron Moskovitz, ***A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton,*** 2002 Wis. L. Rev. 657. One common criticism is that given standard police practice, the passenger compartment of a motor vehicle will generally be beyond the immediate reach and control of the arrestee. Given that these are the purported justifications for the ***Belton*** rule, the scope of searches under the rule is not "strictly tied to and justified by the circumstances which rendered its initiation permissible." ***Terry v. Ohio***, 392 U.S. 1, 19 (1968). [10]

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[10] Other common criticisms include (1) that it is an arbitrary *per se* rule and that blanket rules are generally eschewed under the Fourth Amendment in favor of case-by-case examination of the totality of circumstances; (2) the rule does not really

The ***Belton*** bright-line rule thus already bears a tenuous relation to its justifications. Adding the bright-line rules of ***Houghton*** and ***Pallone*** stretch ***Belton's*** rule even thinner. To apply this already fragile, bright-line rule to a non-arrested passenger's belongings located *outside* the vehicle simply snaps the rule in two.

Additionally, such an extension would be inconsistent with the Supreme Court's decisions in ***United States v. Di Re***, 332 U.S. 581, 68 S. Ct. 222 (1948). *See* ***Wyoming v. Houghton***, 526 U.S. 295, 303, 119 S. Ct. 1297 (1999) (relying upon status of item as property separate from the person to allow search). *See, e.g.*, LaFave, ***Search and Seizure,*** Vol. 3, § 7.2(d), p. 594 (explaining why Houghton does not support a search of the passenger's person). Certainly officers could not search Denk's person pursuant to Pickering's arrest. It should be equally impermissible to search his eyeglass case.

In the present case, the eyeglass case was clearly identified as Mr. Denk's and was discovered outside of Pickering's vehicle. Thus, it was outside the scope of a search incident to Pickering's arrest that cannot be justified by the holdings of ***Belton, Houghton***, or ***Pallone***.

Mr. Denk will spend more time on this issue in the section concerning probable cause, for again, he does not believe that ***Houghton*** governs searches incident to arrest.

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accomplish its stated objective of creating a simple and consistent standard for police officers and the courts. The vague test does not explain the requisite "temporal or spatial relationship" to the vehicle, etc

D. The Search of Mr. Denk's Eyeglass Case Exceeded the Permissible Scope of a Probable Cause Search as Authorized in Houghton and Pallone.

1. The applicable law.

As explained above, ***Houghton*** and ***Pallone*** allow the search of a passenger's belongings located inside a vehicle. Breyer's concurrence concisely explains why the scope of such a search would not extend to a non-arrested passenger's person and likely, not even to certain personal effects:

> I would point out certain limitations upon the scope of the bright-line rule that the Court describes. Obviously, the rule applies only to automobile searches. Equally obviously, the rule applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile. As the Court notes, and as ***United States v. Di Re***, 332 U.S. 581, 586-587, 68 S. Ct. 222, 92 L. Ed. 210 (1948), relied on heavily by JUSTICE STEVENS' dissent, makes clear, the search of a person, including even "'a limited search of the outer clothing,'" *ante,* at 7, ... is a very different matter in respect to which the law provides "significantly heightened protection." *Ibid*; cf. ***Ybarra v. Illinois***, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); ***Sibron v. New York***, 392 U.S. 40, 62-64, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968).

Houghton, 526 U.S. at 307-08 (Breyer, J., concurring). Breyer continues on as follows:

> Less obviously, but in my view also important, is the fact that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I

> am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both.
>
> However, given this Court's prior cases, I cannot argue that the fact that the container was a purse automatically makes a legal difference, for the Court has warned against trying to make that kind of distinction. [cited source omitted]. But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," [cited source omitted], which under the Court's cases would properly receive increased protection. ...

Id. at 308. Breyer noted that because Houghton's purse was quite some distance away from her person, he considered the search valid.

Mr. Denk thus makes the following assertions: (1) Pursuant to ***Houghton***, an officer can search a passenger's belongings within a vehicle where he or she has probable cause to believe that the car in general, and the item in specific, contains the object of the search; (2) An officer cannot search a passenger's body or clothing pursuant to that same justification; (3) an officer cannot search a passenger's belongings where these items are outside the vehicle, are claimed by the passenger, and are personal effects in close proximity to the passenger.

It is important to realize that a refusal to extend ***Houghton's*** bright-line rule to these circumstances will not burden or endanger police officers. Pursuant to clearly- established, oft-employed precedent, with additional justification, an officer would be able to search personal effects or items outside of a car. For example, if the officer had probable cause to arrest the passenger, a search could be performed incident to arrest. If the officer had reason to fear for his or her safety, a pat-down search could be performed.

In the present case, the officer needed something more in order to perform a warrantless search of Denk's eyeglass case. Let's assume that Denk had tried to rid himself of the case and the officer witnessed this. The officer would then likely have probable cause based on the totality of the circumstances to search the eyeglass case. Now assume that Denk had tried to rid himself of the item and the officer did not see this. One can assume that an attempt to disown an object would involve either or both of throwing the object away from one's person and denying ownership when asked. Well, if the item is intentionally thrown far away from the person, then he or she would not have standing to challenge any search, either because it is abandoned, or because his denial would negate any expectation of privacy in the object.

Additionally, such a bright-line rule would not provide any further clarification. It would not answer the question of how to treat a purse or wallet, or how to determine whether an item is more like an extension of the person such that ***Di Re*** would prohibit a search.

In sum, the bright-line rules of ***Houghton*** and ***Pallone*** do not extend to a search of passenger items located outside of a vehicle. To permit such an extension would stretch an already fragile rule to its breaking point. Further, such an extension would run afoul of the Supreme Court's decisions in ***Di Re*** and ***Ybarra***. Finally, there is simply no need for a bright-line rule in this situation, and such a rule would be hard to apply.

2. The state did not meet its burden to justify the warrantless search as pursuant to probable cause.

In its certification, the Court of Appeals noted that the trial court did not make any findings of fact. The Court of Appeals also acknowledged that the state did not present any evidence regarding how the eyeglass case came to be on the ground. The Court of Appeals

questioned how Denk's case should be analyzed given this dearth of evidence.

Quite simply, the burden of proof is on the state to justify a warrantless search. The state's failure to adduce crucial evidence in support of a warrant exception should be visited upon the state, not on Mr. Denk.

Because the state has the burden of production and persuasion, and because the arresting officer is generally the state's witness, the state is best situated to know which "jealously and carefully drawn" warrant exception it will rely upon. *See* ***Jones v. United States***, 357 U.S. 493, 499 (1958). The state is therefore in the best position to determine what evidence need be adduced in support of its claim. It is not the defendant's job to ensure that the record is clear as to any and every possible justification for the search. Such a task would be impossible.

Allocation of the burden of proof is a fundamentally important factor in any case. The allocation decides the "default" position and determines who will win in a close or confusing case. The burden of proof ensures that a decision will be reached in every case. It may "determine the application of certain doctrines regarding the sufficiency of that proof, such as the proposition followed in some jurisdictions that when the party with the burden of proof offers evidence consistent with two opposing propositions, he proves neither." *See* LaFave, Vol. 6, §11.2(b), p. 41 n. 27 (2004) (cited source omitted.).

While it is true that a reviewing court may search the record for facts supporting the trial court's ruling, it is not obliged to do so in every case. ***Argonaut Ins Co v. LIRC***, 132 Wis. 2d 385; 392 N.W.2d 837 (1986). Unless there is evidence on the record that the decision-maker has undertaken a reasonable inquiry and examination of the facts as the basis of his or her decision, that decision

will constitute an abuse of discretion and will be disregarded by the reviewing court. ***Id.*** at 392.

In the case at bar, the state failed to prove any valid exception to the warrant requirement. If the evidence had demonstrated that Mr. Denk surreptiously threw the item, denied ownership, or that the officer saw the case fall from the passenger cabin onto the ground, then perhaps the state would have met its burden to prove an exception (*i.e.,* abandonment or probable cause).

Because warrantless searches are presumptively unreasonable and the state failed to meet its burden to demonstrate such an exception, the search of Mr. Denk's eyeglass case and all fruits therefrom must be suppressed.

II. MR. DENK SHOULD BE ALLOWED TO WITHDRAW HIS PLEA BECAUSE THE PLEA AGREEMENT ON WHICH IT WAS BASED WAS ILLUSORY AND THUS HIS PLEA WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED

A. As a Matter of Law, There Was No Factual Basis For Count Two of the Information, Which Involved Possession of Paraphernalia Used to "Convert" Methamphetamine and Was the Most Serious of the Charges Facing Mr. Denk.

Wisconsin Statute § 961.573 is part of Wisconsin's Controlled Substances Act and criminalizes the possession of drug paraphernalia. The first subsection is the most general and states as follows:

> (1) No person may use, or possess with the primary intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, ***contain, conceal, inject, ingest, inhale or otherwise introduce into the human body*** a controlled substance or

> controlled substance analog in violation of this chapter. Any person who violates this subsection may be fined not more than $500 or imprisoned for not more than 30 days or both. (***emphasis added***).

The highlighted words relate to paraphernalia for personal use.

Subsection (3), relates only to certain types of methamphetamine-related paraphernalia and states as follows:

> (3) No person may use, or possess with the primary intent to use, drug paraphernalia to *manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack or store* methamphetamine or a controlled substance analog of methamphetamine in violation of this chapter. Any person who violates this subsection is guilty of a Class H felony (*emphasis added*).

Sub (3), the statute at issue, thus proscribes some, but not all of the intended uses described in sub (1). While sub (1) makes it a crime to possess paraphernalia used to "***contain, conceal, inject, ingest, inhale or otherwise introduce into the human body***" a controlled substance, sub (3) specifically excludes these behaviors related to personal use. Thus, while both subsections prohibit the possession of any paraphernalia used in the *manufacture* of controlled substances, only the more general sub(1) makes it illegal to possess drug paraphernalia associated with personal use.

In Mr. Denk's case, following the preliminary hearing, the state added a wholly new charge, namely, possession of methamphetamine-related drug paraphernalia, a Class H felony (8; App. 109). The information alleged that Mr. Denk possessed a "[m]ethamphetamine pipe to convert methamphetamine" and, as is clear from the record, relied on a glass smoking

pipe for its factual basis[11] (*id.*). Because the plain language of sub(3) excludes from its definition any meth-related paraphernalia primarily intended for personal use, there was no factual basis for count two as a matter of law.

The interpretation of a statute is a question of law to be reviewed *de novo*. ***State v. Cole***, 2003 WI 39, ¶12, 262 Wis. 2d 167, 663 N.W.2d 700. The goal of statutory interpretation is to ascertain and give effect to the legislature's intent. ***Id.*** at ¶13. To determine legislative intent, the court must first look to plain language of the statute. ***State ex. Rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. In determining a statute's plain meaning, the court must interpret the language in its context "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd results." ***Id.*** at 46 (citing source omitted).

Similarly, statutory language must be read in a manner that gives reasonable effect to every word and avoids surplusage. ***Id.*** at ¶46. If words used in one subsection are omitted from another, it must be presumed that the legislature specifically intended a different meaning. ***Oney v. Schrauth***, 197 Wis. 2d 891,

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[11] The evidence in the record makes it clear that the "pipe" referred to in the criminal information was intended for use in smoking methamphetamine. The police reports, which were attached to and form the entire factual basis for the criminal complaint, state that the officer opened the eyeglass case "and saw a glass pipe that I believed to be drug paraphernalia *used for the smoking of methamphetamines*" (*emphasis added*) (1:4; App. 105). The preliminary and suppression hearing transcripts refer only to this same glass smoking pipe. At no point in the record is there the slightest suggestion that the pipe was intended for use or could be used for the manufacture of methamphetamine.

541 N.W.2d 229 (Ct. App. 1995) (*citing* ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis. 2d 375, 388, 480 N.W.2d 1, 6 (1992) for proposition that "the omission of a word or words in the revision of a statute indicates an intent to alter its meaning").[12]

The plain language of Wis. Stat. § 961.573(3) unambiguously evinces a legislative intent to punish only meth-related paraphernalia used in the manufacture or delivery of methamphetamine. In both subs (1) and (3), the proscribed uses are grouped not arbitrarily or alphabetically, but by category. The first 10 or so words—"plant" through "prepare"—all relate to the manufacture of controlled substances. The next words—"prepare" through "store" all relate to the delivery of controlled substances. The last 6 functions relate to the personal use of controlled substances.

In drafting sub (3), the legislature omitted the words ***"contain, conceal, inject, ingest, inhale or otherwise introduce into the human body"*** relating to paraphernalia intended for personal use. *See* Wis. Stat. § 961.573(3). It must be presumed that this omission was neither accident nor coincidence.

Additionally, § 961.571 defining "drug paraphernalia" provides examples of various types of paraphernalia. Wisconsin Stat. § 961.571(1)(a)1 describes kits used in the manufacture of plant-based substances, while sub (1)(a)2 relates to "kits" for manufacturing of synthetic drugs. Meanwhile, sub (1)(a)11 of that statute covers "objects used, designed for use or primarily intended for use" in inhaling, ingesting or introducing controlled substances into the body. *See*

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[12] *See also* ***Sutherland on Statutory Construction:*** "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." ***Sutherland Stat. Const.***, § 46.06, at 98 and n. 4.10 (rev. 5th ed. Supp.1999)

§ 961.571(1)(a)11, stats. As examples of this latter category, the statute enumerates a wide variety of pipes, including "[m]etal, wooden, acrylic, ***glass***, stone, plastic or ceramic pipes." (emphasis added). *See* Wis. Stat. § 961.571(1)(a)11a-b, g- j, and m. Thus, "pipes" are mentioned only in conjunction with personal use.

The trial court's assertion that the charge is valid simply because the state used the word "convert" instead of "inhale" misses the mark. First, as described above, the context of "convert" as used in these statutes unambiguously indicates an intent to proscribe "conversion" related to the manufacture of drugs. Second, Chapter 961 includes a specific definition of the word "manufacture" which includes the words "conversion" and "convert". *See* § 961.01(13), Stats. This demonstrates that the word "convert" as used in this chapter refers only to the manufacture of controlled substances.

Indeed, to read the word "convert" as including the inhalation or smoking of drugs for personal use would produce absolutely absurd results. Were this the intent of the legislature, anytime a person smoked a "joint" or "bowl" of marijuana or other drug, they would be guilty of felony manufacturing, contrary to Wis. Stat. § 961.41(1).[13] That defies common sense and reads the words "ingest" and "inhale" out of existence.

Other absurdities would also result from a reading of § 961.573 which proscribes a glass smoking pipe. It goes against all common sense to believe that the legislature intended to punish the possession of a methamphetamine smoking pipe more severely than

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[13] Again, this is because the statutory definition of "manufacture" includes "[to] convert." *See* § 961.01(13), Stats. Therefore if "convert" includes the burning of drugs in a pipe order to facilitate inhalation, a person is "manufacturing" drugs whenever a controlled substance in smoked.

possession of the drug itself. Additionally, in reading all provisions of the drug chapter together, it can be seen that possession of heroin, like methamphetamine, is a Class I felony. *See* Wis. Stat. § 961.41 (3g)(am). Yet possession of paraphernalia used to introduce heroin into the human body remains an unclassified misdemeanor. Why, then, would the legislature seek to so radically increase a person's exposure for possession of a methamphetamine pipe?

The legislative history of Wis. Stat. § 961.573 (3) confirms that the legislature did not intend that it apply to methamphetamine pipes. Although a court should not resort to analysis of a statute's history in order to create ambiguity, it is appropriate to "consult the legislative history to demonstrate how that history supports our interpretation of a statute otherwise clear on its face." ***Landwehr v. Landwehr***, 2006 WI 64, ¶24, 715 N.W.2d 180. As stated in ***Landwehr***, "when the plain wording of a statute unambiguously evinces the legislative intent, this court may examine the legislative history to support our reading of the plain meaning of the statute." ***Id.*** at ¶9 (citing sources omitted).

Wisconsin Statute § 961.573(3) was created by 1999 Wisconsin Act 129, which also created Wis. Stat. § 961.437 entitled "[p]ossession and disposal of waste from manufacture of methamphetamine." *See* 1999 Wisconsin Act 129, §§1, 4. The Act's introduction states that it relates to:

> possession and disposal of waste produced by the illegal manufacture of the controlled substance methamphetamine, **possession of paraphernalia used in the manufacture of the controlled substance methamphetamine** and providing penalties.

(**emphasis added**) 1999 Wisconsin Act 129, Introduction.

The analysis that accompanies the bill's introduction further confirms the legislature's intent to increase only the penalties for paraphernalia relating to the manufacture of methamphetamine. For example, the section analyzing the purpose of the new paraphernalia provisions is entitled "[p]ossession of paraphernalia used to manufacture methamphetamine." Analysis by the Legislative Reference Bureau (LRB) to 1999 Assembly Bill 704, at 2. The analysis continues on to state as its purpose increasing penalties for paraphernalia when used to "unlawfully manufacture, compound, produce, process, prepare, test, analyze, pack, repack or store methamphetamine." ***Id.***

Wisconsin Statute § 961.573(3) was subsequently amended by 2005 Wisconsin Act 263. Among other modifications, this Act made it a crime to violate sub(3), relating to meth-paraphernalia, in the presence of a child 14 years or younger. As with 1999 Wisconsin Act 129 described above, the drafters' notes evince a clear intent to apply sub(3) only to paraphernalia used in the *manufacture* of methamphetamine. *See, e.g,* Analysis by the Legislative Reference Bureau (LRB) to 2005 Assembly Bill 48 (characterizing sub(3) as proscribing "paraphernalia [] for the making or storing of methamphetamine)[14].

