STATE OF WISCONSIN

SUPREME COURT

Case No. 2014AP2488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
REVERSING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
WILLIAM M. ATKINSON, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

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STATE OF WISCONSIN

S U P R E M E C O U R T

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BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

ISSUE PRESENTED

When a defendant who pleads guilty or no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get, can the defect be remedied by reducing the sentence to the

maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea?

The court of appeals decided that reduction of the defendant's sentence was not an appropriate remedy when the defendant was misinformed that the maximum penalty was lower than the actual maximum, and that the only available remedy was withdrawal of the defendant's plea. *State v. Timothy L. Finley*, Case No. 2014AP2488-CR, slip op. ¶ 37 (Wis. Ct. App. Sept. 30, 2015) (Pet-Ap. 122).

STATEMENT OF THE CASE

Nature Of The Case

This is an appeal from a judgment and order of the Circuit Court for Brown County, William M. Atkinson, Judge, denying the motion of the defendant-appellant, Timothy L. Finley, Jr., to withdraw his plea to an enhanced charge of felony domestic abuse.

The Wisconsin Court of Appeals, District III, reversed in an opinion that has been published, *State v. Finley*, 2015 WI App 79, 365 Wis. 2d 275, 872 N.W.2d 344, holding that the only remedy when a defendant is erroneously told and believes that the maximum penalty is lower than the maximum actually allowed by law is withdrawal of the defendant's plea, and that the error could not be remedied by reducing the defendant's sentence to the term he was informed and believed he could get.

Facts And Procedure

Finley pleaded no contest to a charge of first-degree recklessly endangering safety with penalty enhancers for being a repeater and for using a dangerous weapon (90:5).

Both Finley's attorney and the circuit court erroneously told him that the maximum penalty that could be imposed on his plea was 19.5 years in prison (63:3; 90:4; 93.2:12, 15).

The stated maximum was four years less than the actual maximum of 23.5 years, derived by adding together 12.5 years for a Class F felony, 6 years for the repeater enhancer and 5 years for the weapon enhancer. *See* Wis. Stats. §§ 939.50(3)(f), 939.62(1)(c), 939.63(1)(b), 941.30(1) (2013-14). Counsel made a mathematical error adding up these numbers (93.2:15) which was repeated by the court.

Finley said he understood that the maximum penalty he faced was 19.5 years (90:4).

Despite the advice that the maximum penalty was 19.5 years, Finley was initially sentenced to the actual maximum of 23.5 years (92:30-31).

Finley filed a postconviction motion asking the circuit court to permit him to withdraw his plea or in the alternative to "commute his sentence to a total of 19.5 years based on the Wisconsin Supreme Court's recent decision in *State v. Gerald D. Taylor*, 2013 WI 34, [347] Wis. 2d [30], [829] N.W.2d [482] (decided April 23, 2013)" (63:1).

When this motion was denied on both alternatives, Finley filed his first appeal in the court of appeals (72).

Finley alternatively argued on his first appeal that he was entitled to reduction of his sentence, but the court of appeals declined to address this argument because it reversed on other grounds. *State v. Timothy L. Finley*, Case No. 2013AP1846-CR, slip op. ¶ 16 n.4 (Wis. Ct. App. Mar. 18, 2014) (Pet-Ap. 133-34). The court held that there was a violation of *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because the record failed to

show that Finley had been advised of the correct maximum penalty. Case No. 2013AP1846-CR, slip op. ¶ 16 (Pet-Ap. 133-34).

Under the procedure established in *Bangert*, the court of appeals reversed the first order denying Finley's motion to withdraw his plea, and remanded the case to the circuit court to give the state an opportunity to prove that, despite the misinformation he received from both his attorney and the court, Finley actually knew that the correct maximum was 23.5 years. Case No. 2013AP1846-CR, slip op. ¶ 16 (Pet-Ap. 133-34).

The state did not seek review of this decision.

The only witness called by the state at the remand hearing was the attorney who represented Finley when he entered his plea. Counsel testified that his usual practice was to advise his clients about the correct maximum penalty, but that he had no specific recollection of advising Finley of the correct maximum (93.2:9, 11). Counsel admitted that the written plea questionnaire stated the wrong maximum penalty, and that he went over the plea questionnaire, with the wrong penalty, with Finley (93.2:12, 15).

On this record, the state failed to meet its burden to prove by clear and convincing evidence that anyone ever told Finley the correct maximum penalty, much less that Finley actually knew the correct maximum penalty when he entered his plea.

Although Finley withdrew his alternative request for reduction of his sentence based on *Taylor*, the prosecutor picked up where Finley left off and urged the court to reduce Finley's sentence based on that case (93.2:23).

The circuit court ruled that Finley was "entitled to have his sentence modified to no more than the amount that was represented to him by the Court and stated on his Plea Questionnaire and Waiver of Rights Form and that was nineteen years and six months" (93.2:23).

The circuit court again denied Finley's motion to withdraw his plea (93.2:24), and Finley appealed again (111).

Decision Of The Court Of Appeals

On Finley's second appeal, the state did not attempt to argue that it had met its burden to prove that Finley knew the correct maximum penalty that could have been imposed. Case No. 2014AP2488-CR, slip op. ¶¶ 21, 23-24, 31, 36 (Pet-Ap. 112, 113-14, 118, 121-22).

Rather, the state argued that "'the question is more pragmatic, i.e., whether the defendant knew that the sentence [that] was *actually imposed* on him, whether the maximum or something less, could have been imposed.'" Case No. 2014AP2488-CR, slip op. ¶ 23 (Pet-Ap. 113). The state contended that when a defendant eventually receives a sentence equal to or less than the maximum sentence he was informed and believed he could get, here 19.5 years, the defendant is not entitled to withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 23 (Pet-Ap. 113).

The court of appeals thought the state's argument was not supported by the decision of this court in *Taylor*, the case that had been relied on at one time or another by both parties below. Case No. 2014AP2488-CR, slip op. ¶¶ 25-27 (Pet-Ap. 114-15).