In sum, both the plain language of Wis. Stat. § 961.573(3) and its legislative history establish a legislative intent to penalize only paraphernalia relating to

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[14] Specifically, the analysis states:

> Current law prohibits the use of, and the possession with intent to use, drug paraphernalia. A person who violates this prohibition may be imprisoned for not more than 30 days or fined more than $500 or both. If the paraphernalia is for making or storing methamphetamine, the person may be sentenced to a term of not more than six years...

Analysis by the LRB to 2005 Assembly Bill 48

the manufacture or distribution of methamphetamine. Therefore, as a matter of law, there was no factual basis for the most serious charge Mr. Denk faced.

B. The Improper Charging of Count 2 as a Class H Felony Rendered Mr. Denk's Plea Bargain Illusory.

Mr. Denk pled pursuant to an agreement promising to dismiss the most serious felony charge for a plea to a lesser felony, possession of methamphetamine. In reality, there was no factual basis for the dismissed count. Therefore, Mr. Denk's plea bargain was illusory and his plea was unknowing and unintelligent.

In order for a plea to pass constitutional muster, a defendant must have "sufficient awareness of the relevant circumstances and likely consequences" of his plea. ***Brady v. U.S.***, 397 U.S. 742, 748, 25 L.Ed 747, 90 S. Ct. 1463 (1970). Where a defendant enters a plea that was, "at the time of its entry, attributable to force, fraud, fear, *ignorance, inadvertence or mistake*," there is a manifest injustice. ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992).

In ***Woods***, the defendant pled guilty with the understanding that the prosecutor would be recommending a two-year *consecutive* sentence. However, because he was, at the time, serving a juvenile court disposition, the adult court did not have the authority to order a consecutive sentence. ***Id.*** at 137. Woods later appealed on the ground that his plea agreement was void as "illegal and illusory" because the parties had agreed to an illegal sentence recommendation. ***Id.*** at 134. The Court of Appeals agreed and held that where '[t]he record is clear that [the defendant], at least in part, made the decision to plead guilty based on inaccurate information provided to him by the lawyers and judge," his plea was uninformed. ***Id.*** at 140. The court went on to find the plea not only unknowing, but

involuntary as well, noting that "where inaccurate legal information renders a plea an uninformed one, it can also compromise the voluntariness of the plea." ***Id.*** (*See also* ***State v. Brown***, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543, allowing plea withdrawal where, based on statements made by both parties that went uncorrected by the judge, a defendant misunderstood the collateral consequences of his plea, namely that his convictions would not require him to register as a sex offender; ***State v. Dawson***, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12, allowing plea withdrawal where the defendant pled under a misapprehension that he had preserved the possibility of a legal benefit, namely, reduction to a misdemeanor after successful probation, that was legally impossible for him to obtain.)

Wisconsin has also recognized that a plea bargain may be illusory where the charges dismissed as part of the defendant's plea agreement should never have been charged in the first place. *See* ***State v. Dibble***, 2002 WI App 219, 257 Wis. 2d 274, 650 N.W.2d 908. In ***Dibble***, the defendant was originally charged with four separate counts. As part of a negotiated settlement, he pled to two of the charges with the understanding that the others would be dismissed.

On appeal, Dibble asserted that the dismissed charges were multiplicitous, and therefore, he could not have been convicted of them at trial. He explained that, because the charges were multiplicitous, his plea bargain was illusory.

The appellate court, citing ***Woods***, acknowledged that a "plea to a legal impossibility renders the plea an uninformed one." ***Woods***, 173 Wis. 2d at 140. However, because the court found that the charges were not, in fact, multiplicitous, it did have to decide whether the plea bargain was illusory.

While the ***Dibble*** Court recognized the claim but did not reach the ultimate issue, other jurisdictions faced with cases similar to the present case have recognized that, where the value of any consideration offered to a defendant in exchange for his plea is exaggerated or misunderstood, the plea bargain is illusory and the defendant may withdraw his plea. (*See e.g.*, ***People v. Roderick Johnson***, 86 Mich. App. 77, 79, 272 N.W.2d 200 (1978), holding that if a defendant's plea was induced by a promise to forego an habitual offender enhancer when the defendant was not, in fact, eligible to be charged with that enhancer, the defendant was per se misinformed as to the benefit of his plea and the bargain was illusory; ***People v. Lawson***, 75 Mich. App. 726, 730, 255 N.W.2d 748, 750 (1977), holding that where a plea bargain included promises from the state not to recommend consecutive sentences when, by statute, the sentences would have had to be ordered to run concurrent anyway, the defendant "pled with an exaggerated belief in the benefits of his plea and would be allowed to withdraw his plea.)

In the present case, as in ***Woods*** and ***Brown***, the consideration given Mr. Denk for his guilty plea was null and void as a matter of law. Per the record, Mr. Denk was informed that in exchange for his plea to the possession of methamphetamine charge, the state would be moving to dismiss the most serious charge he faced, a Class H felony with a maximum sentence of $10,000 and 6 years, nearly double the time he faced on the crime to which he pled. As in the Wisconsin and the Michigan cases listed above, Mr. Denk pled as part of a plea bargain wherein the value of his consideration was greatly exaggerated. Indeed, the prosecutor acknowledged that had the paraphernalia count been correctly charged, defense counsel "would have improved her bargaining position with the charges that were remaining" (45:7-8).

In the court of appeals, the state argued that because Mr. Denk did not testify postconviction, he failed

to meet his burden to prove "he really would have gone to trial had he been aware of the argument his appellate counsel now makes as to the dubious validity of the felony paraphernalia charge" (state's court of appeals' brief at 20). Mr. Denk respectfully submits that this is not what the case law requires.

Where a defendant alleges that his plea was not intelligently entered, he "is not required to show that the misunderstanding *affected* his decision to enter his plea." ***State v. Howell,*** 2006 WI App 182, ¶41 n12, 722 N.W.2d 567, ***citing State v. Harden***, 2005 WI App 252, ¶5, 287 Wis. 2d 871, 707 N.W.2d 173. In ***Howell***, the court noted that both parties seemed to be under the misapprehension that the defendant had to allege that his misunderstanding caused him to plead. The court rejected this reading and said that "[i]f the parties mean to suggest that Howell must prove 'linkage' between his decision to enter a plea and something else, they are mistaken." ***Id.*** The court noted that ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), required this linkage precisely because its plea- withdrawal claim was based on ineffective assistance of counsel. According to the court, "***Bentley*** is a specific type of plea withdrawal case in which the alleged misunderstanding is based on a claim of ineffective assistance, drawing into the analysis the performance and prejudice prongs of ***Strickland***... Thus the part of ***Hampton*** [requiring prejudice] that the State relies on does not apply here because Howell has not asserted ineffective assistance of counsel." ***Id.***

Furthermore, as far as Mr. Denk can ascertain, this sort of showing was not required in the substantive cases upon which he relies. For example, both the ***Brown*** and ***Dawson*** Courts focused on the record of the defendant's plea hearing. Because it was clear from the record that both parties misstated the collateral consequences of the defendant's plea *as a matter of law*, and because the record established that the court did not correct these misstatements, the defendants' pleas were unknowing.

CONCLUSION

For these reasons, Mr. Denk respectfully requests that the court reverse the judgment of conviction and remand with directions that all evidence obtained in, and derived from, the unlawful searches of Mr. Denk's person and belongings, and all fruits therefrom, be ordered suppressed, and that Mr. Denk's no contest plea be withdrawn.

In the alternative, Mr. Denk requests that the court reverse the judgment of conviction and remand with directions that Mr. Denk shall be permitted to withdraw his plea of no contest.

Dated this 24th day of April, 2008.

Respectfully submitted,

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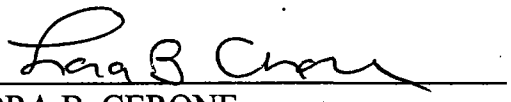
CERTIFICATION AS TO FORM/LENGTH

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 9,459 words.

Dated this 24th day of April, 2008.

Signed:



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APPENDIX

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Appeal No. 2006AP1744-CR Cir. Ct. No. 2004CF31

WISCONSIN COURT OF APPEALS
DISTRICT III

Lora Cerone

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN A. DENK,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

We certify the following question: whether the police may search the personal belongings of a passenger that are found outside a motor vehicle incident to the arrest of the driver based on the reasoning of *State v. Pallone*, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568.

The facts are undisputed. Jordan Denk was a passenger in a car driven by Christopher Pickering. A police officer approached the car, which was parked on the side of the road, to ascertain whether the driver was having problems with the vehicle. After determining that Pickering was not having car troubles, the officer noticed that the car's license plate was expired. The officer ran a check on his computer, which showed that the license plate was registered to a different vehicle. The officer approached the car again, this time detecting the smell of marijuana. At the police officer's instruction, both Pickering and Denk

exited the car. The officer searched Pickering and found drug paraphernalia. Pickering admitted that he was also in possession of marijuana. After placing Pickering under arrest, the officer walked around to the passenger side of the vehicle and noticed an eyeglass case lying on the gravel, right outside the passenger's door.[1] The officer asked Denk if the eyeglass case was his and he replied that it was. The officer asked Denk to retrieve the eyeglass case. Denk picked it up and placed it on the hood of the car. The officer searched the case, finding drug paraphernalia. The officer then placed Denk under arrest and searched his person, finding drugs.

Denk moved to suppress evidence against him, arguing that his rights under the Fourth Amendment were violated when the police officer searched his eyeglass case. The circuit court denied the motion.

The State contends that the search of Denk's eyeglass case was constitutional as incident to Pickering's arrest under ***Pallone***. In ***Pallone***, 236 Wis. 2d 162, ¶¶54-55, the supreme court held that the police search of a passenger's closed duffel bag inside a car was legal under the search-incident-to-arrest exception to the warrant requirement when the driver had been placed under arrest. The ***Pallone*** court explained that personal belongings of a passenger located in a motor vehicle are subject to search based on safety concerns for the police and the need to preserve evidence. ***Id.***, ¶¶47, 50.

[1] There was no testimony at the suppression hearing about how the eyeglass case got on the ground and the circuit court made no findings of fact pertaining to how the eyeglass case came to be in this location.

The State contends that the search was permissible under ***Pallone*** because Denk was standing within easy reach of the eyeglass case when it was on the ground, thus raising concerns for the officer's safety and the potential destruction of evidence. The State argues that the scope of a search incident to arrest should not be limited to an arbitrarily circumscribed area inside the vehicle but, instead, the scope of the permissible search should be measured under the "flexible concept of immediate area." The State argues that this will prevent the person arrested from grabbing a weapon or destroying evidence that may be located outside the car. The State contends that its argument is also based on common sense because "no court has ever held, or would ever hold, that occupants of a vehicle can defeat the search incident to arrest exception by surreptitiously tossing their contraband on the ground outside the car ...."

Denk contends that the State's argument calls for an unprecedented extension of ***New York v. Belton***, 453 U.S. 454 (1981), which allows police to search the passenger compartment of a car incident to the arrest of an occupant of the car. Denk contends that no Wisconsin case has ever extended ***Belton*** to include the belongings of a passenger who has not been arrested that are located outside the car. Denk notes that the supreme court in ***Pallone*** carefully framed the issue before it as whether a driver's arrest justified "a warrantless search of the passenger compartment and *any containers, open or closed, located in that compartment.*" ***Pallone***, 236 Wis. 2d 162, ¶42 (emphasis added). Denk contends that ***Pallone*** allows a search of only those items located inside a vehicle.

United States Supreme Court precedent teaches that, while a passenger's belongings in a car may be searched incident to the arrest of an occupant of the car because they may conceal evidence of the arrestee's crime, probable cause to search a car does not justify a body search of a passenger.

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). If the eyeglass case had been found in the car, it would have been constitutionally permissible to search it. *See* ***Pallone***, 236 Wis. 2d 162, ¶¶54-55; ***Houghton***, 526 U.S. at 303. Conversely, if the eyeglass case had been in Denk's pocket or otherwise on his person, the police would not have been permitted to open it or search it incident to Pickering's arrest. *See* ***Houghton***, 526 U.S. at 303.

The question thus presents itself: what inquiry should be made when a passenger's personal belongings are found outside a motor vehicle? Must the circuit court make a factual finding as to how the passenger's property ended up outside the vehicle? May the police officer draw an inference that Denk tossed the case from the car or that it fell out of the car, and was thus subject to search? Should the police officer draw an inference that the case fell out of Denk's pocket, and thus was not subject to search? Because the State carries the burden, does the State's failure to show how the eyeglass case got out of the car require an inference that it was on Denk's person and then fell to the ground, thus resulting in suppression of the evidence?

Pursuant to WIS. STAT. RULE 809.61 (2005-06), we certify the appeal in this case to the Wisconsin Supreme Court for its review and determination.[2]

[2] Denk raises a second issue that can be resolved under existing law, so we do not address that question in this certification.

STATE OF WISCONSIN CIRCUIT COURT PEPIN COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 04-CF-31

JORDAN A. DENK,

Defendant.

Jordan Case #05CF31

ORDER DENYING DEFENDANT'S RULE 809.30 POSTCONVICTION MOTION

For the reasons stated on the record at the hearing held on June 27, 2006, it is hereby ordered that the Defendant's Motion for Postconviction Relief is DENIED.

Dated this 10th day of July, 2006.

BY THE COURT:

JAMES J. DUVALL
Circuit Court Judge

CIRCUIT COURT
Pepin County, Wis.
FILED

JUL 07 2006

Rosemary E. Carlisle
CLERK OF CIRCUIT COURT

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SCHEMBERA & SMITH
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1907 Wilson Street
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Telephone: 715-235-4220
FAX: 715-235-4239

August 2, 2005

Jordan Denk
S1329 State Road 35 South
Nelson, WI 54756

RE: *State v. Jordan A. Denk*
Pepin County Case No. 04CF31

Dear Jordan:

I am writing to confirm our telephone conversation today. It is my understanding that you are willing to accept the District Attorney's plea offer. This offer requires you to plead guilty or no contest to the felony possession of methamphetamine. The State would then dismiss the possession of drug paraphernalia felony charge. The State would also dismiss the misdemeanor paraphernalia possession charge. Again, we will be free to argue sentencing and will obtain a pre-sentence investigation report. The State will likely be asking for jail time, although we will be free to argue whatever jail time we think is appropriate.

In exchange for this plea offer, the District Attorney is expecting your co-operation against your co-defendant, Christopher Pickering. I spoke with the District Attorney, who informs me that Mr. Pickering is close to making a deal. He currently has a trial scheduled for August 8th I will inform you as to whether you have to testify, however for the time being you should keep that date open.

After you plea and are sentenced, we can then appeal the Motion hearing. Your plea date is currently scheduled for Tuesday September 20th, at 9:00am. Please meet me at the Courthouse at 8:30am so that we can go over the necessary paperwork.

If you have any questions in the mean time, please feel free to call me. I will let you know as soon as I know something about Mr. Pickering's trial. Thank you.

Sincerely,

Kerry A. Lemke
State ID No. 1045383

KAL/dmh

For Official Use Only

State of Wisconsin vs. Jordan A. Denk

Judgment of Conviction

Sentence Withheld, Probation Ordered

Date of Birth: 02-01-1986

Case No.: 2004CF000031

CIRCUIT COURT
Pepin County, Wis.
FILED
OCT 26 2005
Rosemary L. Cain
CLERK OF CIRCUIT COURT

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
2	Possession of Methamphetamine	961.41(3g)(g)	No Contest	Felony I	11-15-2004		09-20-2005

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
2	10-25-2005	Probation, sent withheld	3 YR		Department of Corrections

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	20.00				70.00		

Conditions:

Ct.	Condition	Length	Agency/Program	Begin Date	Begin Time	Comments
2	Jail time	5 MO	Pepin County Jail	11-25-2005	09:00 am	Sentenced to five (5) months in Pepin County Jail with work release privileges commencing November 25, 2005 at 09:00 A.M.

Ct.	Condition	Agency/Program	Comments
2	Costs		Pay cost of case as scheduled by your P.O.
2	Work release / Huber law	Department of Corrections	Granted work release privileges.
2	Drug treatment	Department of Corrections	no posession of drugs, no drinking, no possession of alcohol.
2	Other	Department of Corrections	Maintain F/T employment or go back to school F/T as recommended by your P.O. Submit to DNA. Follow all recommendation as determined by P.O.
2	Alcohol assessment	Department of Corrections	Complete alcoholic assessment/treatment as scheduled by your P.O.

IT IS ADJUDGED that **0** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

State of Wisconsin vs. Jordan A. Denk

Judgment of Conviction
Sentence Withheld, Probation Ordered

Date of Birth: 02-01-1986

Case No.: 2004CF000031

BY THE COURT:

James J. Duvall, Judge
Jon D Seifert, District Attorney
William A Schembera, Defense Attorney

Rosemary Carlisle
Court Official

October 26, 2005
Date

STATE OF WISCONSIN | CIRCUIT COURT Pepin County, Wis. | Pepin County

STATE OF WISCONSIN, Plaintiff,

FILED
JAN 27 2005
Rosemary E. Carlisle
CLERK OF CIRCUIT COURT

INFORMATION

Jordan A. Denk
51329 STH 35
Nelson, WI 54756

D.O.B. 02/01/1986

Case No.2004CF000031
DA Case No.2004PP000352

Defendant.

I Jon D. Seifert, do inform the Court that in said County, the defendant did:

Count 1: POSSESSION OF METHAMPHETAMINE

The above-named defendant on or about Monday, November 15, 2004 at 12:05 PM, Pepin County, Wisconsin, did possess or attempt to posses methamphetamine or a controlled substance analog of methamphetamine, contrary to sec. 961.41(3g)(g) Wis. Stats., a Class I Felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned not more than three (3) years and six (6) months, or both.

Count 2: POSSESSION OF DRUG PARAPHERNALIA

The above-named defendant on or about Monday, November 15, 2004 at 12:05 PM, Pepin County, Wisconsin, did knowingly possess with primary intent to use, Methamphetamine pipe to convert Methamphetamine, contrary to sec. 961.573(3) Wis. Stats., a class H felony, and upon conviction may be fined not more than Ten Thousand Dollars ($10,000), or imprisoned for not more than six (6) years, or both.

And the Court shall suspend the defendant's operating privileges for not less than six (6) months nor more than five (5) years. If the defendant's driving privileges are already suspended, any suspension imposed must be served consecutively.

Contrary to Section, 961.41(3g)(g) and 961.573(3),Wisconsin Statutes, and against the peace and dignity of the State of Wisconsin.

Respectfully submitted the 26 day of Jan., 2005.

Jon D. Seifert
District Attorney

1/26/2005

him if he minded if I patted him down for my safety. He stated he did have a Swiss army knife in his front pocket. I asked him if he would just empty the contents of his pockets onto the trunk of the car at which time he did produce a Swiss army knife that he placed on the trunk of the car. I asked him if he had anything else on him and he stated, "no." I asked him if I could pat him down for my safety at which time he became very quiet. He said, "I do have a problem with that." When I asked him why he said, "I don't like to be touched." When I asked him if he would simply empty the contents of his pockets onto the car, he said he would do that. When he reached into the front pocket of his sweatshirt, it appeared to me that he was picking and choosing what he was going to take out of there. He did produce a pack of cigarettes and some miscellaneous papers. While he was taking his hand out, I did see what I believed to be a glass pipe. It appeared to be drug paraphernalia. When I asked him what else was in his pocket he said something to the effect of "I don't want to say." I asked him if he had narcotics on him and he made another statement something to the effect of "yes." At that time, I placed him into handcuffs and told him he was being detained. I did look inside the front pocket of his sweatshirt and found a baggie containing several individually wrapped quantities of the brownish-green plant-like material I believed to be marijuana, a green glass pipe, and a silver cylinder that was capped on both ends. In the baggie containing the various amounts of marijuana was a small metal scale. I asked Mr. Pickering if he had anything else on him and he stated he did not. I asked him what was in the silver cylinder and he said, "a bowl's worth."

At that time, I went over to the passenger side of the vehicle and asked Mr. Denk if he had any narcotics on him and he stated, "no." I saw a black eye glass case lying on the ground right next to the passenger door of the vehicle. I asked Mr. Denk if that was his. He stated that it was. He retieved it and placed it on the top of the car at which time I opened it and saw a glass pipe that I believed to be drug paraphernalia used for the smoking of methamphetamines. I again asked Mr. Denk who's eye glass case it was. He stated, "the eye glass case is mine but the stuff inside of it is not." I placed Mr. Denk into handcuffs and escorted him over to the front of my squad car. I did a pat down search of his person. During that search, I found a plastic baggie in his right front coat pocket. That baggie contained a brownish-green plant-like material I suspected to be marijuana. Also, a smaller baggie containing a white powdery residue was located in the same pocket. I asked Mr. Denk what was in that baggie and he stated he did not know. I told him that I would like him to tell me because I was concerned of handling it and he stated, "it's meth."

I then placed Mr. Denk in the back seat of my squad car and informed him he was under arrest for possession of narcotics and then went back to the suspect vehicle where Mr. Denk had left his coat. I searched that coat more thoroughly, incident to the arrest, and located a silver pipe with a rubber band wrapped around it and a glass pipe, multi-colored white and yellow. I believed both to be used for smoking of narcotics.

I took Mr. Pickering back to my squad car and placed him inside and told him that he was also under arrest for possession of narcotics and drug paraphernalia. I asked Mr. Pickering if I could move his car from the intersection of Sand Road which he stated was fine. I did move his vehicle a short distance after searching it finding no other evidence of crime. The vehicle was secured and the keys were returned to him.

I then transported both males to the Pepin County Jail where I arrived at approximately midnight.

I took Mr. Pickering into the Jail Library at 12:14 A.M. on November 15, 2004 where I read him his Miranda Rights. He stated he would waive his rights and did sign the form. I asked him how much

STATE OF WISCONSIN CIRCUIT COURT PEPIN COUNTY
BRANCH I

STATE OF WISCONSIN,
Plaintiff,
vs.
JORDAN A. DENK,
Defendant.

MOTION HEARING

File No. 04-CF-31

The above-entitled matter coming on to be heard before the Honorable Dane F. Morey, judge of the above-named court, commencing on Monday, the 16th day of May, 2005, at approximately 9:37 a.m., in the courthouse in the City of Durand, County of Pepin, State of Wisconsin.

A P P E A R A N C E S.

Jon D. Seifert, District Attorney for Pepin County, Durand, Wisconsin, appeared as counsel for and on behalf of the State.

Kerry A. Lemke, Attorney at Law, Menomonie, Wisconsin, appeared as counsel for and on behalf of the Defendant.

Jordan A. Denk, the Defendant, appeared personally.

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THE COURT: I assume the State has no more evidence to present today.

MR. SEIFERT: No, Judge.

THE COURT: All right. The motion to suppress is denied.

Obviously, there wasn't even a stop. He was already stopped. And, as a caretaker of the community, the police officer has the right to inquire if somebody is stopped along the road, especially a country road and using a cell phone. Maybe they're in trouble of some kind.

So, after he did that, he checked the license number and found out it was the wrong plates on the wrong car. And so, obviously, he had a right to arrest for a violation of the traffic laws and to search incidental to an arrest.

Plus, there was a consent to the search of the vehicle. And there was a consent to the search of the person of Mr. Denk.

And, also, Mr. Denk admitted, after being informed of his constitutional rights, that those items that were seized were his.

So the motion is denied. And the case will proceed on to trial or disposition.

MR. SEIFERT: Thank you, Judge.

STATE OF WISCONSIN CIRCUIT COURT PEPIN COUNTY
BRANCH I

STATE OF WISCONSIN,)
)
Plaintiff,) MOTION HEARING
)
vs.) File No. 04-CF-31
)
JORDAN A. DENK,)
)
Defendant.)

The above-entitled matter coming on to be heard before the Honorable James J. Duvall, Judge of the above-named court, commencing on Tuesday, the 27th day of June, 2006, at approximately 10:43 a.m., in the courthouse in the City of Durand, County of Pepin, State of Wisconsin.

A P P E A R A N C E S.

Jon D. Seifert, District Attorney for Pepin County, Durand, Wisconsin, appeared as counsel for and on behalf of the State.

Lora B. Cerone, Attorney at Law, Madison, Wisconsin, appeared as counsel for and on behalf of the Defendant.

Jordan A. Denk, the Defendant, appeared personally.

I N D E X

EXHIBITS:

	IDENTIFIED	OFFERED	RECEIVED
Defendant's:			
1 - Letter	19	19	19

Whereupon, the following proceedings were duly had:

THE COURT: All right. We'll call State versus Jordan Denk, 04-CF-31. Mr. Denk appears with Attorney Lora, L-O-R-A, Cerone, C-E-R-O-N-E, from the State Public Defender's Office, Appellate Division.

Isn't that correct?

MS. CERONE: That's correct.

THE COURT: Attorney Seifert on behalf of the State.

There's a motion for postconviction relief, requesting permission for plea withdrawal or sentence modification.

Do either one of you have any evidentiary presentations, you know, besides argument?

Ms. Cerone?

MS. CERONE: No, sir.

THE COURT: Mr. Seifert?

MR. SEIFERT: No, Judge.

THE COURT: Ms. Cerone?

MS. CERONE: Your Honor, we're asking that Mr. Denk be allowed to withdraw his plea on the grounds that his plea bargain was illusory, in that what was purported to be a -- the most serious felony, possession of methamphetamine paraphernalia, was, in fact, a Class "B" Misdemeanor.

THE COURT: Okay. And here's where I've got questions.

MS. CERONE: Yes.

THE COURT: Because I looked at the Information. And the Information charges it as a felony. And it doesn't allege specifically that the paraphernalia was used to ingest, as your brief suggests.

It says that the paraphernalia was possessed with primary intent to use, to convert, which is an authorized option under 961.573(3).

And I think I understand your argument in saying that he was told a felony paraphernalia charge would be dismissed. And I think that's exactly what happened.

So what am I missing?

MS. CERONE: I believe, Your Honor, that the legislature didn't intend for possession of a methamphetamine pipe to be a felony.

I think that the way the -- that the statute is written, the plain language makes it clear that, when the legislature laid out the sorts of paraphernalia, in general, that are prohibited, they included paraphernalia for personal use. Inhale, ingest, consume, things like that.

THE COURT: Now, counsel, you're assuming that this pipe was possessed for the purpose of inhaling as opposed to another purpose.

MS. CERONE: That's right, Your Honor. That is what all the police reports --

THE COURT: (Interposing) Where -- I mean I don't see that in the record. Because the State had the option to attempt to prove that it was used for converting, whether that's the same thing as inhaling or something. But he was charged with converting, possessing with intent to convert.

And, had the matter gone to trial, that's what they would have had to have proven. But that's an authorized purpose. And that's where I'm puzzled, you know.

MS. CERONE: From my review of the record, Your Honor, and from the factual basis in the complaint, the only alleged use of the pipe was to smoke, to smoke from.

And I do not believe that that is what is meant by "converted," because that renders all the language that was purposely excluded meaningless.

And, again, I'm taking that from the motion to suppress, from the Criminal Complaint, and from the police reports. There's nothing to support that the pipe

was used for anything other than inhaling. And --

THE COURT: (Interposing) Okay. The State had the option to proceed to trial on the convert or conversion option, had the plea negotiation not gone forward.

Isn't that correct?

MS. CERONE: I believe that -- Well, certainly, they could have gone to trial. I'm not sure what you mean, Your Honor.

THE COURT: Sure. The State is not bound by theories, you know, that were in the police reports or in the motion to suppress. They could have gone in and attempted to prove up conversion, however that's defined in the statute.

And I didn't look at the jury instruction, if there's a definition of "convert".

MS. CERONE: There isn't.

THE COURT: There is not. Okay.

MS. CERONE: Well, Your Honor, I believe that they would be bound by the evidence provided to Mr. Denk because there are notice requirements.

And all of the evidence in the record supports that the pipe was a glass pipe used to smoke methamphetamine.

THE COURT: Mr. Seifert? I think this is

the -- It gets right down to the heart of the argument.

Mr. Seifert, your thoughts on that?

MR. SEIFERT: Well, Judge, to tell you the truth, I can't remember exactly what my reasoning was when I charged "convert" as opposed to what would seem to be the more obvious use of a methamphetamine pipe, you know, to smoke or to use. I don't know what the reason was. I can't recall exactly why I used "convert" instead of anything else.

But I think the fact of the matter and the important thing is just that. If it was a bad charge, it was a bad charge. But the State still has the option to charge a bad charge. And, if it's a poor charge, you're going to lose at trial.

So I think the heart of this thing is, Was it a legitimate, legal charge? And, therefore, was there benefit to Mr. Denk by having it dismissed? I think, certainly, there was.

You know, does it have to be a certainty that a conviction will arise in order for the State to deal away a charged charge? I don't think so.

I think, had Mr. Denk's former attorney thought that she wasn't getting the benefit of the bargain, she could have asked the Court to dismiss the charge based on the facts in there, in the report. And, had it been

dismissed, then she would have improved her bargaining position with the charges that were remaining.

But she didn't do that. She chose to deal with the State and with me, particularly, in this matter.

So I think the fact -- If the Court delves into the issue of determining the strength or weakness of charges that are dismissed as part of plea negotiations as to whether or not the defendant got a good deal or not, I don't think that that is an area that the Court has the ability or that public policy would direct the Court to, Judge.

MS. CERONE: May I respond, Your Honor?

THE COURT: Let me just ask a point of clarification. Was there a preliminary hearing in this matter?

Yes, there was.

MR. SEIFERT: I think there was. Yes.

THE COURT: Now, I just looked at the transcript of the preliminary hearing. And the Court found probable cause of one or more felonies.

And I don't think anyone disputes the fact that there was probable cause for Count 1.

MS. CERONE: No, sir.

THE COURT: And the State is free to add any transactionally-related charge to the Information after

the preliminary.

MS. CERONE: But, Your Honor, in order for a charge to stand, there must be a factual basis for it in the record. And I do not believe that there is a factual basis for this charge in the record.

I don't believe that it's a matter of the strength or the weakness. I agree that the Court can't -- you know, shouldn't get into the business of deciding whether or not somebody got a good deal.

However, this is a matter where there's no factual basis for that charge. And that puts it in a different realm and allows the Court to examine it and to allow Mr. Denk to withdraw his plea.

THE COURT: I'm trying to see how Mr. Denk was misled. Because, if Mr. Denk was clearly misled, then that's fine. Although I'm a little concerned that he may get exactly what he wishes for, which is getting this case reopened and put back on for trial on these charges, which well could be behind you at this point.

But that's not really the test. The test is, Was he misled? And he was told I will dismiss a felony paraphernalia charge if you plead to Count 1. And that's exactly what happened.

Now, counsel can argue -- and, perhaps, maybe exactly in the right of it -- that that charge was a

throw-away charge or did not have great weight to it.

But the bottom line is he was charged. And the District Attorney, at that point, at least, absent a motion to dismiss or something, had the right to take him to trial on both counts.

You may not have a high opinion as to the probability of success on Count 2, but I think he had the right to try it and to argue a different purpose for the pipe other than simply ingesting.

And that's assuming, for the sake of the argument, that a pipe for ingesting does not meet conversion. For example, if the pipe was used to convert the methamphetamine from one form into another form so that it could be used. I mean that could have been the State's theory.

MS. CERONE: I understand, Your Honor. And I just want to make it clear that our argument is that there's no factual basis for that and that the statute doesn't contemplate that sort of conversion. It would render it completely meaningless. Because why else would the legislature have taken out all of the language regarding personal use?

THE COURT: Are you saying that Mr. Denk's original counsel, Ms. Lemke, gave him false Information that he relied upon in making the decision?

Because I think the information she gave him is we're going to dismiss Count 2. Count 2 is a felony paraphernalia charge. And that's exactly what happened.

MS. CERONE: That's -- I can represent to the Court that she -- I mean it's not an evidentiary hearing at this point.

But I can represent to the Court that Ms. Lemke did believe that that referred to the pipe used for smoking and that she had never thought beyond it or really read the statute to see the difference between the section on methamphetamine paraphernalia and on drug paraphernalia, in general.

And I chose not to pursue it as an ineffective assistance of counsel because I thought the case law didn't require that because the record made it clear that everybody understood that what I believe is a misapprehension -- that everybody was under a misapprehension. And that other cases that have dealt with an illusory plea bargain argument had not required it be brought by ineffective assistance.

THE COURT: The other thing is I'm not sure in the record at this point we have something from Mr. Denk saying, "I would have made my decision differently had I known that" -- you know, the points that you're raising.

MS. CERONE: And, again, Your Honor, I believe

that the case law doesn't require that because it's not actually a Bangert claim. It's not about the plea colloquy. It's about the terms of the plea bargain.

And that would -- The other cases dealing with this sort of issue have called it a manifest injustice and, therefore, have said that whatever Mr. Denk -- however it led him to act is irrelevant because the focus is on the contract and whether or not he actually got the benefit that he believed.

MR. SEIFERT: Judge, can I respond to those comments?

THE COURT: Sure.

MR. SEIFERT: Whether or not the former attorney, Ms. Lemke, understood the statute correctly or not is irrelevant in this case because it was, in fact, a charge that could have gone forward, as the Court mentioned.

So whether she believed it could go forward under the misunderstanding that a smoking pipe used for ingesting was a felony or whether she understood that, you know, conversion, if that were proven, would result in a felony, the effect on her representation of Mr. Denk would have been the same.

And so I don't think that if, in fact, Ms. Lemke didn't understand that statute correctly, that

it has any effect on this circumstance, because it's -- if it were a mistake, it didn't have any effect on what advice she would have given him.

THE COURT: Well, see, we're all speculating. And that's the problem. Because we don't know what Ms. Lemke said to Mr. Denk.