The court of appeals acknowledged that *Taylor*, citing *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64,

reaffirmed that where the defendant was told that the maximum penalty was higher than the penalty actually authorized by law, the proper remedy may be to commute the defendant's sentence rather than let him withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 28 (Pet-Ap. 115-16).

But the court of appeals said that the situation in this case was not the same as in *Cross* because here the defendant was told that the sentence that could be imposed was lower than the correct maximum. Case No. 2014AP2488-CR, slip op. ¶ 29 (Pet-Ap. 116-17).

The court of appeals said there were at least two related problems with the state's argument that a reduction in the defendant's sentence could overcome, as a matter of due process, the fact that the defendant's plea was not entered knowingly, intelligently and voluntarily because he misunderstood the potential maximum penalty to be less than it really was. Case No. 2014AP2488-CR, slip op. ¶ 32 (Pet-Ap. 118).

The first problem, according to the court of appeals, is that Wis. Stat. § 973.13, which provides that a sentence in excess of the maximum authorized by law is automatically commuted to the legal maximum, does not apply in this case where no sentence in excess of the legal maximum was ever imposed. Case No. 2014AP2488-CR, slip op. ¶ 31 (Pet-Ap. 118).

The court of appeals said that a second and more significant problem with the state's argument was that it conflated *Taylor*'s analysis of whether the defendant's plea was entered knowingly, intelligently and voluntarily with *Taylor's* analysis of whether the defendant was entitled to plea withdrawal on some other basis of manifest injustice. Case No. 2014AP2488-CR, slip op. ¶ 34 (Pet-Ap. 119-20).

In conclusion the court of appeals stated,

> Therefore, because Finley's plea was not entered knowingly, intelligently, and voluntarily, we conclude his plea was entered in violation of his right to due process, which establishes a manifest injustice requiring plea withdrawal. As we read *Taylor* and other supreme court precedent, and given the parties' arguments in this appeal, such a violation is not curable, after the fact, by "commutation" of an otherwise lawful sentence down to the maximum amount of punishment the defendant was incorrectly informed he or she faced at the time of the plea.

Case No. 2014AP2488-CR, slip op. ¶ 37 (Pet-Ap. 122).

The court of appeals reversed the judgment and order of the circuit court, and remanded the case with instructions to grant Finley's motion to withdraw his plea. Case No. 2014AP2488-CR, slip op. ¶ 37 (Pet-Ap. 122).

ARGUMENT

When a defendant who pleads guilty or no contest is misinformed that the maximum penalty that could be imposed is lower than the maximum actually allowed by law, and the sentence imposed is more than the defendant was told he could get, the defect may be remedied by reducing the sentence to the maximum the defendant was informed and believed he could receive instead of letting the defendant withdraw his plea.

The issue on this appeal is not whether Finley knew the correct maximum penalty. The state has acknowledged that he did not. The record shows that Finley was erroneously

informed and believed that the maximum penalty was 19.5 years rather than the actual maximum of 23.5 years.

The single issue presented for decision is whether the only remedy for this error is plea withdrawal, or whether the error can be better remedied by reduction of Finley's sentence to the maximum penalty he was informed and believed he could receive.

This court has held that reduction of the sentence can be an appropriate remedy when the defendant was misinformed that the maximum penalty was higher than it really was. *State v. Taylor*, 2013 WI 34, ¶ 33, 347 Wis. 2d 30, 829 N.W.2d 482; *Cross*, 326 Wis. 2d 492, ¶ 34.

The court has yet to authoritatively decide whether reduction of the sentence can also be an appropriate remedy when the defendant was misinformed that the maximum penalty was lower than it really was. But *Taylor, Cross* and other cases suggest that sentence reduction is an appropriate remedy in both situations.

Taylor, citing *Cross*, repeated the general proposition that a plea that is not entered knowingly, intelligently and voluntarily violates fundamental due process so that the plea may be withdrawn as a matter of right. *Taylor*, 347 Wis. 2d 30, ¶ 25 (citing *Cross*, 326 Wis. 2d 492, ¶ 14).

But *Cross* subsequently quoted a decision of the United States Supreme Court holding that a defendant is not entitled to withdraw his plea simply because he misapprehended the likely penalties attached to alternative courses of action, and it turned out that the maximum penalty then assumed to be applicable was inapplicable. *Cross*, 326 Wis. 2d 492, ¶ 29 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

Cross went on to say, in accord with the great weight of authority from other state and federal courts, that "the failure of the defendant to know and understand the precise maximum . . . is not a per se violation of the defendant's due process rights." *Cross*, 326 Wis. 2d 492, ¶¶ 33, 36. "[A] defendant's due process rights are not necessarily violated when he is incorrectly informed of the maximum potential imprisonment." *Cross*, 326 Wis. 2d 492, ¶ 37.

Taylor repeated that incorrectly informing the defendant of the maximum penalty does not necessarily violate his due process rights, and added that "in some circumstances, a guilty plea will still be knowing, intelligent and voluntary . . . when the defendant is informed of the incorrect maximum sentence." *Taylor*, 347 Wis. 2d 30, ¶ 33 & n.8.

If a defendant's failure to know and understand the correct maximum penalty is not a per se violation of the defendant's due process rights, then withdrawal of his plea is not a per se remedy for the entry of his plea without such knowledge.

Indeed, when a defendant appeals an order refusing to allow him to withdraw his plea, the issue is not whether the plea should have been accepted but whether, long after the plea was accepted, the defendant should be permitted to withdraw it. *State v. Thomas*, 2000 WI 13, ¶ 23, 232 Wis. 2d 714, 605 N.W.2d 836; *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988); *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978). Thus, the relevant inquiry includes not just whether there was a violation of some rule or right when the defendant entered his plea, but also what should be done to correct any violation.