And, if we're saying that the reason for the plea withdrawal is the fact that he was given bad information, that he was -- somebody misstated to him -- Is that the reason for the plea withdrawal?

MS. CERONE: The reason for the plea withdrawal, Your Honor, would be, in the most legal terms, that there was no factual basis for that charge. That he believed that there was a factual basis for that charge and that he was getting the most serious felony dismissed, when, in fact, that was illusory.

There was no factual basis for that charge. So, if the Court believes there was a factual basis for that charge, I don't think we get to anything else.

THE COURT: Yah. I guess I can't find on the record that there was not, because he was -- If it said inhale, for example, and that was not one of the available options under sub. 3 -- and that would assume that inhale is different from convert -- then I think that's fine.

But the charged offense was "convert". That's a proper option under that.

Whether the State could have proven that at trial is something I can't decide. I can't find that they cannot have done so.

And, in fact, I note that there was a probable cause bindover without exclusion of that charge at preliminary hearing. So --

MS. CERONE: (Interposing) Your Honor, can I just make one thing clear?

THE COURT: Yes.

MS. CERONE: Just so the record is clear, we are asking the Court to find that it is -- And I mean I understand that the Court may not, but we are asking the Court to find that, as a matter of law, "convert" cannot apply to these facts.

So I think that, if the Court -- that that is a decision, a determination, that the Court should make if the Court --

THE COURT: (Interposing) I don't think I have the ability to make that finding because I haven't heard the case, you know.

And they are not even limited -- The State is not even limited to what they put on at the preliminary hearing. They could bring in other witnesses, other

evidence as to how this particular piece of paraphernalia was used.

And, until we had some sort of an evidentiary hearing on that, I don't think I can make that finding. Because what you're asking me to do is make a ruling that, under these facts, that could not constitute convert, correct?

MS. CERONE: Correct. That we're limited to the record. And that, based on the facts of record, which are all the facts that the Court is left to consider -- Based on those facts, there's no factual basis that it could have been properly charged as conversion.

THE COURT: The problem is I don't have to make -- the District Attorney does not have to show a factual foundation for a dismissed charge. They may have been able to show a factual foundation for that charge had the matter gone to trial.

In this case, Mr. Denk was told by the State we will dismiss a felony paraphernalia charge. That's exactly what he got for his plea bargain.

And, if I am wrong, the Court of Appeals can tell me. So that aspect of the motion is denied.

As far as the sentence modification, I just want to make sure I understand your argument. It refers

to the Court's referral to Mr. Pickering. And the comment that I think we're talking about is out of the sentencing transcript, where I'm looking at page fifteen, line seven, where the Court said, "I'm going to come down a little bit on this recommendation for a couple reasons." Because the decision was for less than what the State asked for.

"First of all, I note Mr. Pickering was your compatriot. And, for whatever reason, he got a hundred days. I think it was marijuana rather than methamphetamine."

And that's the statement that you're referring to, counsel; is that right?

MS. CERONE: Yes, sir.

THE COURT: All right. Okay. And I will note for the record, in Mr. Pickering's case -- Am I also correct -- Just for the sake of making the record, we're talking about this plea of no contest case, number 04-CF-30, State versus Christopher Pickering.
Mr. Pickering was charged with possession with intent to deliver THC, which is the active ingredient contained in marijuana. Count 2, possess THC, which accounts for marijuana. And Count 3, possess paraphernalia of the type used to -- with marijuana.

And so my question is -- Well, first of all, as

far as the legal standard, I think that the defendant has the initial burden to show that information was inaccurate and that the Court relied on inaccurate information.

How was that sentence -- How's that statement inaccurate?

MS. CERONE: Your Honor, obviously, I cannot determine what was in your head. Our reading of it was that, perhaps, the Court believed that Mr. Pickering was convicted -- that the difference -- that he got a hundred days because he was charged with a simple marijuana possession count, when, in fact, he was charged with possession with intent to deliver, which I think is significantly more serious than simple possession of marijuana.

And, also, Your Honor, the fact that he did receive a deferred judgment agreement, which I don't believe the Court knew at the time when it sentenced Mr. Denk.

THE COURT: Okay. As far as the Deferred Prosecution Agreement, at this time, I can't remember if I had that in mind or not. I didn't refer to it. So I don't know that I relied on the Deferred Prosecution Agreement aspect.

As far as the fact that Mr. Pickering's charges

involved marijuana as opposed to methamphetamine, I think that was factually accurate, because I didn't say simple possession. I just said marijuana instead of methamphetamine. And I talked about the dangers to society of this particular controlled substance, methamphetamine.

Methamphetamine is in a different category than marijuana. And, to me, I did rely on the difference between the nature of the controlled substances in the two cases, as I thought about comparing Mr. Denk's case to Mr. Pickering's case. Because I think one is a methamphetamine case and the other is a marijuana case. I didn't refer to which -- you know, possession versus delivery.

So that's the point that I am struggling with as to where the inaccurate information is.

Anything further on that point, counselor?

MS. CERONE: No, Your Honor. Before the Court adjourns, though, I would just like to introduce one exhibit on the first issue.

THE COURT: Okay. Sure.

MS. CERONE: The letter that I had attached to the motion from Attorney Lemke -- I just want to make sure that it makes it into the record for appellate purposes.

THE COURT: Sure.

(Exhibit Number 1 was marked for identification.)

MS. CERONE: So I would ask that the Court accept this as an exhibit.

THE COURT: All right. You are handing me Exhibit 1, dated June 27, 2006.

Any objection to this being added as part of the record?

MR. SEIFERT: It's correspondence between Ms. Lemke and her client, Mr. Denk?

THE COURT: Yes.

MR. SEIFERT: Is there a relevant time frame in regard to this matter?

THE COURT: I think it's the same letter that was attached.

MS. CERONE: Yes.

MR. SEIFERT: Then no objection, Judge.

THE COURT: Then Exhibit 1 is received into the record.

(Exhibit Number 1 received in evidence.)

THE COURT: Let me just review the letter again.

(Brief pause.)

THE COURT: All right. Again, in reviewing

Exhibit 1, it says the offer requires you to plead guilty or no contest to the felony possession of methamphetamine. It's exactly what happened. And, again, this letter is from his attorney to Mr. Denk.

The State would then dismiss the possession of drug paraphernalia felony charge. The State would also dismiss the misdemeanor paraphernalia possession charge. That's exactly what happened.

And so, again, for the reasons previously stated, I think that he got exactly what he was told he was going to get when he made the decision.

Anything further?

MS. CERONE: No, Your Honor.

THE COURT: Okay. Then, just to be clear, the motion for sentence modification is denied because the -- there's not been a showing that information relied on by the Court was, in fact, inaccurate.

Thank you.

MS. CERONE: Thank you.

MR. SEIFERT: Thank you, Judge.

(The proceedings were adjourned at 11:08 a.m.)

STATE OF WISCONSIN)
) ss CERTIFICATE OF REPORTER
COUNTY OF BUFFALO/PEPIN)

I, Jane M. Babbitt, Official Court Reporter for the Circuit Court of Buffalo/Pepin Counties, Alma/Durand, Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of twenty pages, has been carefully compared by me with my stenographic notes as taken down by me in machine shorthand and by me thereafter transcribed the same into typewriting, and that it is a full, true, and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 3rd day of July, 2006.

Jane M. Babbitt
Court Reporter
RMR

STATE OF WISCONSIN CIRCUIT COURT PEPIN COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 04CF31

vs.

JORDAN A. DENK,

Defendant.

ORDER

BASED UPON the testimony and evidence presented at the motion hearing held on May 16, 2005,

IT IS HEREBY ORDERED:

That the Defendant's Motion to Suppress is denied.

Dated this 27 day of May, 2005.

BY THE COURT:

Hon. Dane F. Morey
Circuit Court Judge
Pepin County, Wisconsin

CIRCUIT COURT
Pepin County, Wis.
FILED
MAY 27 2005
Rosemary L. Carlisle
CLERK OF CIRCUIT COURT

parties by the Court pursuant to Rule 77(d) F.R.C.P., and Rule 21-A of District Court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MICHAEL LAWRENCE BRESSETTE,

Petitioner,

vs. No. 72-C-347

RAMON L. GRAY, Warden,

Respondent.

OPINION AND ORDER.

The petition for issuance of the writ of habeas corpus is before the court on the pleadings, transcripts of the State court criminal proceedings and briefs and oral argument of counsel. Neither party has asserted a request for evidentiary hearing with respect to the claim for relief asserted here.[1]

Petitioner was convicted on his pleas of guilty of robbery by force and of robbery, and sentenced to two terms of ten years each to be served consecutively, in February 1971. The conviction was affirmed on writ of error in the WisconsinSupreme Court in Bressette v. State, 54 Wis. 2d 323 (1972).

He challenges the validity of the pleas of guilty he entered on the ground that they were induced by an illusory plea bargain. It appears from the record and is so reflected by the statement of facts preceding the opinion of the Wisconsin Supreme Court, that initially two complaints were filed against petitioner; one relating to an incident occurring on May 18th, 1970, charging him with robbery by force, contrary to §943.32(1)(a), Wis. Stats., carrying a maximum penalty of ten years imprisonment, and the other relating to events of December 28th, 1970, charging him with armed robbery, contrary to §943.32(1)(a) and (2), Wis. Stats.,[2] with a maximum thirty year

term. Although petitioner, in the December incident, brutally attacked the robbery victim with his fists, it is undisputed that he was not otherwise armed.

The record further shows that before acceptance of the pleas the trial court, in the presence of petitioner and his counsel, was advised by the prosecuting assistant district attorney that the parties had entered into a plea bargain whereunder the State agreed to reduce the armed robbery charge to robbery and petitioner agreed to plead guilty to the charges. The assistant district attorney expressly stated that, as part of the plea bargain, the State would recommend the maximum ten year sentences for each offense and that these sentences should be served consecutively.

The court thereafter, after inquiry, determined that the pleas to the charges of robbery by force and robbery were voluntarily and understandingly entered, and on said pleas and the evidence adduced in support thereof, found petitioner guilty of both charges and imposed the sentences recommended by the State.

On writ of error in the Wisconsin Supreme Court, petitioner apparently contended, inter alia, that the trial court should have ascertained his understanding of the plea bargain concerning the reduction of the initial charge of armed robbery to robbery on which his pleas of guilty were premised and that said pleas were not understandingly and voluntarily entered because the plea bargain was illusory since he was not armed with a dangerous weapon.

The Supreme Court rejected this claim on the ground that the trial court was not obligated to be sure a defendant knows and understands the elements of a crime with which he was not charged.

Respondent submits that petitioner's defense attorney could not have taken the view that the promise of reduction of the armed robbery charge to simple robbery was illusory because other jurisdictions following the

Wisconsin definition of the phrase "dangerous weapon" found in the armed robbery statute, have held that fists, under appropriate circumstances, may be deemed to be dangerous weapons. Accordingly, it is contended that the possibility that petitioner could have been convicted of armed robbery could not be excluded. The decision to plead guilty, based on the promise to reduce the charge from armed robbery to robbery should, therefore, be considered as representing a deliberate choice by petitioner's attorney, rendering the plea immune to attack on postconviction review. See McMann v. Richardson, 397 U. S. 759 (1970) and Tollett v. Henderson, _____U. S. _____, decided April 17, 1973, 41 Law Week 4486.

It is noted that the Wisconsin Supreme Court in disposing of the claim based on an illusory plea bargain did not premise its decision on a view that an attack with fists may constitute armed robbery and that the bargain could be considered a reasoned choice on behalf of petitioner. And Justice Wilkie, dissenting in Bressette v. State, supra, at p. 240, states unequivocally,

> "....Clearly this defendant was not 'armed with a dangerous weapon' (sec. 943.32(2)) and, therefore, could not possibly be convicted of armed robbery. Thus, the plea bargain entered into by the defendant and the prosecution was completely illusory."

The construction of the phrase "dangerous weapon" alone is not determinative of the question whether or not an attack with fists may constitute armed robbery. In State v. Born, 159 N. W. 2d 283 (Minn. 1968), it was held that an attack with fists and feet fell within the purview of the language "instrumentality.....calculated.... to produce death or great bodily harm," for purposes of a statute proscribing assaults with a dangerous weapon. It is elementary that the intention to harm is of the essence in an assault. Raefeldt v. Koenig, 152 Wis. 459, 462 (1913). Fists and feet may well be deemed the instrumentality or dangerous weapon used in the threat of or perpetration of inflicting harm.

The Wisconsin statute defining the degrees of robbery contemplates the commission of the offense by use of force or threat of force in every degree. See Champlain v. State, 53 Wis. 2d 751, 753 (1972). The use of the phrase "while armed with a dangerous weapon" (emphasis added) necessarily requires use of an instrumentality different from and capable of inflicting a greater or different harm than that resulting from the use of force or threat of force contemplated by the language defining simple robbery. In this context, the use of fists may bring the offense within the definition of simple robbery, but the requirement of commission of armed robbery under §943.32(2) "while armed" must be interpreted as the bearing or carrying of the additional instrumentality of a dangerous weapon as defined in §939.22(10), Wis. Stats.[3]

The Wisconsin Supreme Court noted that in view of the viciousness of the attack petitioner could have been charged and tried on additional offenses. We fully concur in this observation, but conclude that armed robbery was not a charge of which he could have been convicted since it is undisputed that petitioner bore no weapon or used no other instrumentality than the members of his own body in the attack on the victim.

If petitioner's counsel advised his client to plead guilty based on considerations of avoiding the substantially more severe penalties of the armed robbery offense, of which petitioner could not have been convicted, his representation must be deemed inadequate as a matter of law.

Since the State's promise of reducing the armed robbery charge to robbery was illusory, petitioner's pleas based on the promise must be deemed invalid. See Lassister v. Turner, 423 F. 2d 897 (4th Cir. 1970); Santobello v. New York, 404 U. S. 257 (1971) and Brady v. United States, 397 U. S. 742 (1970). See State ex rel. White v. Gray, 57 Wis. 2d 17, 26 (1972), and Rahdahl v. State, 52 Wis. 2d 144, 152 (1971):

"....when the defendant is not given a fair or reasonable alternative to choose from, the choice is legally coerced."

Accordingly, the pleas and the convictions based thereon must be vacated.

NOW, THEREFORE, IT IS ORDERED that the relief requested in the petition for habeas corpus is granted and that petitioner be released from the custody of the respondent warden unless the State initiates proceedings for retrial on the charges no later than two weeks from date of this order.

Dated, Milwaukee, Wisconsin, this 13th day of June, 1973.

Robert E. Tehan

U. S. Senior District Judge.

FOOTNOTES.

[1] Petitioner expressly reserved his right to raise two additional claims presenting factual questions in the event he would not prevail at this time.

[2] "943.32 ROBBERY
(1) Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means may be imprisoned not more than 10 years:

(a) By using force against the person of the owner with intent thereby to overcome his physical resistance or physical power of resistance to the taking or carrying away of the property; or

* * * *

(2) Whoever violates sub. (1) while armed with a dangerous weapon may be imprisoned not more than 30 years."

[3] "939.22 WORDS AND PHRASES DEFINED
In the criminal code, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:

* * * *

(10) 'Dangerous weapon' means any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm."

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 first names and last initials 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 this 24th day of April, 2008.

Signed:

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2006AP1744-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JORDAN A. DENK,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN PEPIN COUNTY CIRCUIT COURT, THE HONORABLE DANE F. MOREY AND HONORABLE JAMES J. DUVALL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATE OF WISCONSIN

IN SUPREME COURT

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

STATEMENT OF THE ISSUES PRESENTED

1. Was the warrantless search of defendant-appellant Jordan Denk's eyeglass case, found outside the car after arresting the driver for possession of controlled substances, lawful?

The trial court answered: "Yes."

2. Did defendant-appellant Jordan Denk show a "manifest injustice" sufficient to withdraw his no contest plea after sentencing?

The trial court answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by this court for full briefing, both oral argument and publication appear warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to Wis. Stat. § (Rule) 809.19(3)(a), the State elects not to present a full statement of the case. Facts are presented below as necessary to develop the argument.

ARGUMENT

I. THE SEARCH OF DENK'S EYEGLASS CASE WAS LAWFUL.

A. Summary Of The State's Position.

This appeal was certified to this court by the court of appeals to determine whether the police may search the personal belongings of a passenger that are found outside a motor vehicle incident to the arrest of the driver based on the reasoning of *State v. Palone,* 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568. The officer was about to conduct a search of the car, with the driver's consent, and incident to arrest after having arrested the driver for

possession of marijuana. Denk said the eyeglass case was his and placed it on top of the car. The officer found methamphetamine drug paraphernalia inside the case.

The State argues that it is a logical, if not necessary, extension of *Pallone* to include an eyeglass case lying immediately next to the car, and which had been within its passenger compartment until shortly before it was discovered. The historical justifications for search incident to arrest, officer safety and preservation of evidence, were present both by the fact of arrest and the specific circumstances of the case.

The lone officer came to the car when it was stopped late at night on a country road and stopped to inquire as to whether the occupants needed assistance. He determined that they did not, but that the car was improperly registered. Upon approaching the car a second time, the officer smelled the odor of burning marijuana. Both occupants denied smoking marijuana, but Denk volunteered that he had recently been released from a drug treatment facility. The officer further investigated, and ultimately arrested the driver. The driver was found to possess marijuana and a knife on his person. The driver also became agitated during the search, clenched his fists, and gave the impression he was going to "run or fight." After finding the methamphetamine pipe in Denk's eyeglass case, and additional paraphernalia and drugs on his person or in his clothes, he was also arrested.

The State also argues that the search of the eyeglass case was a logical, if not necessary, extension of the vehicle probable cause exception to the warrant requirement relied upon in *Pallone.* The policy considerations of disappearance of the evidence and reduced expectation of privacy militate in favor of this extension especially because the occupants were involved in smoking the evidence.

The State also argues that the search can be justified because the eyeglass case was in "plain view,"

and could have readily contained a weapon or contraband. There was also consent given by the driver to search the car, and arguably by Denk by acquiescing to the driver's consent and by placing the case on top of the car in front of the officer. And finally, if the case was deliberately put on the ground by Denk to conceal it from the officer the search can be justified as being of abandoned property.

B. The Parties Agree That The Standard Of Review Is That Of "Constitutional Fact."

The standard of review is one of "constitutional fact." *State v. Malone*, 2004 WI 108, ¶ 14, 274 Wis. 2d 540, 683 N.W.2d 1; *State v. Johnson,* 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182. This entails a two-step process in which: 1) the trial court's finding of evidentiary or historical fact are upheld unless clearly erroneous; and 2) the appellate court independently evaluates those facts against the constitutional standard to determine whether the search was lawful. *State v. Matejka*, 2001 WI 5, ¶ 16, 241 Wis. 2d 52, 621 N.W.2d 891.

C. A Clarification Of The Facts Relevant To The Search.

The vehicle was found by the arresting officer on a county trunk road in Pepin County at about 11 p.m. on November 14, 2004 (1:3; 38:4). After approaching the vehicle a second time for clarification because the registration tags were expired, the officer smelled the odor of burning marijuana (37:9-10; 38:6, 9). The driver, Pickering, said he did not smoke marijuana, and Denk said he had not smoked marijuana since release from a treatment facility recently the previous May (1:3; 37:11; 38:11). Pickering gave consent to search the car (1:3; 37:11; 38:11, 21). The officer asked the two to step out of the vehicle (1:3; 38:11-12). Denk stood next to the closed passenger door (1:3; 37:11; 38:15).

The officer asked Pickering to remove bulging items from his sweatshirt pocket because of concern for weapons being used against him when he searched the car (37:12; 38:13). One of the items Pickering removed from his pocket was a Swiss army knife (1:4; A-Ap. 110). The officer believed he saw a glass pipe for smoking marijuana in the sweatshirt pocket, and at the suppression hearing was not sure if Pickering removed the pipe from the sweatshirt or if the officer did it himself later (38:13-14). Pickering neither removed all of the items nor consented to a pat down, and "became rigid," "clenched his hands and . . . took a posture that . . . he was either going to run or fight (37:13-14). When first asked what else he had in his sweatshirt, Pickering stated he did not want to say, but when asked if he had any narcotics, Pickering stated that he did have some "weed" (38:14). The officer placed Pickering in handcuffs and told him he was being detained (37:14-15). The officer then pulled three bags and a metal tube of suspected marijuana, a scale and a marijuana pipe out of Pickering's sweatshirt pocket (37:15-16; 38:14-15).

The officer then went over to Denk standing next to the passenger side of the car "to make certain that he didn't have any narcotics or weapons on him" (37:11, 16). Denk stated that he did not have any narcotics on his person in response to the officer's question (1:4; A-Ap. 110). As he approached the officer noted "a black, hard eyeglass case lying just barely underneath the car at the passenger door entry area" (37:16; 38:15). The officer thought this was odd and asked Denk if it was his (37:16-17). At the preliminary examination the officer testified that "He said that it was. And then he voluntarily picked the eyeglass case up and placed it on the roof of the car" (37:17). At the suppression hearing the officer stated that he believed he asked Denk to retrieve the case, and Denk placed it on the car (38:15). In response to the question about ownership, Denk said the case was his but not anything inside of it (38:16). At another point during the hearing, the officer stated he "believed" he asked Denk

what was inside of the case, and "may" have asked if he could look inside (38:22).

At the preliminary hearing, the officer testified that he looked inside the eyeglass case and saw a glass pipe, suspected for smoking methamphetamine, and a baggie with a white powdery residue inside (37:17). The police report states that the baggie was in his coat pocket (1:4; A-Ap. 110). At the suppression hearing, the officer testified that in the case he saw the pipe and some cleaning tools (38:16). The officer again asked Denk whose eyeglass case it was, to which he responded "the eyeglass case is mine but the stuff inside of it is not" (1:4; A-Ap. 110; 38:23). Denk was placed in handcuffs (1:4; A-Ap. 110; 38:16).

At the preliminary examination the officer testified that he then moved Denk over towards the squad car and searched him (37:18), a pat down search (1:4; A-Ap. 110; 38:17) for the officer's own safety (37:31; 38:21-22). In his coat pocket the officer found a baggie with suspected marijuana (37:18-19) believed to be for Denk's personal use (37:31) and two pipes (37:23). At the suppression hearing the officer stated that he found two plastic baggies during pat down (38:17, 23). Denk said that the white powdery substance in one of the baggies was methamphetamine (1:4; A-Ap. 110; 37:19; 38:17).

Denk and Pickering were arrested, put in the squad car and transported to the sheriff's department (37:19-20). The police report states that after Denk was arrested and placed in the squad car, the officer searched Denk's coat in the car "more thoroughly, incident to arrest, and found silver and glass pipes suspected for smoking narcotics" (1:4; A-Ap. 110). At the suppression hearing the officer testified that he finished searching Pickering's car before transport and no paraphernalia or contraband were found in it (38:17), but he did find two marijuana pipes in Denk's jacket (38:20).

The officer, with Pickering and Denk, arrived at the Pepin County Jail at approximately midnight on November 15, 2004 (1:4; A-Ap. 110). At the station, Pickering stated that he and Denk had been smoking Pickering's marijuana (1:5; 37:22). Denk was informed of and waived his *Miranda* rights (1:5; 37:24; 38:19). Denk admitted that all of the items in his coat, on his person and in the eyeglass case were his (1:5; 37:23-24; 38:20). Denk stated that he had been released from drug treatment for methamphetamine in May 2004 (1:5). A test on Denk's suspected marijuana was positive for THC (37:26).

After the May 16, 2005 hearing on the motion to suppress, the trial court denied the motion on the grounds that: 1) after determining that the car was improperly registered, the officer had a right to search incidental to that arrest; and 2) there was consent to search car and the person of Mr. Denk (38:24; A-Ap. 112). The court's ruling was reduced to a one-page order incorporating the grounds enunciated at the hearing (14; A-Ap. 134).

The trial court's specific findings of fact were: 1) there was no law enforcement stop because the car was already stopped on a country road; 2) the officer approached the vehicle in his community caretaker function to see if assistance was needed; 3) there was grounds for a traffic arrest because of a vehicle registration violation; 4) there was grounds for a search incidental to arrest; 5) there was consent to search the vehicle and the person of Mr. Denk; and 6) Denk admitted, after being informed of his constitutional rights, that the seized items were his (38:24; A-Ap. 112).

D. The Search Of The Eyeglass Case Was Lawful As Incident To An Arrest.

1. This issue is determined by *State v. Pallone.*

In *Pallone,* 236 Wis. 2d 162, this court upheld the search of a passenger's duffel bag after arrest of the car's driver for a municipal ordinance. The search was held to fit under both the search incident to arrest exception to the warrant requirement, and under the vehicle probable cause exception. *Pallone*, 236 Wis. 2d 162, ¶¶ 3, 43, 50, 54, 57, 84. A search incident to arrest involving a vehicle includes open or closed containers within its passenger compartment, even absent probable cause to believe there is contraband therein. *Pallone*, 236 Wis. 2d 162, ¶¶ 31, 32. The search of the vehicle incident to arrest was lawful even though the arrest was only for a civil village ordinance violation for open intoxicants. *Pallone*, 236 Wis. 2d 162, ¶ 43.

The court explained that the two historical justifications for the warrant exception of a search incident to an arrest are the safety of the officer and the discovery and preservation of evidence. *Pallone*, 236 Wis. 2d 162, ¶¶ 47, 50. The threat to safety "'flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty.'" *Pallone* , 236 Wis. 2d 162, ¶ 48 (quoted source omitted). The search incident to arrest exception applies even if the suspect is handcuffed, guarded and in a squad car. *Pallone*, 236 Wis. 2d 162, ¶ 35 (citing to *State v. Fry,* 131 Wis. 2d 153, 180, 186 n.1, 388 N.W.2d 565 (1986) (search lawful even though both defendants were handcuffed, confined in separate squad cars, and guarded by officers at the time of the search).

Pallone, the passenger, gave the officer an overt reason to suspect that the duffel bag might contain a weapon or further evidence of an ordinance violation by

his suspicious behavior – walking parallel to the officer along the side of the car, and nervously reaching for the bag. *Pallone*, 236 Wis. 2d 162, ¶¶ 9-10. The officer was justified in going through the entire duffel bag, even after determining that it did not contain any more containers of alcohol, because a weapon could have been secreted in a container as innocuous as a small cardboard box for baggies. *Pallone*, 236 Wis. 2d 162, ¶¶ 13, 49.

The *Pallone* court noted that the second historical justification, to discover and preserve evidence, was also present, because it was likely the officers would find additional containers of beer. *Pallone*, 236 Wis. 2d 162, ¶ 50. "In an arrest situation, we cannot expect an officer to stop looking for further evidence of the offense." *Pallone*, 236 Wis. 2d 162, ¶ 51. "Admittedly, it is unlikely that occupants of a truck would store spillable, open bottles of beer in a duffel bag while the vehicle is in motion. But it is conceivable that they might conceal the open bottles in a zippered duffel bag once they pull into a parking lot and step out." *Id.*

It is true, as set forth above, that the *Pallone* court explained how on the facts of the case the historical concerns of officer safety and need to preserve evidence were met. But it is also true that the court went to great lengths to reaffirm that these concerns are met because of the fact of arrest:

> Because **the "fact of the lawful arrest" establishes the authority to search**, *Robinson*, 414 U.S. at 235 this exception does not require a showing that the police officer had probable cause to believe that a vehicle contains contraband. *See generally id.* at 234-35. The **fact that there is an arrest gives rise to two heightened concerns** that justify a warrantless search: (1) the need to ensure officer safety, and (2) the need to discover and preserve evidence. *Knowles*, 525 U.S. at 116-18.

Pallone, 236 Wis. 2d 162, ¶ 32 (emphasis added).

> In this case, the search incident to arrest **exception applies because Riff was under arrest.**

Pallone, 236 Wis. 2d 162, ¶ 43 (emphasis added).

> **The threat to officer safety during an arrest "flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty**, and not from the grounds for arrest." *Knowles,* 525 U.S. at 117.

Pallone, 236 Wis. 2d 162, ¶ 48 (emphasis added).

Moreover, this argument is consistent with and relied upon *Fry,* where a lawful search incident to arrest was conducted even though the defendants were handcuffed and in a squad car under guard. *State v. Fry,* 131 Wis. 2d 153, 173-74, 388 N.W.2d 565 (1986). And, as recently as 2005, this court reiterated that a search incident to an arrest requires no more justification than the arrest itself. *State v. Sykes,* 2005 WI 48, ¶ 14, 279 Wis. 2d 742, 695 N.W.2d 277.

2. The *Pallone* search incident to arrest exception applies to Denk's case even though the eyeglass case was outside the car.

The policy considerations giving rise to the search incident to arrest exception (as well as the vehicle probable cause and consent exceptions discussed below) strongly militate in favor of applying it to the search of Denk's eyeglass case even if it were outside the car. Not only were the historical considerations met because of the **fact** of Pickering's arrest, but the specific facts of the case show a legitimate concern for officer safety and preservation of evidence.

The *Pallone* court stated in reference to the search incident to arrest:

> Its legitimacy was strengthened here because Pallone was standing at arm's length from the duffel bag. The authority to search incident to arrest is broad, *Robinson,* 414 U.S. at 232-33, and so it remains under the facts of this case.

Pallone, 236 Wis. 2d 162, ¶ 54.

> Under Wis. Stat. § 968.11 and the decision of the United States Supreme Court in *Chimel v. California,* 395 U.S. 752 (1969), the search incident to arrest exception allows police officers to search those areas of a vehicle within the "immediate control" of the person under arrest. *Fry,* 131 Wis. 2d at 165. This exception to the warrant requirement acknowledges that in arrest situations, it is reasonable for the officer to search the area into which "an arrestee might reach in order to grab a weapon or evidentiary items."

Pallone, 236 Wis. 2d 162, ¶ 33. Denk was standing within easy reach of the eyeglass glass when it was on the ground **and** especially after he put it on the car. The "easy access/immediate control" factor is the same in both cases.

The statutory authority for search incident to arrest, Wis. Stat. § 968.11, does not arbitrarily circumscribe the scope to a specific area, but rather uses the flexible concept of area of immediate control. *Pallone,* 236 Wis. 2d 162, ¶¶ 33-34. The State's argument here is consistent with the statute.

Even under the law of search incident to arrest in houses, where there is a greater expectation of privacy, the scope of the search is fluid and depends on the extent of the area from which the suspect might obtain a weapon **or** destroy evidence. *Sykes*, 279 Wis. 2d 742, ¶ 20 (citation omitted).

The State's argument is also supported by resort to common sense. First of all, no court has ever held that occupants of a vehicle can defeat the search incident to arrest exception by surreptitiously tossing their contraband

on the ground outside the car, and then claiming that it was outside the scope of the search if found by the arresting officer. This argument is consistent with the *Pallone* court's reasoning as to why a passenger's belongings should be subject to search even in the absence of evidence of his or her complicity, and thus preclude "sabotage [of] an otherwise legal search":

> A contrary rule would overlook the reality that weapons and evidence can reside in passenger property just as easily as they can in arrestee belongings. **If this court were to adopt such a rule, we would provide vehicle occupants with the incentive to sabotage an otherwise legal search** by concealing weapons or evidence in areas that remain within an occupant's easy reach.

Pallone, 236 Wis. 2d 162, ¶ 56 (footnote omitted; emphasis added).

Second, by picking up the eyeglass case and putting it on top of the car, Denk made it again part of the vehicle's cargo and subject to search. He did not claim it fell off his person or put it in his pocket. No court would hold that a person could escape the law of vehicle searches by affixing drug containers to the outside or underside of the vehicle, and then claim that because they were outside the passenger compartment they could not be searched.

And third, by placing the eyeglass case on the car, Denk put it in plain view, giving rise to yet another legal justification for a search. And, he gave himself even easier access to it, enhancing security concerns for the officer, who did not know it contained only Denk's prized methamphetamine pipe, and not a knife. The officer had already found a knife on Pickering. Worse, Pickering had become agitated, refused to empty his pockets or submit to a pat down, and clenched his fists as if readying for a full "fight or flight" altercation (37:13-14). And finally, the fact that the two had consumed drugs in the officer's presence and presumably were "high" furthered

exacerbated fear that they would act irrationally, and violently, if they panicked.

The weakness of Denk's argument is also made plain by posing the question as to what Denk thinks the officer should have done after seeing the eyeglass case on the ground. It must be remembered that Denk was **not** instructed to put the case on the top of the car – he did that voluntarily (37:17; 38:15). He did not give **any** indication that it had fallen out of his clothing or attempt to put it in a pocket, or back in the car. It would have been foolhardy for the officer – given all that had transpired up to that time – to turn his back on Denk and proceed to search the car. It also would have been most peculiar for an officer to tell Denk to put the case in his pocket so it would be legally out of reach. If the officer had told Denk to put it back in the car, it could have been searched anyway.

The facts in Denk's case also somewhat ameliorate the concerns raised by the *Pallone* dissent. The arrest of Pickering was for a serious crime, not for a municipal civil ordinance. *See Pallone*, 236 Wis. 2d 162, ¶ 86. The search of the passenger Denk's belongings did not morph into something unrelated to the arrest of the driver (*i.e.,* beer to weapons to sandwich bag box to drugs). *See Pallone*, 236 Wis. 2d 162, ¶ 88. While in *Pallone* it may have been contrary to common sense to look for open containers of beer in a duffel bag, it was not inherently unreasonable to suspect another weapon or contraband in Denk's eyeglass case. *See Pallone*, 236 Wis. 2d 162, ¶¶ 95-96. And, in Denk's case there was none of deviousness that troubled the dissent when citing to the newspaper article entitled "Drug Busts Start as Traffic Stops." *Pallone*, 236 Wis. 2d 162, ¶ 90 n.28. The officer stopped in his "community caretaker" function, to render assistance to a possible disabled motorist, and would happily have gone on his way if not for the erroneous registration tags and the strong odor of burning marijuana when he approached the car a second time.