Proportionality between a wrong and its remedy is an essential concept of justice. *Stone v. Powell*, 428 U.S. 465, 490

(1976). Therefore, remedies should be tailored to the injury they try to right without unnecessarily infringing on competing interests. *State v. Anderson*, 2006 WI 77, ¶ 75, 291 Wis. 2d 673, 717 N.W.2d 74, *modified on other grounds State v. Alexander*, 2013 WI 70, ¶ 28, 349 Wis. 2d 327, 833 N.W.2d 126; *State v. Webb*, 160 Wis. 2d 622, 630, 467 N.W.2d 108 (1991); *Bubolz v. Dane County*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990); *State v. Monje*, 109 Wis. 2d 138, 147, 325 N.W.2d 695 (1982); *Kutchera v. State*, 69 Wis. 2d 534, 542-43, 230 N.W.2d 750 (1975).

In the circumstances presented in this case, the injury is entering a plea mistakenly believing that the maximum sentence was less than the actual maximum to which the defendant could be sentenced. The competing consideration is the interest of the state, the victim and the witnesses in the finality of criminal convictions, without having to litigate the defendant's guilt at a trial necessitated long after the crime was committed and the issue of the defendant's guilt was apparently resolved. *Taylor*, 347 Wis. 2d 30, ¶ 48.

The defendant's injury because of this misinformation can be effectively corrected without infringing on the state's interest in finality by reducing a sentence that is higher than the defendant thought he could get to a sentence that is in accord with the penalty the defendant was informed and believed he could receive when he entered his plea.

Reducing the defendant's sentence in this way effectively corrects the misinformation he received and the misunderstanding he had when he entered his plea.

The purpose of informing the defendant of the maximum penalty is to assist him in making an intelligent decision whether to plead guilty. A defendant who is contemplating a plea must decide whether he is willing to put himself in a position where he could end up having to spend as much time

in jail as the maximum amount of time he is told he could have to spend there.

A plea entered with a mistaken belief that the maximum penalty is less than it really is is no less knowing than a plea entered with knowledge of the correct maximum penalty when the lesser incorrect maximum is imposed. In both cases, a maximum penalty is stated, the defendant agrees to plead knowing he could get the stated penalty, and he gets the penalty he knew he could get when he entered his plea.

A defendant who is sentenced to the maximum penalty he is told, regardless of whether it is the correct maximum or not, knew he was taking a risk that he could be sentenced to that much time behind bars. The defendant knew when he decided to enter his plea that he could be sentenced to the very sentence he actually receives.

A defendant who is told when he enters his plea that the maximum penalty is 19.5 years, and who is sentenced to 19.5 years, cannot complain that he was blindsided by getting a sentence he did not know and anticipate he could get. *See State v. Denk*, 2008 WI 130, ¶¶ 78, 80, 316 Wis. 2d 5, 758 N.W.2d 775 (a defendant is not entitled to withdraw his plea when he receives the benefit of his plea bargain at sentencing).

Under these circumstances, the failure to inform the defendant that he could potentially get a greater sentence than the one he actually gets is inconsequential under either the harmless error or manifest injustice standards.

A defendant's failure to know the precise maximum is harmless if it does not affect his substantial rights. *Cross*, 326 Wis. 2d 492, ¶ 36. *See State v. Denson*, 2011 WI 70, ¶ 69 n.13, 335 Wis. 2d 681, 799 N.W.2d 831 (the harmless error rule prohibits

reversal for even constitutional errors not affecting a party's substantial rights).

The defendant's failure to know the correct maximum penalty is a harmless insubstantial defect when he did not get that penalty, or any other penalty greater than the sentence he was told he could receive. *Taylor*, 347 Wis. 2d 30, ¶¶ 34, 41, 52; *State v. Brown*, 2006 WI 100, ¶ 78, 293 Wis. 2d 594, 716 N.W.2d 906. In the end there would simply be a hypothetical risk that never materialized. What the defendant did not know did not hurt him.

Withdrawal of a plea may be necessary to correct a manifest injustice if the defendant proves that his plea was entered "'without knowledge . . . that the sentence actually imposed could be imposed.'" *State v. Reppin*, 35 Wis. 2d 377, 385 n.2, 151 N.W.2d 9 (1967) (quoting tentative ABA Standard 2.1(a)(ii)(3)). *Accord, e.g., State v. Rock*, 92 Wis. 2d 554, 558, 285 N.W.2d 739 (1979); *Ernst v. State*, 43 Wis. 2d 661, 666, 170 N.W.2d 713 (1969), *modified in part on other grounds, Bangert*, 131 Wis. 2d at 260.

If "the defendant's sentence does not exceed that stated as possible by the judge, there is no manifest injustice." III American Bar Association Standards for Criminal Justice, Pleas of Guilty, commentary to present Standard 14-2.1(b)(ii)(C) at p.14-57 (2d ed. 1986 supp.).[1]

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[1] When a defendant attempts to withdraw his plea, the manifest injustice test rather than the harmless error test applies. *Taylor*, 347 Wis. 2d 30, ¶ 43.

The important practical difference in the two tests is the allocation of the burden of proof. The burden of proving harmless error, i.e., lack of prejudice, is on the state. *State v. Harvey*, 2002 WI

Courts in other jurisdictions have agreed.

Stating the rule, the court held in *Commonwealth v. Barbosa*, 2003 PA Super 77, 819 A.2d 81, that "if a defendant enters an open guilty plea and justifiably believes that the maximum sentence is less than what he could receive by law, he may not be permitted to withdraw the plea unless he receives a sentence greater than what he was told." *Barbosa*, 819 A.2d 81, ¶ 5.

Spelling out the justification for this rule, the court said in *Cole v. State*, 850 S.W.2d 406 (Mo. Ct. App. 1993), that where the sentence conforms to precisely what the defendant understood to be the maximum sentence to which he exposed himself by his plea, the defendant understood the consequences of his plea. *Cole*, 850 S.W.2d at 409-10 (citing *United States v. Rodrigue*, 545 F.2d 75 (8th Cir. 1976); *Bell v. United States*, 521 F.2d 713 (4th Cir. 1975); *United States v. Sheppard*, 588 F.2d 917 (4th Cir. 1978)). *See also United States v. Iaquinta*, 719 F.2d 83, 85 n.4 (4th Cir. 1983); *Bachner v. United States*, 517 F.2d 589, 597 (7th Cir. 1975); *United States v. Aviles*, 405 F. Supp. 1374, 1380-82 (S.D. N.Y. 1975); *Vanzandt v. State*, 212 S.W.3d 228, 235-36 (Mo. Ct. App. 2007) (reaffirming rule in *Cole*).