And finally, Denk's argument that *Pallone* was wrongly decided in view of LaFave and other states' courts (Denk's Brief at 17-19) was raised by the *Pallone* dissent and rejected by the majority *See Pallone*, 236 Wis. 2d 162, ¶¶ 52, 81-82, 90-93. Until a majority of this court decides to restrict or overrule *Pallone,* it stands as the controlling law. A logical, if not necessary, extension of its holding would be to include the search of Denk's eyeglass case. This is because the same legal and policy considerations apply and because the case was indeed a container within the car's passenger compartment up to moments before the search.

E. The Search Of The Eyeglass Case Was Also Authorized Under The Vehicle Probable Cause Exception.

The *Pallone* court also held that the search of the duffel bag was justified under the vehicle probable cause search warrant exception even absent an arrest. *Pallone,* 236 Wis. 2d 162, ¶¶ 83, 84. The court stated:

> This exception permits the warrantless search of a vehicle or any containers within the passenger compartment if there is probable cause to believe that the vehicle or the containers hold the object of the search. . . . The exception also applies to passenger belongings capable of containing the object of the search. We again emphasize that the rationales and requirements for this exception differ from those that satisfy the search incident to arrest exception. One key distinction is that this exception requires an overriding standard of probable cause.

Pallone, 236 Wis. 2d 162, ¶ 58 (citations omitted).

Probable cause in this context means only a "'fair probability.'" *Pallone*, 236 Wis. 2d 162, ¶ 74. There need not be a showing of probable cause for a search incident to an arrest. *Pallone*, 236 Wis. 2d 162, ¶ 73. Warrantless searches of homes are "presumptively

unreasonable;" searches of vehicles are not. *Pallone*, 236 Wis. 2d 162, ¶ 59.

> This probable cause exception for automobiles is built on two key factors that distinguish motor vehicles from other areas to be searched. First, the "ready mobility" of a vehicle makes it more likely that contraband or evidence of a crime will vanish during the period necessary to secure a valid warrant. *Houghton,* 526 U.S. at 304 (citing *Carney,* 471 U.S. at 390); *Carroll,* 267 U.S. at 153. Second, persons have reduced privacy expectations in motor vehicles, an expectation that "is significantly less than that relating to one's home or office." *Carney*, 471 U.S. at 391. . . .Thus, the exception can arise even if the vehicle is "found stationary in a place" like a parking lot. *Carney,* 471 U.S. at 388, 392 (probable cause to search a parked motor home).

Pallone, 236 Wis. 2d 162, ¶ 60.

The court noted that the scope of the search includes a passenger's belongings regardless of whether the passenger is suspected of wrongdoing. *Pallone*, 236 Wis. 2d 162, ¶ 70. The court further noted that "passengers 'often [] engage[] in a common enterprise with the driver,' sharing the same interest of concealing contraband." *Pallone*, 236 Wis. 2d 162, ¶ 71 (quoted source omitted).

The officer smelled marijuana and had found drugs on the driver's person. This, plus the fact that Denk had volunteered his recent release from drug treatment, gave ample probable cause to believe that Denk was complicitous and that a search of the vehicle would yield more evidence. When one adds the fact of the officer seeing the eyeglass case on the ground – ideal for concealing drugs, paraphernalia, or a knife – he would have been derelict in his duty had he not searched further. The eyeglass case was not on Denk's person, and there is no **evidence** it ever had been.

This part of the holding in *Pallone* was based upon *Wyoming v. Houghton*, 526 U.S. 295 (1999). It is true that

in *Houghton* the Supreme Court upheld the search of a passenger's purse that was in the car. However, certain portions of the opinion make plain that *Houghton* supports the State's argument that the exception should apply to an eyeglass case that had been inside the car shortly before it was seen on the ground. First of all, a woman's purse is likely to contain very personal, if not exclusively feminine, items such that the search is much more intrusive than the search of Denk's eyeglass case. Secondly, in *Houghton* the officer took the search to the second level of intrusion by examining a pouch and a wallet inside the purse. *Houghton*, 526 U.S. at 298. Nonetheless, the Supreme Court stated:

> During virtually the entire history of our country – whether – whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile – it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.

Houghton, 526 U.S. at 301 (citation omitted).

> Even if the historical evidence, as described by *Ross*, were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings. Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars . . . .

Houghton, 526 U.S. at 303. The search of Denk's eyeglass case, which clearly had been within the vehicle until shortly before the search, was a logical if not necessary extension of the teaching of *Houghton* in order to effectuate its mandate.

F. The Driver Gave Consent To Search The Vehicle And Its Contents, Which Would Extend To Property Of The Passenger Outside The Car But Accessible.

The driver of the car, Pickering, had given consent to search the car (38:11). This included consent to search the passenger's belongings. *Matejka,* 241 Wis. 2d 52. In *Matejka,* this court went further, and held that the passenger's failure to object to the driver giving consent fortified the conclusion that there was consent:

> Our conclusion is strengthened by the fact that Matejka, unlike Matlock, was present and aware of the fact that Miller had consented to the search of the common area, the interior of the van, and yet made no attempt to circumscribe the scope of the search to exclude her jacket.

Matejka, 241 Wis. 2d 52, ¶ 37. Pickering's consent, and Denk's acquiescence to it, militates in favor of finding that the search of the eyeglass case was with consent. The fact that Matejka's jacket was inside the van and Denk's case outside is not determinative, because the issue in both cases is the passenger's acquiescence to the driver's consent.

And finally, there is some support, even if slight, for the argument that Denk himself consented to the search by picking up the eyeglass case and putting it on the car. In *State v. Phillips,* 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998), this court held that consent to search need not be given verbally, but could be inferred from words, gesture or conduct. In *Phillips,* when the officer asked for permission to search the house, Phillips went into his bedroom and produced the drugs – which the court construed as consent. *Id.* The totality of the circumstances in Denk's case at least raise the specter that he himself consented by gesture and implication.

The State's argument based upon *Matejka* and *Phillips* would also support the trial court's conclusion that there was consent (38:24; A-Ap. 112). The State acknowledges that the record does not support the conclusion that Denk overtly consented to the search of his eyeglass case or his person.

G. By Picking Up The Eyeglass Case And Placing It On The Top Of The Car, Denk Had Made It Subject To Search For Being In Plain View.

Seizure and inspection without a warrant is legitimate when the officer is lawfully in a position to view evidence in plain view or the discovery is inadvertent. *State v. McGill,* 2000 WI 38, ¶ 40, 234 Wis. 2d 560, 609 N.W.2d 795.

Even if it was the officer who instructed Denk to pick up the case, rather than Denk picking it up voluntarily, there is no evidence in the record that the officer told him to put it on top of the car. Similarly, there is no evidence in the record that the case came from Denk's pocket, rather than being loose in the interior of the car. It was in plain view both when seen on the ground and after being placed on top of the car. Given that, and all of the other circumstances of the case, the officer was justified in looking inside what was in plain view.

H. Denk Had No Reasonable Expectation Of Privacy In The Eyeglass Case Because It Was Abandoned.

In *State v. Roberts,* 196 Wis. 2d 445, 538 N.W.2d 825 (Ct. App. 1995), the court held that the defendant had abandoned the drugs in his car after running from it when approached by a police officer. Specifically, Roberts ceased to have a reasonable expectation of privacy after he

fled, and a warrantless search of the car did not violate the Fourth Amendment. *Roberts*, 196 Wis. 2d at 449. A defendant has the burden of proving a reasonable expectation of privacy in the object searched as a threshold matter before even invoking the Fourth Amendment analysis, and this cannot be done if the property is abandoned. *Roberts*, 196 Wis. 2d at 453-55. Abandonment for Fourth Amendment purposes requires relinquishing a reasonable expectation of privacy, and not all property interest in the item. *Roberts*, 196 Wis. 2d at 454. The expectation of privacy must be objectively reasonable and not merely subjective. *Id.*

The court further stated that "[e]vents occurring after abandonment may be considered by the court as evidence of intent to abandon." *Roberts*, 196 Wis. 2d at 456 n.2. After the search of the eyeglass case, Denk expressly disavowed ownership of the contents – the methamphetamine pipe (38:23). This supports the argument that he had deliberately intended to abandon the case and pipe so as not to get caught with it.

An important fact in Denk's case is that the officer found the eyeglass case on the ground. It was only after this, and in response to the officer's question, that Denk said it was his, picked it up, and placed it on the car.

Roberts militates in favor of this court's finding that the eyeglass case was abandoned. The eyeglass case was lying on the ground, and had either been deliberately thrown there by Denk so he would not be found in possession of drug paraphernalia, or it had inadvertently fallen out of the car when Denk got out. In any event, it was, in fact, abandoned for Fourth Amendment purposes. Denk's statement that the case was his, before the officer looked inside and found the methamphetamine pipe, may establish some property interest, but not an objectively reasonable expectation of privacy within the rule of *Roberts*. In other words, society is not prepared to recognize a reasonable expectation of privacy in an object discarded so as not to incriminate its owner. The fact that

Denk picked it up and said it was his, only after it was seen by the officer on the ground, does not change its status as abandoned and subject to search for Fourth Amendment purposes.

Denk also failed the *Roberts* requirement that he prove a reasonable expectation of privacy. Denk did not testify and appellate counsel declined to put forth any evidence from any other source (45:11-12, 18, 20). Denk has failed his burden of proving why this court should find a reasonable expectation of privacy in something lying on the ground, when there would have been none even if it were in the car.

In *State v. Hart,* 2001 WI App 283, ¶ 22, 249 Wis. 2d 329, 639 N.W.2d 213, the court stated:

> The district attorney correctly cites cases holding that a warrantless seizure of property whose owner has abandoned it does not violate the Fourth Amendment. *State v. Bauer*, 127 Wis. 2d 401, 407, 379 N.W.2d 895 (Ct. App. 1985). The district attorney has also cited *California v. Hodari D.*, 499 U.S. 621 (1991), for the proposition that a person who throws something to the ground as he or she is being approached by the police will be deemed to have voluntarily abandoned it.

Abandonment does not require active flight; voluntarily relinquishing possession and control is sufficient. *State v. Knight,* 2000 WI App 16, ¶¶ 2, 14, 232 Wis. 2d 305, 606 N.W.2d 291.

II. DENK SHOULD NOT BE ALLOWED TO WITHDRAW HIS NO CONTEST PLEA BECAUSE HE RECEIVED THE BENEFIT OF THE BARGAIN AND HAS NOT SHOWN A MANIFEST INJUSTICE.

A. Summary Of The State's Position.

The State argues that Denk received various benefits from the plea bargain whether or not he ultimately could have been convicted of felonious possession of paraphernalia for possession of a methamphetamine pipe. This included dismissal of two other charges, a sentence recommendation of jail rather than prison time – meaning no more than a year, and no risk of conviction for the felony paraphernalia charge. Moreover, no court has held that possession of a methamphetamine pipe could not constitute a felony, such that there was risk of conviction.

This court had held that reduction of a charge for which the defendant could not be convicted, to a charge for which he was properly convicted, did not constitute an "illusory" plea bargain rendering the plea not knowingly and intelligently entered.

Whether or not Denk's claim is analyzed as being ineffective assistance of counsel, with the attendant requirement that he prove prejudice, he still bears the burden of proof as to manifest injustice. This is because Denk does not claim any deficiency in the plea colloquy prior to his conviction for felony possession of methamphetamine. He has not shown manifest injustice.

B. The Standard Of Review Is That Of Constitutional Fact.

In *State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12, the court stated:

> A defendant who seeks to withdraw a plea after sentencing has the burden of showing by "clear and convincing evidence" that a "manifest injustice" would result if the withdrawal were not permitted. *State v. Truman,* 187 Wis. 2d 622, 625, 523 N.W.2d 177 (Ct. App. 1994). To meet this standard, a defendant must show "serious questions affecting the fundamental integrity of the plea." *Libke v. State,* 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).
> . . . .
>
> Although it is often said that whether to grant a post-sentence plea withdrawal motion is committed to the sound discretion of the trial court, when a defendant establishes a constitutional violation, the withdrawal of his or her plea becomes a matter of right and the trial court has "no discretion in the matter" to deny the motion. *Bangert,* 131 Wis. 2d at 283. Whether a plea was knowingly and voluntarily entered is a question of constitutional fact. *Id.* We affirm the trial court's findings of evidentiary or historical facts unless they are clearly erroneous, but we independently determine whether the established facts constitute a constitutional violation that entitles a defendant to withdraw his or her plea. *Id.* at 283-84; *State v. Sturgeon,* 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999).

Dawson, 276 Wis. 2d 418, ¶¶ 6-7.

C. A Clarification Of The Facts Relevant To The Plea Bargain.

The four original charges in the November 16, 2004, complaint were: Count 1 - felonious possession with intent to deliver THC (marijuana), with maximum incarceration of three years six months and a maximum fine of $10,000; Count 2 - misdemeanor possession of

marijuana, with maximum incarceration of six months and a maximum fine of $1,000; Count 3 – misdemeanor possession of a marijuana pipe as drug paraphernalia, with maximum incarceration of thirty days and a maximum fine of $500; and Count 4 – felonious possession of methamphetamine, with maximum incarceration of three years six months and a maximum fine of $10,000 (1:1; 39:2-3).

At the conclusion of the preliminary examination the court found "that it's probable that one or more felonies have been committed and he probably committed it" (37:32). The information filed after the preliminary examination substituted felonious possession of a methamphetamine pipe as paraphernalia, with maximum incarceration of six years and a maximum fine of $10,000, for the felonious possession with intent to deliver marijuana charge in the complaint (8; A-Ap. 109).

The details of the plea bargain itself also need clarification. The trial attorney's letter to Denk stated terms of the plea bargain beyond dismissal of felony paraphernalia and the two misdemeanors from the original complaint. It stated that "The State will likely be asking for **jail** time . . . " (31; A-Ap. 106; emphasis added). Jail, versus prison, incarceration is limited to one year or less. Wis. Stat. § 973.02. Therefore, an additional benefit of the plea bargain was limiting the possible incarceration from ten years to one.

Denk was also expected to testify against Pickering if needed as a witness (31; A-Ap. 106). And the plea bargain expressly noted Denk's right to appeal the denial of the suppression motion after he was convicted and sentenced. (*Id.*).

On October 25, 2005, Denk entered a no contest plea to, was convicted of, felony possession of methamphetamine (21; 43:15). At the plea hearing it was noted that Denk cooperated with law enforcement officers in making one controlled buy, but the results were

not as Denk had apparently represented them likely to be (44:2-3). Thus there was no "plea and sentence arrangement based on significant cooperation and significant success" as had been contemplated (44:3).

Denk stated at the plea hearing that he had no questions about the plea bargain, that he had ample opportunity to discuss it with his attorney, and that he was satisfied with his attorney's services (44:6-7). Denk also stated that he had no questions about what he was charged with (44:8). Denk's attorney stated that she had ample time to discuss the plea with Denk, and that he was entering into it knowingly and voluntarily (44:8-9).

At the sentencing hearing the prosecution recommended a disposition of three years' probation, with six months in the county jail (43:4). It was also brought out that plea negotiations involved Denk cooperating with law enforcement officers, which had only limited success at least in part because of limited efforts on Denk's part (44:7, 9).

Sentence was withheld, and Denk was placed on probation with five months in the county jail, with work release, as a condition (21; 43:15). The felony possession of methamphetamine paraphernalia charge, and misdemeanor charges of possession of THC and THC paraphernalia, were dismissed (44:9-10). The trial court noted Denk's admission to having sold controlled substances (43:14).

At the postconviction motion hearing, held on June 6, 2006, Denk's appellate counsel declined the opportunity to present any evidence at the hearing that Denk was misled, did or did not think that the felony paraphernalia charge presented a valid risk of conviction, and disavowed any claim of ineffective assistance of trial counsel (45:11-12, 18, 20). The sole factual basis for the plea withdrawal were appellate counsel's personal representations, hearsay or otherwise:

> MS. CERONE: That's - - I can represent to the Court that she - - I mean it's not an evidentiary hearing at this point.
>
> But I can represent to the Court that Ms. Lemke did believe that that referred to the pipe used for smoking and that she had never thought beyond it or really read the statute to see the difference between the section on methamphetamine paraphernalia and on drug paraphernalia, in general.
>
> And I chose not to pursue it as an ineffective assistance of counsel because I thought the case law didn't require that because the record made it clear that everybody understood that what I believe is a misapprehension - - that everybody was under a misapprehension. And that other cases that have dealt with an illusory plea bargain argument had not required it be brought by ineffective assistance.

(45:11).

The trial court perceived the problem with this approach:

> THE COURT: Well, see, we're all speculating. And that's the problem. Because we don't know what Ms. Lemke said to Mr. Denk.

(45:13).

The trial court denied Denk's motion to withdraw his no-contest plea (45:19-20). The court held that: 1) Denk was not misled because the State had fulfilled its promise to dismiss the felony paraphernalia charge; 2) the bindover after the preliminary examination did not exclude charging felony paraphernalia; 3) the State properly charged "convert," rather than "inhale," as required by subsec. (3), for felony paraphernalia; and 4) the court could not find a failure to prove "convert" absent a trial, and the record did exclude the possibility that the State could prove the charge (45:9-15). The court's ruling was reduced to a one page order incorporating the grounds enunciated at the hearing (48).