93, ¶ 40, 254 Wis. 2d 442, 647 N.W.2d 189. The defendant has the burden to show manifest injustice. *State v. Dawson*, 2004 WI App 173, ¶ 6, 276 Wis. 2d 418, 688 N.W.2d 12; *Thomas*, 232 Wis. 2d 714, ¶ 16.

To show manifest injustice the defendant must show there is a serious flaw in the fundamental integrity of his plea. *Dawson*, 276 Wis. 2d 418, ¶ 6; *Thomas*, 232 Wis. 2d 714, ¶ 16. This is conceptually the same as showing there was some error that adversely affected his substantial rights, i.e., that the error was prejudicial and not harmless.

This is simply common sense. When the defendant knows when he enters the plea that he could get the sentence he ultimately gets, the defendant knowingly takes the risk that by pleading guilty or no contest he could get that very same sentence.

If the defendant enters a plea believing he could get no more than a particular sentence, and he initially gets a greater sentence, but his sentence is ultimately reduced to a penalty that is no more than the one he was told and believed he could get, he assumes the same position as a defendant who is sentenced in the first instance to the lesser maximum he is told and believes he could get. He is not permanently injured when the failure to advise him of the correct maximum penalty is corrected by reducing his sentence in accord with his expectations. *See Taylor*, 347 Wis. 2d 30, ¶¶ 41, 52; *Brown*, 293 Wis. 2d 594, ¶ 78.

In the ordinary case, there is no sound reason to correct a defect in the information a defendant was provided about the maximum sentence by allowing him to withdraw his plea rather than by reducing his sentence to one he was informed and believed he could receive. Plea withdrawal in this situation is simply a windfall that is disproportionate to the problem.

Withdrawing a plea is not necessary to correct misinformation when the incorrect information is subsequently treated as though it was the correct information and the defendant is sentenced on the basis of the information he thought was correct.

"We told you what you could get and you are now getting what we told you" equitably solves the problem for all concerned. By reducing his sentence to one the defendant was informed and believed he could receive the defendant is fully

restored to the same position he believed he was in when he entered his plea.

Indeed, reduction of the sentence is a more generous remedy for a defendant who is misinformed that the maximum penalty is lower than it actually is than for a defendant, like Cross, who was misinformed that the maximum penalty was higher than it really was. A defendant who is misinformed that the maximum penalty is higher than it actually is has his sentence reduced to the actual maximum penalty. *Cross*, 326 Wis. 2d 492, ¶ 34. But a defendant who is misinformed that the maximum penalty is lower than it actually is has his sentence reduced to a term below the actual maximum.

By reducing the defendant's sentence, the defendant benefits from the court's error in failing to correctly advise him of the higher maximum penalty by having his sentence capped at a term of imprisonment that is less than he could have received if he had been advised correctly, and less than the court originally thought was appropriate. In effect, the de facto maximum becomes the lesser penalty stated by the court instead of the greater penalty stated by the law.

If sentence reduction is a proper remedy when a misinformed defendant's sentence is reduced to the actual maximum penalty, it is certainly a proper remedy when a misinformed defendant's sentence is reduced to a term that is less than the actual maximum.

Another benefit of sentence reduction rather than plea withdrawal as a remedy is that it prevents a defendant from taking advantage of the misinformation to get rid of a substantial sentence when the real problem is not his plea but the long sentence he knew could be imposed but was hoping would not be. *See Taylor*, 347 Wis. 2d 30, ¶ 49.

So withdrawal of a plea is not required as the remedy if a court provides an adequate alternative remedy, fair to both the defendant and the state, by reducing the defendant's sentence to one that does not exceed the sentence he was told he could get and believed he could get when he pleaded. *United States v. Lewis*, 875 F.2d 444, 445 (5th Cir. 1989); *Sheppard*, 588 F.2d at 918.

The state does not mean to suggest that reduction of the defendant's sentence is the only remedy when the defendant is misinformed of the correct maximum penalty. In an exceptional case there may be a manifest injustice that requires withdrawal of the plea. *See Taylor*, 347 Wis. 2d 30, ¶ 25; *Cross*, 326 Wis. 2d 492, ¶ 14. But in the ordinary case reduction of the sentence is the less drastic and therefore preferred remedy. *See State v. Harris*, 2008 WI 15, ¶ 96 n.47, 307 Wis. 2d 555, 745 N.W.2d 397 (the less drastic remedy is favored).

This is not an exceptional case that calls for withdrawal of Finley's plea. Indeed, Finley's original position was that his misunderstanding of the correct maximum sentence could be remedied by reducing his sentence to the one he was told and believed he could receive.

There is no fundamental flaw in the integrity of Finley's plea. There is no manifest injustice in holding Finley to his plea. There is no reason to allow him to withdraw it when the defect in taking that plea has been adequately remedied by reducing his sentence to the sentence he knew he could get and was willing to accept when he entered his plea.

In this case, the court of appeals erred by holding that the only remedy that can correct a manifest injustice caused when the defendant is misinformed that the maximum potential penalty is less than the statutory maximum is plea withdrawal. The problem is adequately corrected by reducing the defendant's sentence to the maximum he was informed and

believed he could receive. This remedy serves the interests of both the defendant and the state in the unfortunate situation where the plea information is incorrect.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals should be reversed, and the judgment and order of the circuit court should be reinstated and affirmed.

Dated: February 10, 2016.

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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 4,469 words.

Dated this 10th day of February, 2016.

_____

Thomas J. Balistreri
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February, 2016.

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Thomas J. Balistreri
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S U P R E M E C O U R T

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TIMOTHY L. FINLEY, JR.,

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On Review of a Decision of the Court of Appeals, District III,
Reversing a Judgment of Conviction and Sentence
Entered in Brown County Circuit Court,
the Honorable William M. Atkinson, Presiding.