D. Denk's Plea Bargain Was Not "Illusory."

1. Denk received the benefit of the bargain even if he could not have been convicted of felonious possession of paraphernalia for possession of a methamphetamine pipe.

The State's argument does **not** depend on this court holding that possession of a methamphetamine pipe could result in conviction for felonious possession of paraphernalia.

After the preliminary examination – excluding the felony paraphernalia charge – Denk was charged with three crimes (possession of methamphetamine, marijuana and the marijuana pipe) and faced maximum incarceration of four years one month. Unless the denial of the suppression motion is reversed on appeal, he has absolutely **no** defense. And, he would have faced a fourth conviction and additional month in jail had the methamphetamine pipe been charged as a misdemeanor. The plea bargain reduced his exposure, subject to the court's approval, to one conviction and a year in jail – even assuming he could not have been convicted of felony paraphernalia.

As noted above, the plea bargain expressly provided for Denk's right to appeal the denial of the suppression motion after he was convicted and sentenced (31). A plea bargain can contain a provision that an appeal be waived per *State v. Bembenek,* 2006 WI App 198, ¶¶ 2, 6, 296 Wis. 2d 422, 724 N.W.2d 685. While it is true that Denk had a legal right to appeal the denial of his suppression motion, absent bargaining it away, the fact that the prosecution did not seek to have Denk waive the

right is further indication that he benefited from the bargain.

And, there is **nothing** in the record from which a reviewing court could conclude, other than the speculation of appellate counsel, that the above analysis was not equally important in Denk's decision to plead no contest.

2. The plea bargain also benefited Denk in that it eliminated the burden of litigating whether he could be convicted for felonious possession of paraphernalia.

Even if this court should ultimately accept Denk's argument that he could never have been convicted of felonious possession of paraphernalia, at the time of Denk's plea there was – and still is – uncertainty. Even if Denk and his attorney thought the charge was absurd, the plea bargain spared Denk the expense and delay of clearly establishing it as settled law, not to mention the risk of an "erroneous" trial court or jury decision.

Denk's brief contains a lengthy and cogent argument as to why mere possession of a methamphetamine pipe should not be a sufficient basis for a felony conviction (Denk's Brief at 24-30). The paradox is that Denk would not have needed to make a seven page argument if even one court had ever so held.

But there are contrary arguments that give one pause, even if a court ultimately determines that they are not at all persuasive. And this is why the plea bargain was **not** illusory, given that Denk knew he was undeniably guilty of a number of crimes in addition to the one he pled to, and the bargain eliminated all risk as to felony paraphernalia.

These contrary arguments are as follows. First of all, Wis. Stat. § 961.573(1), misdemeanor paraphernalia, implies that it was intended to primarily deal with marijuana by use of the words "plant, propagate, cultivate, grow, harvest." Whereas, Wis. Stat. § 961.573(3) specifically and exclusively deals with methamphetamine.

Secondly, the "Comment" To Wis. JI–Criminal 6053 Possession Of Drug Paraphernalia: Methamphetamine - § 961.573(3) states in part:

> This instruction is for the offense defined in § 961.573(3), which prohibits possession of drug paraphernalia with "the primary intent" **to use it in connection with methamphetamine**

Id. (4) (emphasis added). The comment does not speak of "manufacture" and implies broader applicability.

Conversely, Wis. JI-Criminal 6050 Possession Of Drug Paraphernalia - § 961.573(1), states in part:

> Note that offenses **involving methamphetamine** are separately defined in sub. (3) of § 961.573 and carry a higher penalty. . . .

Id. at n.6 (emphasis added). Again, the comment does not speak of "manufacture" and implies broader applicability.

Third, Denk was charged with "convert." *Webster's Third New International Dictionary of the English language unabridged*, 1986, at 499 lists as one definition of "convert" as "to change or turn from one state or another: alter in form, substance, or quality." "Form" is, *inter alia*, defined as "the shape and structure of something as distinguished from the material of which it is composed." *Id.* at 892. These definitions are consistent with a pipe "converting" methamphetamine from its solid "form" to that of a gas.

Fourth, in *State v. Boone,* 108 Ohio App. 3d 233, 670 N.E.2d 527 (1995), the court held that there was no legally cognizable absurdity from the fact that possession of a plastic bag containing marijuana resulted in conviction for a more serious "paraphernalia" crime than did possession of the marijuana itself.

The State does not claim that these points necessarily refute Denk's argument. Rather, the State argues that there is more ambiguity than Denk admits, and that it was perfectly rational for Denk to forego litigating the issue.

And, this court is asked to bear in mind that, in reality, the only issue is the applicable penalty section. There is no dispute that Denk committed a crime – for which he **could** be convicted – by virtue of possessing the methamphetamine pipe. This is not a case of a charge having no connection to the facts.

E. Denk Has Failed To Meet His Burden Of Proving A Manifest Injustice By Clear And Convincing Evidence.

1. Denk's argument was expressly rejected by this court in *Bressette v. State.*

In *Bressette v. State,* 54 Wis. 2d 232, 194 N.W.2d 635 (1972), this court held, *inter alia*, that the plea bargain was not illusory and there was no manifest injustice requiring that Bressette be allowed to withdraw his plea. The plea bargain provided for reduction of armed robbery to robbery even though there was no dispute but that he was not armed, and could not have been convicted of the initial charge. *Bressette,* 54 Wis. 2d at 240. The court stated:

> The court is not obliged to be sure a defendant knows and understands the elements of a crime his is not charged with. The obligation of the court is to be sure that the defendant knows what the elements of the crime with which he is charged are and that the conduct which the defendant admits constitutes the crime charged. The record shows this obligation was fulfilled.

Bressette, 54 Wis. 2d at 238..

Denk cited this case in the court of appeals for the proposition that the dissent, and the federal judge who later granted habeas corpus, properly stated what the law **should** be (Denk's Reply Brief at 10-11). Denk fails to cite, discuss or distinguish the case in the brief filed with this court, although the federal decision appears in Denk's appendix without explanation (A-Ap. at 135-39). *Bressette* has not been overruled, is good law, and is consistent with this court's more modern pronouncements.

2. Denk's case should be analyzed under *State v. Bentley* because he is in fact alleging ineffective assistance of counsel despite protestations to the contrary, and under this analysis he must show that he would not have entered a plea absent the felonious paraphernalia charge.

Denk's appellate counsel expressly disavowed his claim as being under *Bangert* (45:11-12). Therefore, it comes under the rule of *Bentley, Hampton* and *Howell,* discussed in turn below.

If this court accepts the State's argument that Denk's claim is, in fact, premised upon his attorney's failure to inform him that he could not be convicted of

felonious possession of paraphernalia, this case is controlled by *State v. Bentley,* 201 Wis. 2d 303, 548 N.W.2d 50 (1996). In *Bentley,* the supreme court affirmed the denial of the defendant's post-sentencing motion to withdraw his guilty plea for a failure to prove, to a level of clear and satisfactory evidence, that he actually would have proceeded to trial absent erroneous information as to the minimum mandatory length of incarceration.

"A defendant is entitled to withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." *Bentley,* 201 Wis. 2d at 311 (citation omitted). Ineffective assistance of counsel is one form of "manifest injustice." *Id.* In claims of ineffective assistance, this requires a showing "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley,* 201 Wis. 2d at 312 (quoted source omitted).

Certain conclusions are obvious when applying *Bentley* to Denk's case. In *Bentley,* the focus is whether the defendant's conclusory allegation should have entitled him to a hearing. Denk was given a hearing, but declined to testify and forfeited the opportunity to try to meet his burden of proof. He has failed to create a record that would prove he really would have gone to trial had he been aware of the argument his appellate counsel now makes as to the dubious validity of the felony paraphernalia charge.

Secondly, even if Denk's "legal" basis for the claim is not ineffective assistance, his "factual" basis for the claim is. He still must prove an "injustice," and there was no injustice if he would have pled anyway, whether or not he has successfully dodged proving the "prejudice" prong of the ineffective assistance analysis. By putting on no evidence at the postconviction hearing, Denk may have avoided the hearing later being deemed a *Machner*

hearing, but he has not given this court anything to work with to find a "manifest injustice."

3. Denk retains, and has failed to meet, the burden of proof even if the "ineffective assistance" analysis is not employed because he does not claim any defect in the colloquy for the crime of which he was convicted.

In *State v. Hampton,* 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14, this court held that the defendant was entitled to an evidentiary hearing on his post-sentencing motion to withdraw his plea, after alleging that the trial court had failed to inform him that it was not bound by the plea bargain. The court then took the opportunity to harmonize *Bentley* with *State v. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986) which appeared to impose a lesser burden of proof for the withdrawal of a guilty plea. *Hampton*, 274 Wis. 2d 379, ¶¶ 51-65. In the course of so doing, the court made plain that the *Bentley* analysis, and burden of proof, is not limited to ineffective assistance claims.

Bangert applies to alleged defects in the mandatory plea colloquy, which would constitute an error by the court, whereas *Bentley* applies to alleged defects outside of the plea colloquy. *Hampton*, 274 Wis. 2d 379, ¶¶ 51, 57, 72. The *Bentley* "'clear and convincing'" burden of proof for manifest injustice outside of the plea colloquy remains with the defendant whether or not the ineffective assistance analysis is employed. *Hampton*, 274 Wis. 2d 379, ¶¶ 58-65. *"Bangert*-type violations should be apparent from the record. *Bentley*-type allegations will often depend on facts outside the record." *Hampton*, 274 Wis. 2d 379, ¶ 61. In *Bangert*-type cases the burden

of proof shifts to the state after a *prima facie* case is established, *id.*, ¶ 62, whereas in a *Bentley*-type case the defendant always retains the burden of proof. *Hampton*, 274 Wis. 2d 379, ¶¶ 62-63:

> In *Bentley*-type cases, the defendant has the burden of making a *prima facie* case for an evidentiary hearing, and if he succeeds, he still has the burden of proving all the elements of the alleged error, such as deficient performance and prejudice. The defendant must prove the linkage between his plea and the purported defect. The defendant's proof must add up to manifest injustice.

Hampton, 274 Wis. 2d 379, ¶ 63 (emphasis added). The *Bangert*-type case has a lower burden of proof because the trial court can "head off" the problem with a proper plea colloquy, which combines to be an "effective means of enforcing the court's plea taking obligations." *Hampton,* 274 Wis. 2d 379, ¶ 65.

The State's argument is further supported by this court's recent decision in *State v. Howell,* 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48. In *Howell* the court reversed the denial of an evidentiary hearing as to the adequacy of the plea colloquy. The reduced burden of proof under *Bangert* is only operational for plea colloquy deficiencies. *Howell,* 301 Wis. 2d 350, ¶¶ 27-29. A motion brought pursuant to *Bentley,* which is based upon defects outside of the colloquy, can include matters going to whether the plea was knowing, intelligent and voluntary, but this does not obviate the higher burden of proof. *Howell,* 301 Wis. 2d 350, ¶¶ 74-75, 81. The knowing and voluntary aspect of the plea relates to the crime to which the defendant is entering a plea. *Id.*, ¶¶ 53, 56.

Denk does not cite or discuss this court's *Howell* opinion. Rather, Denk cites only the court of appeals' decision (Denk's Brief at 34) for the proposition that Howell did not have to prove that his misunderstanding affected his decision to enter a plea. *Howell,* 296 Wis. 2d

380, ¶ 41 n. 12. Even if this proposition stands as good law after the reversal, because the court of appeals relied upon this court's decision in *State v. Bartelt,* 112 Wis. 2d 467, 484, 334 N.W.2d 91 (1983), it brings Denk no closer to proving a manifest injustice. This is because: 1) at issue was the charge to which Howell pled, not a charge to which he did not plead; 2) the court of appeals rejected the claim that denying a factual basis for the charge after pleading to it constituted a fundamental misunderstanding of the charge; and 3) even if Denk technically need not prove "prejudice," absent same he cannot prove any "injustice" at all.

F. The Cases Upon Which Denk Relies Do Not Support Allowing Him To Withdraw His Guilty Plea.

State v. Woods, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), involved an unlawful consecutive sentence imposed for the crime to which the defendant pled guilty. The sentence was unlawful because an adult court sentence cannot be made consecutive to a juvenile court disposition, as the trial court had intended in *Woods,* 173 Wis. 2d at 137. In Denk's case, there is no claim that the sentence was unlawful.

Woods can be distinguished on additional grounds, rendering it even less supportive of Denk's position. Woods alleged ineffective assistance of counsel, even though the court of appeals did not need to reach the issue. *Woods*, 173 Wis. 2d at 134, 142 n.3. In *Woods,* 173 Wis. 2d at 137, the State stipulated the sentence was unlawful, whereas in Denk's case the State is not stipulating to the alleged error. And, Woods was allowed to withdraw his guilty plea on the **additional** ground that his attorney had renegotiated the plea bargain for the prosecutor to make a **more severe** sentence recommendation – so that it would be more credible to the court while still being well below the statutory maximum

– without Woods' knowledge or consent. *Woods*, 173 Wis. 2d at 140-42. In Denk's case, there are none of these complications.

In fact, *Woods* offers some support for the State's argument in Denk's case. The court reiterated that 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,"'" and that the trial court's exercise of discretion will be given deference absent an abuse – such as an error of law. *Woods*, 173 Wis. 2d at 136-37 (quoted source omitted). Denk has failed to prove to a level of clear and convincing evidence that he suffered a manifest injustice, or that the trial court made an error of law because the charge to which he now objects – felony paraphernalia – was dismissed before its validity could be litigated.

In *State v. Dibble,* 2002 WI App 219, ¶ 1, 257 Wis. 2d 274, 650 N.W.2d 908, the court affirmed the conviction, and denied postconviction relief, because the charges dismissed by the plea bargain were not lesser included to the charges to which Dibble pleaded guilty, and he could have been convicted of all four. The court of appeals related, but did not adopt, Dibble's argument as to why the plea bargain was illusory, and specifically disavowed rendering a legal opinion on the issue. *Dibble*, 257 Wis. 2d 274, ¶ 18.

Dibble's plea bargain may well have been totally illusory if he could not have been convicted of the dismissed charges, because there would have been absolutely no benefit to the bargain. But Denk is forced to admit a benefit to his plea bargain because two counts related to marijuana were dismissed, and because he could have been convicted of at least misdemeanor possession of methamphetamine paraphernalia if not the felony.

And, the issue in *Dibble* went more to the heart of constitutional guarantees – multiple punishments for the

same offense. *Dibble*, 257 Wis. 2d 274, ¶ 5. That core issue is not present in Denk's case because there is no question of any of the dismissed charges being lesser included to the offense for which he was convicted, or of them arising from the very same conduct, as in *Dibble*. 257 Wis. 2d 274, ¶ 2. Possession of methamphetamine is different than possession of its related paraphernalia.

In *Dawson,* 276 Wis. 2d 418, the court held that a legally unenforceable plea bargain to reduce the charge after five years of successful probation rendered the plea invalid as neither knowing nor voluntary. Critical to understanding *Dawson* is the court's statement that a defendant meets the heavy burden of showing a manifest injustice when the "fundamental integrity" of the plea is at issue. *Dawson*, 276 Wis. 2d 418, ¶ 6. In *Dawson,* the fundamental integrity was at stake because its very terms could not be implemented. Denk's case does not involve "fundamental integrity" because he got what he bargained for – dismissal of three charges – even if one of the three was not as serious as initially thought.

The court stated that a plea agreement that leads a defendant to believe he has obtained a material advantage that cannot be legally obtained necessarily produces a plea that is neither knowing or voluntary. *Dawson*, 276 Wis. 2d 418, ¶ 11. Denk did receive a material advantage – dismissal of three charges.

The court further stated "Dawson was induced to enter his plea by a promise that the State could never keep," because a prosecutor can amend a charge but not a judgment. *Dawson*, 276 Wis. 2d 418, ¶¶ 9, 15. This is **not** the situation in Denk's case because the State promised, and did, dismiss a felony **charge** with all parties knowing full well that Denk might not be convicted of it at trial – whether it be defenses based on the facts or the law. Denk's benefit of the bargain was in not "having to run the gauntlet," whether or not his after-the-fact claim that he clearly would have prevailed has any merit.

In *Brown,* 276 Wis. 2d 559, the court held the defendant should be allowed to withdraw his pleas to various sexual offenses involving children because they were premised upon being misinformed that he would not be subject to sex offender registration or sex predator civil commitment. The driving fact of the reversal was that Brown was affirmatively misinformed by his own counsel, with the misrepresentations being agreed to by the prosecutor and acquiesced to by the judge. *State v. Brown,* 2004 WI App 179, ¶¶ 13-14, 276 Wis. 2d 559, 687 N.W.2d 543.

The court stated a defendant has a right to withdraw his plea if the trial court fails to disclose a "direct" (definite, immediate and largely automatic) consequence of a plea, but not if the court fails to disclose a "collateral" (indirect, contingent) consequence. *Brown,* 276 Wis. 2d 559, ¶ 7. The court noted in a footnote that it was not ineffective assistance to fail to advise of collateral consequence. *Brown*, 276 Wis. 2d 559, ¶ 7 n.3 (citation omitted). Brown stipulated that registration and Wis. Stat. ch. 980 sex predator proceedings were collateral consequences. *Brown*, 276 Wis. 2d 559, ¶ 6 n.2. The court held that **affirmative** misinformation to the defendant as to even collateral consequences also created a manifest injustice. *Brown*, 276 Wis. 2d 559, ¶¶ 9-10. But a defendant's own misunderstanding of the law, not based upon statements made by counsel or the prosecution, does not create a manifest injustice. *Brown,* 276 Wis. 2d 559, ¶¶ 11-12.