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POSITION ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

SUPPLEMENTAL STATEMENT OF FACTS

As Respondent, Mr. Finley chooses to supplement the factual background with information from the plea and sentencing hearings.

The case was resolved with a plea agreement on June 25, 2012. The plea agreement provided that Mr. Finley would plead no contest to one count of first degree reckless endangerment, as an act of domestic abuse and with a dangerous weapon, as a repeater. (90:2-3; 44:2). As part of the agreement, the three remaining charges were dismissed and read-in. (44:2). The state agreed to cap its recommendation at ten years of initial confinement. (*Id*.)

At the plea hearing on June 25, 2012, Mr. Finley's attorney tendered a completed plea questionnaire and waiver of rights form to the court. (90:2; 44). In the section reserved for the statement of the maximum penalty, the form reads: "19 years, 6 months confinement and $25,000 fine and court costs." (44:1). The court addressed Mr. Finley personally at the plea hearing. Regarding the maximum penalty, the court stated the separate penalties for the underlying charge of first degree reckless endangerment and for each penalty enhancer. (90:3). The court then asked Mr. Finley, "So, the maximum you would look at then [sic] nineteen years six months of confinement. Do you understand the maximum penalties?"

(90:3-4). Mr. Finely responded, "Yes, sir." (*Id*. at 4) The court accepted Mr. Finley's plea.

However, Mr. Finley faced a maximum penalty of 23.5 years, consisting of 18.5 years of initial confinement and five years of extended supervision.[1]

Mr. Finley returned to court for sentencing on October 19, 2012. The court sentenced Mr. Finley to the maximum punishment: a total of 23.5 years comprised of 18.5 years of initial confinement and five years of extended supervision. (92:30-31).

ARGUMENT

Bangert Holds that an Unknowing Plea Violates Due Process and Plea Withdrawal is the Only Proper Remedy.

A. Introduction and Standard of Review.

On the thirtieth anniversary of ***Bangert***, and tenth anniversary of ***Brown***, this Court has the opportunity to reaffirm the holdings that have protected the plea-taking process for the past several decades: "When a guilty plea is not knowing, intelligent and voluntary, a defendant is entitled to withdraw the plea as a matter of right because such a plea 'violates fundamental due process.'" ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 *citing* ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577

[1] *See* Wis. Stat. § 941.30(1) (first degree reckless endangerment); Wis. Stat. §§ 973.01(2)(b)6m and 973.01(2)(d)4 (class F felony); Wis. Stat. § 939.63(1)(b) (dangerous weapons enhancer); Wis. Stat. § 939.62(1)(c) (repeater enhancer).

(1997); ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

The state concedes that Mr. Finley was told the incorrect maximum penalty at the time of his plea, as he was informed that the maximum sentence was four years less than the circuit court legally could impose. (90:3-4; 44). The state also concedes that Mr. Finley did not know the correct maximum penalty. ***State v. Finley***, 2015 WI App 79, ¶¶21-22, 365 Wis. 2d 275, 872 N.W.2d 344 (Pet. App. 112); (Petitioner's Brief, pp. 7-8). At sentencing, the court imposed the legal maximum penalty, which was four years higher than the penalty Mr. Finley was informed that it could be. (92:30-31). After two postconviction hearings and an appeal, the circuit court reduced the sentence to the improper maximum it had originally informed Mr. Finley of at the time he entered his plea. (93.2:24; 109:4; Pet. App. 123-24).

The state does not argue that the harm in this case is not a ***Bangert*** violation. Rather, the state asks this Court to find that in this situation, a "better remedy" for a ***Bangert*** violation is sentence commutation rather than plea withdrawal. [2] (*See* Petitioner's Brief, p. 8).

For decades, courts have consistently held the denial of the defendant's constitutional right to a knowing and

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2 "Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact." ***Brown***, 2006 WI 100, ¶19. Because of the state's concessions, whether there was a violation of ***Bangert*** or Wis. Stat. § 971.08, and whether the defendant knew the correct maximum punishment at the time of his plea, are not questions before the Court. Additionally, the state never challenged the court of appeals' first decision, which held that Mr. Finley established a ***Bangert*** violation as a matter of law. ***State v. Finley***, No. 2013AP1846, unpublished slip op. (Wis. Ct. App Mar. 18, 2014) (Pet. App. 133); (Petitioner's Brief, p. 4). As such, this Court is reviewing the case in a unique posture.

voluntary plea mandates plea withdrawal. A circuit court "has no discretion in the matter." ***Van Camp***, 213 Wis. 2d at 139. Yet, the state's proposed remedy is to reduce the sentence to the lower, incorrect maximum penalty that the defendant was informed he could receive at the plea hearing.[3] (Petitioner's Brief, p. 8).

Under Wisconsin law, the circuit court must, at the plea colloquy, establish that the defendant understands the charges, range of penalties, and constitutional rights being waived. ***Brown***, 2006 WI 100, ¶52. The prosecution must assist the circuit court in meeting its Wis. Stat. § 971.08 duties and other expressed obligations. ***Bangert***, 131 Wis. 2d 246, 275. The state's argument here is that when it makes a mistake which deprives a person of due process, the state gets to choose the remedy that is most convenient for the state.

The state's proposed remedy fails for several reasons. First, case law is clear that a ***Bangert*** violation, where the state fails to prove that the defendant knew the information he did not correctly receive at the plea colloquy, requires plea withdrawal. Second, the state's proposed remedy lacks authority. The state fails to cite any authority that allows a circuit court to reduce an otherwise legal sentence and re-write the legislature's maximum penalties, solely because the state, defense attorney, and circuit court were mistaken about the maximum penalties and affirmatively misinformed the defendant of the maximum penalties at the plea hearing. Finally, the state's "commutation" remedy cannot "fix" an unknowing plea—an unknowing plea is a violation of due process and cannot later be made knowing by a reduction in the sentence.

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[3] While Mr. Finley originally requested sentence reduction in the alternative to plea withdrawal, this request was withdrawn at the second postconviction hearing. (63:5); (93.2:23) (Pet. App. 123).

B. Plea withdrawal is mandatory because the circuit court misinformed Mr. Finley that the maximum punishment was lower than that required by law, Mr. Finley asserted that he did not know the correct maximum penalty, and the state failed to prove that despite the inadequacy of the plea colloquy, Mr. Finley was otherwise aware of the correct maximum penalty.

The duties imposed by ***Bangert***, and "revitalize[d]" by ***Brown***, are "designed to ensure that a defendant's plea is knowing, intelligent and voluntary." *See* ***Brown***, 2006 WI 100, ¶¶23, 58. Because the defendant waives important constitutional rights by entering a plea of guilty, the law requires that the plea be entered knowingly and voluntarily "with sufficient awareness of the relevant circumstances and likely consequences" that could follow. ***Brady v. United States***, 397 U.S. 742, 748 (1970).

If the defendant has met his initial burden, and if the state fails to establish by clear and convincing evidence that the defendant otherwise knew and understood the information, the defendant is entitled to withdraw his or her plea. ***State v. Nichelson***, 220 Wis. 2d 214, 226, 582 N.W.2d 460 (Ct. App. 1998). Under ***Bangert***, "the final step in the reviewing court's analysis of an attempt to withdraw a plea is straight-forward." ***Id.*** The reviewing court "*has no discretion* in the matter" and plea withdrawal is "a matter of right." ***Van Camp***, 213 Wis. 2d at 139 *citing* ***Bangert***, 131 Wis. 2d at 283 (emphasis added); *see also* ***State v. Cross***, 2010 WI 70, ¶20, 326 Wis. 2d 492, 786 N.W.2d 64 ("If the State cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right.")

All parties are in agreement that: 1) Mr. Finley was misinformed of a maximum penalty lower than the amount allowed by law; 2) Mr. Finley did not know the maximum penalty he was facing upon pleading guilty; and 3) the state failed to prove that Mr. Finley otherwise knew the correct maximum penalty.[4] As such, a ***Bangert*** violation was established and Mr. Finley did not plead with the knowledge and understanding required by the constitution. The state's remark "[w]hat the defendant did not know did not hurt him," misunderstands the harm in a ***Bangert*** situation. (Petitioner's Brief, p. 12). The defendant is *required to know* in order to enter into a valid plea. Due process requires a guilty plea to be affirmatively shown as knowing, voluntary, and intelligent, and this was not accomplished in Mr. Finley's case. Under ***Bangert***, Mr. Finley's plea did not meet the constitutional requirement of knowing, voluntary, and intelligent, and as a matter of right, he is entitled to plea withdrawal. ***Bangert***, 131 Wis. 2d at 283.

C. ***Bangert*** test and manifest injustice test.

The state argues Mr. Finley must not be permitted to withdraw his guilty plea because, despite being misinformed of a maximum penalty that was lower than actually allowed by law, he suffered no manifest injustice because the court reduced his sentence. (Petitioner's Brief, pp. 11-12, 16).

[4] At the second postconviction hearing, the state presented testimony by trial counsel, but failed to introduce any other evidence to meet its burden. (93.2:5-16). As the court of appeals noted in the second appeal, the state's efforts to meet its burden of proof "were minimal; so much so that, on appeal, the State has now abandoned any argument that it met its burden…." ***State v. Finley***, 2015 WI App 79, ¶21, 365 Wis. 2d 275, 872 N.W.2d 344 (Pet. App. 112).

This is an incorrect statement of the test governing due process and plea withdrawal in a ***Bangert*** situation.[5] It appears the state again conflates the ***Bangert*** test for plea withdrawal with the "manifest injustice" test used in other factual situations for plea withdrawal. One way to establish a manifest injustice is a ***Bangert*** violation, but Wisconsin case law establishes that even if no ***Bangert*** violation exists, there are still other circumstances under which circuit courts may find manifest injustice, thereby allowing a defendant to withdraw his plea. *See* ***State v. Cain***, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177 (a manifest injustice may arise from ineffective assistance of counsel, the defendant's failure to personally enter or ratify the plea, or the prosecutor's failure to fulfill the plea agreement, among other things).

Indeed, as a concurring opinion in ***Taylor*** noted, over time the court has shifted its focus in plea withdrawal cases from the "manifest injustice" test to the "development of rules for particular fact situations." ***State v. Taylor***, 2013 WI 34, ¶66, 347 Wis. 2d 30, 829 N.W.2d 482 (J. Prosser concurring).

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[5] The state argued similarly in ***Taylor***, advocating for the manifest injustice standard as the only test to determine whether Taylor should be allowed to withdraw his plea, and this Court soundly rejected that argument: "[W]hen a defendant seeks to withdraw his plea based on an alleged violation of Wis. Stat. § 971.08 or other court-mandated duty, the court should analyze the alleged error under ***Bangert*** and, if necessitated by the defendant's motion, under the manifest injustice standard." ***State v. Taylor***, 2013 WI 34, ¶50 n. 18, 347 Wis. 2d 30, 829 N.W.2d 482. Similarly, in ***Cross***, the court first determined whether a ***Bangert*** violation had occurred, and after concluding that it had not, moved on to whether the defendant had established a manifest injustice warranting plea withdrawal. ***State v. Cross***, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64.

Bangert governs under the particular fact situation of this case—plea withdrawal due to a defective plea colloquy. The court of appeals correctly found that Mr. Finley's case lies squarely within the ***Bangert*** framework, and that a ***Bangert*** violation is in and of itself a manifest injustice mandating plea withdrawal. ***State v. Finley***, 2015 WI App 79, ¶37 (Pet. App. 122).

D. The circuit court lacks authority to commute a sentence as a remedy for an unknowing plea.

In Mr. Finley's case, instead of granting plea withdrawal, the circuit court commuted Mr. Finley's sentence to 14.5 years of initial confinement and five years of extended supervision "in the interest of justice." (93.2:23-24; 109:3-4; Pet. App. 123-24). The court relied on Wis. Stat. § 973.13, and ***State v. Taylor***, 2013 WI 34, ¶45, n.13, to fashion this remedy. (*Id.*).