In all of the above cases, the dispute involved the charge to which the defendant actually pled – which thereby implicates "fundamental integrity." In Denk's case, there is merely a dispute as to the characterization of one of the dismissed charges, which is clearly collateral to the fundamental integrity of the plea.

CONCLUSION

Based upon the foregoing arguments the State respectfully asks this court to affirm the conviction and the decisions of the trial court denying Jordan Denk's motions to suppress physical evidence and for postconviction relief.

Dated this 12th day of May, 2008.

Respectfully submitted,

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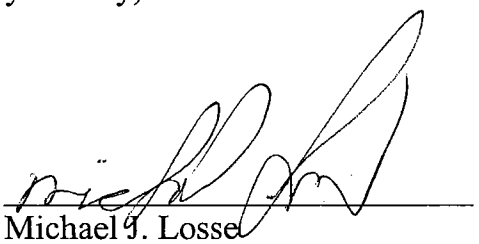
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,724 words.

Dated this 12th day of May, 2008.



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STATE OF WISCONSIN

IN SUPREME COURT

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Plaintiff-Respondent,

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JORDAN A. DENK,

Defendant-Appellant.

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE SEARCH OF MR. DENK'S EYEGLASS CASE EXCEEDED THE PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO THE ARREST OF MR. PICKERING.

Denk asserts that ***State v. Pallone***[1] does not authorize a search here for three reasons. First, ***Pallone*** did not create a bright-line rule allowing as incident to a driver's arrest the search of any and all passenger

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[1] 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568.

belongings found inside that vehicle, no matter the circumstances. Second, ***Pallone*** certainly did not create a bright-line rule which would allow, without more, the search of a passenger's belongings located outside of that vehicle. Third, the facts in the present case are distinguishable from those in ***Pallone*** such that neither of the twin historical rationales is sufficiently implicated.

The state continues to declare that that the mere fact of an arrest is what triggers the right to perform an incidental search and that because there was an "arrest," the officer was permitted to search Denk's belongings. Denk agrees that the fact of an arrest generally triggers the bright-line rule allowing an incidental search of the *arrestee*.[2]

The state argues that an arrest automatically triggers the right to search a passenger due to the "threat to officer safety during an arrest [which] flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty ..." (state's brief at 10, citing ***Pallone*** and ***Knowles***.) The state asserts that "Denk was standing within easy reach of the eyeglass case when it was on the ground and especially after he put it on the car. The 'easy access/ immediate control' factor is the same ..." (state's brief at 11).

This would all make sense if Denk had himself been arrested. Denk does not argue that, had the eyeglass case been found at Pickering's feet and within his immediate reach, the officer could not have searched it.

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[2] It is worth remembering that even the ***Belton*** bright-line rule is not without limitations. An officer is "entitled" to perform a search incident to only a *custodial* arrest. *See, e.g.,* ***Knowles v. Iowa***, 525 U.S. 113, 116-118, 119 S. Ct. 484 (1998). Additionally, such a search must be contemporaneous with the arrest, and the arrestee must have been a "recent occupant." *See* ***Thornton v. United States***, 541 U.S. 615, 622, 124 S. Ct. 2127 (2004).

Certainly that would have been proper under ***Belton*** and ***Chimel***.[3]

But Denk was not under arrest. There was no increased danger resulting from "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." ***Knowles,*** 525 U.S. at 116-17.[4] It makes no sense to take an already problematic bright-line rule and apply it here, where, as in ***Knowles***, neither of the justifications is sufficiently present.

More importantly, the state's requested extension of ***Belton*** and ***Pallone*** offers no real guidance to officers or citizens. The state suggests that "common sense" requires an extension of ***Belton's*** bright-line rule to passenger belongings located outside the car (state's brief at 11-13). What exactly is the state proposing, and where would it end? We know that a search of a passenger's person or clothing incident to a driver's arrest would run afoul of the Constitution. *See* ***United States v. Di Re***, 332 U.S. 581, 586-87, 68 S.Ct. 222 (1948)(personal searches of non-arrested occupants are not authorized under the automobile exception as a result of the occupant's mere presence in the vehicle, even where there is probable cause to search that vehicle); ***Ybarra v. Illinois,*** 444 U.S. 85, 91, 100 S. Ct. 338 (1979)(person's mere proximity to those engaged in criminal activity, or their presence in a location where a search has been authorized by warrant does not automatically give probable cause to search the person.)

Likewise, it would appear from the ***Houghton*** decision that even *probable cause* to search the vehicle

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[3] ***New York v. Belton***, 453 U.S. 454, 101 S. Ct. 2860 (1981); ***Chimel v. California***, 89 S. Ct. 2034 (1969).

[4] Similarly, a custodial arrest involves danger to an officer because of the "extended exposure which follows the taking of a subject into custody and transporting him to the police station." ***Id.*** at 117.

would not necessarily justify a search of a person's purse or wallet (Denk's brief at 20-22).

So what, exactly, is the state proposing? What is the principled difference between a passenger's pockets or purse and Denk's eyeglass case which was located outside of the car? It does not make sense to say that the case can be searched because, at some point, it must have been inside Pickering's vehicle. Clearly, Denk, himself, was also inside Pickering's vehicle and ***Di Re*** would not permit this search. How far does the state wish to stretch this already suspect exception?[5]

There is no good answer and any such extension would confuse the law and run afoul of the United States Constitution. Rather, this court should hold that without something more, ***Belton's*** bright-line rule simply does not apply to a non-arrestee's belongings located outside a vehicle. In ***Pallone***, that "something more" was the menacing behavior of the passenger himself. Had the facts of record demonstrated that Denk posed an articulable threat to officer safety, the officer likely would have been able to search the case. Or, had the case rested right next to Pickering as well, then a search likely would have been justified under ***Chimel***. Similarly, if the officer testified that Denk had tried to drop, hide, or kick the case, then the officer would have been able to search the case pursuant to the automobile/ probable cause exception.

Though the state might wish otherwise, these are simply not the facts of record. Denk's eyeglass case was found next to him on the ground. He instantly avowed ownership. It is perfectly reasonable to believe that the case fell from his pocket or his jacket, or even his hand. Perhaps he did not notice that it fell, or perhaps he was afraid to reach down and pick it up for fear the officer

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[5] See Denk's brief-in-chief at 18-10; *See also* Scalia's critical concurrence in ***Thornton,*** 541 U.S. 615, 625 *et seq*.

would see such a move as ominous or "menacing." Without more, without some specific linkage between Denk and the twin rationales of the search incident to arrest doctrine, the officer could not search the eyeglass case incident to Pickering's arrest.[6]

II. THE SEARCH OF MR. DENK'S EYEGLASS CASE WAS NOT JUSTIFIED PURSUANT TO THE PROBABLE CAUSE EXCEPTION TO THE WARRANT REQUIREMENT.

Denk acknowledges the existence of the automobile exception to the warrant requirement. *See, e.g.,* ***State v. Sherry***, 2004 WI App 207, 277 Wis. 2d 194 (probable cause plus ready mobility permits warrantless searches of cars). However, Denk continues to argue that the search of Denk's eyeglass case was unlawful here, where there was not a sufficient linkage between Denk's case and criminal activity. In other words, the officer did not have sufficient probable cause to believe that Denk's eyeglass case contained the object of his search.

As stated previously, a person's mere presence in a vehicle or proximity to a criminal is, without more, insufficient to justify a search of that person. Additionally, the mere odor of marijuana, without more, is insufficient to justify the search of an occupant. *See, e.g.,* ***State v. Secrist***, 224 Wis. 2d 201, 589 N.W.2d 387 (1999); ***State v. Mata***, 230 Wis. 2d 567, 602 N.W.2d 158 (Ct. App. 1999); ***State v. Wilson***, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999). In each of these cases, the court required some specific linkage between the person and the contraband at issue, or between the item to be searched and the suspected contraband. *See also* ***United***

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[6] Again, Denk asserts that whether the officer had a specific reason to believe that Denk's eyeglass case contained contraband is more efficiently analyzed as implicating the probable cause/automobile exception to the warrant requirement. As such, Denk will discuss these issues later.

States v. Humphries, 372 F.3d 653 (4th Cir. 2004); ***State v. Gibson***, 141 Idaho 277, 283, 108 P.3d 424, 430 (Ct. App. 2005)("Although a drug's odor detected by a dog alerting on a vehicle provides probable cause to believe that the drug is present and authorizes the search of the vehicle, the mere existence of the drug in an automobile does not of itself authorize the police either to search any other place or provide probable cause to arrest any person in the vicinity. ... Probable cause to believe that drugs are located in an automobile may not automatically constitute probable cause to arrest all persons located in the vehicle; some additional factors would generally have to be present, indicating to the officer that those persons possessed the contraband.)

Here, the case was clearly Denk's personal belonging, and there was no probable cause to arrest Denk. By this point, the officers had already discovered the contraband on Pickering's person and, per ***Secrist*** and ***Mata***, had thus established a firm linkage between Pickering and the smell of marijuana. To state that the officer could automatically search or arrest Denk at this point would undermine the logic of ***Secrist***.

Again, to recognize that the present, particular case lacks such a necessary linkage will not open the floodgates for egregious abuse or absurd results, nor will such recognition leave officers without a remedy. Certainly the officer could have asked Denk more questions about the eyeglass case, or could have sought his consent to search the case. The officer did neither. Nor did the officer testify that the object of his search was frequently or commonly squirreled away or discovered in the eyeglass' cases belonging to the friends of those arrested for drug offenses.

And, again, had Denk been seen surreptitiously tossing or attempting to hide the case, or had he disavowed ownership, then the officer would likely have been able to search the case. Had Denk engaged in such

furtive actions, given the totality of the circumstances, probable cause would almost certainly have attached. Had Denk disavowed ownership, the case would have been abandoned. There is nothing novel about requiring a finding of specific, individualized probable cause before sanctioning a warrantless search.

III. THE SEARCH OF MR. DENK'S EYEGLASS CASE WAS NOT JUSTIFIED BY ANY OTHER EXCEPTION TO THE WARRANT REQUIREMENT.

Contrary to the state's position, the "plain view" exception is inapplicable. The issue is not whether the officer could see the eyeglass case, but whether its nature as contraband was immediately and readily apparent. *See, e.g.,* ***State v. Johnson***, 187 Wis. 2d 237, 242, 522 N.W.2d 588 (Ct. App. 1994) ("When the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object, the plain-view doctrine cannot justify its seizure").

Similarly, the search is not justified by the consent exception. The state has the burden to prove valid and voluntary consent. *See* ***State v. Johnson***, 2007 WI 32, ¶16, 299 Wis. 2d 275, 729 N.W.2d 182. Mere acquiescence to an officer's directions is not voluntary consent. ***Id.***

As mentioned in Denk's brief-in-chief, at the point the officer searched the case, he was no longer operating pursuant to Pickering's consent and its permissible scope. At this point, the officer had already gone beyond the scope of Pickering's consent by reaching into Pickering's pockets and/or ordering Pickering to comply with his commands (38:13-15).

Further, the fact that the eyeglass case was found outside of the car supports the notion that the case was beyond the scope of Pickering's consent. The state tries

to assert that Denk intentionally removed the case from the car. Denk asserts that perhaps it fell from his pocket. Either way, the case was far beyond the scope of the Pickering's consent as authorized by ***State v. Matejka.***

Finally, the eyeglass case was not "abandoned" (state's brief at 18-20). The state goes so far as to suggest that Denk does not have standing to challenge this search (state's brief at 20). However, when supplemental briefing was requested by the Court of Appeals in light of ***State v. Bruski,***[7] the state expressly disavowed this argument:

> The State agrees with Denk that ***Bruski*** does not apply. As explained in Denk's supplemental brief, ***Bruski*** deals with standing; and in the present case, the State is not challenging Denk's standing ...

(State's supplemental brief in COA, filed April 27, 2007). Thus, the state conceded that Denk had a reasonable expectation of privacy in the vehicle and the item sufficient to meet his burden of production.

It is not fair on the one hand, to concede that Denk had a reasonable expectation of privacy, and then later argue that Denk further had to prove that the property was not abandoned. Once Denk met his burden of production, he did not have to assist the state in meeting its burden of proof. Why would Denk gratuitously seek to address a theory (abandonment) that was never raised in the trial court? Again, Denk clearly demonstrated standing. It was then up to the state to prove facts sufficient to support an exception to the warrant requirement.

Furthermore, Denk did demonstrate that the property was not "abandoned." The case was located in close proximity to him and he claimed an ownership

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[7] ***State v. Bruski***, 2007 WI 25, 299 Wis. 2d 177, 727 N.W.2d 503. *See* **Order of Court of Appeals dated April 3, 2007.** Counsel will submit 10 copies of Denk's supplemental brief forthwith.

interest in the property. Once again, there are no record facts to support the state's hypothesis that Denk tried to abandon the property.

IV. TO DISALLOW WITHDRAWAL OF A PLEA UNKNOWINGLY ENTERED WOULD RESULT IN A MANIFEST INJUSTICE.

Though Denk will relies mainly on the arguments in his opening brief, he adds a few points.

First, with regard to the state's citation to ***Bressette v. State***, 54 Wis. 2d 232, 194 N.W.2d 635 (1972), as explained in Denk's reply brief in the Court of Appeals, a federal court later adopted the dissent's reasoning and granted habeas corpus relief. ***See Bressette v. Gray***, E.D. Wis., No. 72-C-347, filed June 13, 1973 (App. 101-106)[8]. Thus, a federal court with expertise in the federal constitution has agreed with Denk's position. While this unpublished decision is not binding precedent, it is persuasive authority for the notion that an improperly-charged count, even if dismissed, can create a manifest injustice.

Second, the state clouds the issue by purporting that Denk received the following benefits: a recommendation from the state of jail, rather than prison, time (state's brief at 23); consideration for performing a controlled drug buy (state's brief at 24); preservation of the statutory right to appeal the denial of the suppression motion (state's brief at 26); and the benefit of not having to litigate this novel issue (state's brief at 27-28).

That Denk received "some" benefit does not render his plea intelligent. As argued in Denk's brief-in-

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[8] Because this case is from another jurisdiction, it can be cited pursuant to Rule 809.23, Stats., and ***State v. Stenzel***, 2004 WI App 181, 276 Wis. 2d 224, 688 N.W.2d 20. Denk included a copy of this decision as part of the appendix to his brief-in-chief in This Court (*see* A-Ap. at 135-139).

chief, from the record, it is clear that all parties were operating under a misapprehension of the law.

But even if a manifest injustice is conceived of as as stemming from a bargain's hypothetically quantifiable "value," Denk's plea bargain was greatly overvalued, thus resulting in a manifest injustice.

First, though it is true that the prosecutor did not request prison time and that Mr. Denk was free to pursue his statutory right to appeal the suppression decision, neither of these were part of his plea bargain! Neither was part of the consideration offered by the state in exchange for his plea and so their existence is irrelevant to the issue at hand. In fact, as the state acknowledges, the reason for the state's sentencing recommendation was Denk's cooperation with authorities, an issue totally separate from any consideration offered by the state. If anything, this supports the notion that Denk gave more than he received and that his bargain was illusory.

Second, as mentioned in Denk's brief-in-chief, that there exists a paucity of case law on this issue or on the meaning of the word "convert" demonstrates only that no other case has involved this unambiguous mistake of law. To assert that Denk was, without his knowledge, spared the stress of having to litigate a frivolous issue disparages the criminal justice system, where it is presumed that baseless charges will not stand.

In sum, as explained in Denk's brief-in-chief, there is a wealth of precedent which stands for the notion that a plea involving mistake of law (or legal impossibility) that is perpetuated by all of the parties and the court is an unknowing and unintelligent plea. This strikes at the heart of constitutional guarantees of due process. Denk does not assert that any manifest injustice stems from some vague notion that he did not get any consideration for his guilty plea. Rather, where a plea is based even in part on objectively material, unambiguously inaccurate

information, and where all parties played a role in perpetuating this mistake, to not allow plea withdrawal to a defendant, who is generally unschooled in the law and dependent on these various players, constitutes a manifest injustice.

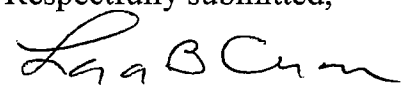
CONCLUSION

For these reasons, Mr. Denk respectfully requests that the court reverse the judgment of conviction and remand with directions that all evidence obtained in, and derived from, the unlawful searches of Mr. Denk's person and belongings, and all fruits therefrom, be ordered suppressed, and that Mr. Denk's no contest plea be withdrawn.

In the alternative, Mr. Denk requests that the court reverse the judgment of conviction and remand with directions that Mr. Denk shall be permitted to withdraw his plea of no contest.

Dated this 27th day of May, 2008.

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 2,989 words.

Dated this 27th day of May, 2008.

Signed:

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