The circuit court has no authority to a commute a sentence in this situation. Specifically, 1) ***Cross*** and ***Taylor*** do not support commutation as an alternative remedy to plea withdrawal once a ***Bangert*** violation has been established; 2) Wis. Stat. § 973.13 does not give the circuit court authority to commute an otherwise legal sentence to the incorrect maximum sentence the defendant was informed of at his plea hearing; 3) a circuit court has limited authority to modify a sentence, which does not include modification "in the interests of justice"; and finally, 4) outside authority interpreting Federal Rule of Criminal Procedure 11 or similar provisions does not support the state's argument that commutation is an appropriate remedy for an unknowing plea under the ***Bangert*** standard.

1. ***Cross*** and ***Taylor*** do not support commutation as an alternative remedy to plea withdrawal once a ***Bangert*** violation has been established.

The state relies on dicta in ***Cross*** and ***Taylor*** to argue that commutation is a possible remedy for an unknowing plea. However, ***Cross*** and ***Taylor*** reinforced and developed the long-standing plea withdrawal procedure in ***Bangert*** and ***Brown***. This Court's canon still holds that when a ***Bangert*** violation has been established, plea withdrawal is the only remedy. The difference is that in ***Cross*** and ***Taylor***, both defendants failed to establish a prima facie ***Bangert*** violation. ***Cross*** and ***Taylor*** *do not hold* that if a prima facie ***Bangert*** violation is established, and the state failed to meet its burden to prove the plea was knowing, that the appropriate remedy is commutation. ***State v. Cross***, 2010 WI 70, ¶20 ("If the State cannot meet its burden, the defendant is entitled to withdraw his plea as a matter of right.")

In ***Cross***, during the plea colloquy, the circuit court informed the defendant that the maximum possible sentence was slightly higher than the penalty actually allowed by law. ***Cross***, 2010 WI 70, ¶¶21, 30. This Court found that this mistake was not necessarily a ***Bangert*** violation. ***Id***. at ¶30. In other words, the defendant had failed the first step of the ***Bangert*** test because this Court held that it was not a violation of the court mandated duties to inform the defendant of a maximum punishment slightly higher than that mandated by law. "[A] defendant can be said to understand the range of punishments as required by 971.08 and ***Bangert*** when the maximum sentence communicated to the defendant is higher, but not substantially higher, than the actual allowable sentence." ***Id***. at ¶38.

Similarly, in ***Taylor***, the defendant faced a maximum penalty of six years for the charge of uttering a forgery, plus two years for the repeater enhancer. ***Taylor***, 2013 WI 34, ¶1. However, at the plea hearing, the court informed Taylor that he faced a maximum penalty of six years. ***Id.*** at ¶2. The court ultimately sentenced Taylor to six years. ***Id.*** at ¶3. This Court held that the circuit court did not violate any mandated duty with regard to Taylor's plea to the underlying offense, which made it impossible for Taylor to establish a ***Bangert*** violation. ***Id.*** at ¶34. Furthermore, the ***Taylor*** Court observed that the record was "replete with evidence" that Taylor was aware of the accurate potential penalty. ***Id***. at ¶35. Therefore, in ***Taylor***, just as in ***Cross***, the Court found that the defendant had failed to meet the first step of the ***Bangert*** test.

Here, we have a ***Bangert*** violation. The court told Mr. Finley the maximum penalty he could face was less than the amount allowed by law. All parties agree that Mr. Finley did not know the correct maximum penalty when he entered his plea. (Petitioner's Brief, pp. 7-8). ***Cross*** and ***Taylor*** explicitly state that the factual situation present in Mr. Finley's case may constitute a ***Bangert*** violation. ***Cross*** 2010 WI 70, ¶39 (When the maximum communicated at the plea hearing is "lower than the amount allowed by law, a defendant's due process rights are at greater risk and a ***Bangert*** violation may be established."); ***Taylor***, 2013 WI 34, ¶34.

The state misreads ***Cross*** and ***Taylor*** when it contends, "If a defendant's failure to know and understand the correct maximum penalty is not a per se violation of the defendant's due process rights, then withdrawal of his plea is not a per se remedy for the entry of his plea without such knowledge" (Petitioner's Brief, p. 9). Again, this Court in ***Cross*** and ***Taylor*** found no ***Bangert*** violation. ***State v. Cross***

2010 WI 70, ¶38; ***Taylor***, 2013 WI 34, ¶¶34-35. The Court then concluded that the defendants had failed to satisfy the manifest injustice test only after it had already determined that the defendants failed to satisfy the ***Bangert*** test.[6] In contrast, Mr. Finley has established a ***Bangert*** violation, and plea withdrawal *is* the "per se" remedy for a ***Bangert*** violation. *See* ***State v. Cross***, 2010 WI 70, ¶20.

An unknowing plea has occurred when the defendant is misinformed that the maximum sentence is actually less than that allowed by law, the defendant asserts he did not know the correct maximum penalty, and the state fails to prove otherwise. This is a ***Bangert*** violation. As such, Mr. Finley is entitled to plea withdrawal. This Court's holdings in ***Cross*** and ***Taylor*** support the remedy of plea withdrawal because an actual ***Bangert*** violation occurred in Mr. Finley's case but not in ***Cross*** and ***Taylor***.

2. Wis. Stat. § 973.13 does not apply.

Section 973.13 is inapplicable to the facts of this case. While the state argued this statute applied in the circuit court and in the court of appeals, it has not renewed that argument in its petition for review or brief-in-chief.[7] The circuit court relied on this statute in modifying Mr. Finley's sentence.

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[6] The state's reliance on ***Taylor*** to assert that there is no manifest injustice in Mr. Finley's case repeats the same mistake it did in the court of appeals. As the court of appeals aptly noted, "nearly all of the State's citations to ***Taylor*** deal with that portion of the decision concerning whether there is manifest injustice in enforcing a plea agreement, post-sentence, independent of a finding that the defendant did not plead knowingly, intelligently, and voluntarily." ***Finley***, 2015 WI App 79, ¶35 (Pet. App. 121). Again, there is no independent finding in Mr. Finley's case that his plea was knowing, intelligent, and voluntary.

[7] Arguments not raised on appeal are forfeited. *See* ***State v. Margaret H.***, 2000 WI 42, ¶37, n.5, 234 Wis. 2d 606, 610 N.W.2d 475.

However, § 973.13 does not give the circuit court authority to commute an otherwise legal sentence to the incorrect maximum sentence the defendant was informed of at his plea hearing.

Section 973.13 contemplates a situation when the circuit court has imposed "a maximum penalty in excess of that authorized by law," and allows for validating the length of a sentence by reducing it "only to the extent of the maximum term authorized by statute." Wis. Stat. § 973.13. Therefore, this statute remedies an invalid sentence, not an unknowing plea. As the court of appeals soundly reasoned:

> By statute, Finley's maximum penalty *was* that which he initially received, twenty-three and one-half years' imprisonment. His sentence was commuted not to "the amount authorized by law" or "the maximum term authorized by statute," but rather to an amount Finley misunderstood to be his maximum exposure based on errors surrounding his plea.

State v. Finley, 2015 WI App 79, ¶33 (Pet. App. 119) (emphasis in original). Because Mr. Finley's original sentence was not in excess of that authorized by law, this statute provides no authority to reduce his sentence, as it already is "the maximum term authorized by statute." Wis. Stat. § 973.13. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.,*** 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is given its common, ordinary, and accepted meaning").

The state and circuit court originally relied on footnote 13 in ***Taylor***, along with the portion of ***Cross*** on which the ***Taylor*** footnote relied, for the authority that Mr. Finley's sentence could be commuted under § 973.13. However, Mr. Finley agrees with the court of appeals that these cases do

not clearly indicate that § 973.13 can apply to the circumstances found in this case. ***State v. Finley***, 2015 WI App 79, ¶33, *citing* ***Taylor***, 2013 WI 34, ¶¶34, 45 n. 13, and ***Cross***, 2010 WI 70, ¶¶34–35 (Pet. App. 119).

Furthermore, the state misreads and overemphasizes the importance of ***Taylor***'s footnote 13. This footnote appears in the court's analysis of whether plea withdrawal is necessary to correct a manifest injustice. ***Taylor***, 2013 WI 34, ¶45 n. 13. The court had already considered whether a ***Bangert*** violation had occurred, and after concluding that it had not, moved on to whether the defendant had established a manifest injustice warranting plea withdrawal. ***Taylor***, 2013 WI 34, ¶50 n. 18. As such, this footnote is not relevant to plea withdrawal in a ***Bangert*** context, and Mr. Finley's case belongs within the ***Bangert*** framework.

However, even if the ***Taylor*** footnote holds that a failure to inform a defendant of a penalty enhancer at the plea hearing allows for commutation of the sentence to remove the penalty enhancer and thereby renders the plea knowing under ***Bangert***, this remedy does not work in Mr. Finley's case. Here, it is impossible to "commute" the sentence and remove one or more of the penalty enhancers to create a maximum punishment of 19.5 years.[8]

[8] *See* ***State v. Finley***, 2015 WI App 79, ¶30 (Pet. App. 117) ("This case is not amenable to the type of resolution applied in ***Taylor*** …. Here, the circuit court did, in fact, sentence Finley, at least initially, to the maximum penalty allowed by law as a result of both the repeater and dangerous weapon enhancers. Moreover, even after 'commuting' the sentence, the circuit court did not sentence Finley only to the twelve and one-half years' imprisonment maximum for the underlying offense of reckless endangerment as domestic abuse.")

Mr. Finley's underlying plea to first degree reckless endangerment carried a maximum punishment of 12.5 years, consisting of 7.5 years of initial confinement and 5 years of extended supervision. *See* Wis. Stat. §§ 939.50(3)(f), 973.01(2)(b)6m and (d)(4). The dangerous weapon enhancer added five years to the initial confinement, *see* Wis. Stat. § 939.63(1)(b), and the repeater enhancer added six years to the initial confinement. *See* Wis. Stat. § 939.62(1)(c). Removing any of these penalty enhancers does not reduce the maximum sentence to 19.5 years that Mr. Finley was informed he could receive.[9]

Finally, to find § 973.13 applicable in this case would lead to an absurd result and allow a mistake by the circuit court and prosecutor to rewrite the legislature's maximum penalties. It is a well-established proposition in our system of separate branches of government that the legislature prescribes the range of punishment for a particular crime, and the court imposes the punishment. ***Spannuth v. State***, 70 Wis. 2d 362, 367, 234 N.W.2d 79 (1975); s*ee* ***State v. Horn***, 226 Wis. 2d 637, 646, 594 N.W.2d 772 (1999) ("The legislature has the authority to determine the scope of the sentencing court's discretion. The sentencing court has discretion, within that legislatively-determine scope, to fashion a sentence…")

[9] The record also supports that the penalty enhancers and underlying charge cannot be configured in a way to make the potential maximum penalty Mr. Finley could be facing 19.5 years total, as the defense attorney could not even recall how he came up with that number. At the second postconviction hearing, Mr. Finley's trial attorney testified that he had "racked [his] brain," but had no recollection of where 19.5 years came from. (93.2:12). He testified that "the number came from somewhere and I wrote it down, so obviously there is some sort of math error that was made or typo of one form or another."(93.2:15).

The facts in Mr. Finley's case easily illustrate the danger with the state's proposed remedy. The victim requested that Mr. Finley receive "everything possible as a punishment in this case." (92:13). The circuit court also thought the maximum penalty was necessary, stating "I don't know what cases require the maximum if this one doesn't." (92:30). Yet, because of a miscalculation, the legislature's authority is ignored, the victim's input cannot be fully considered, and the circuit court's original intent is thwarted.

The state's proposed rule of commutation rewrites the legislature's mandate of what a maximum penalty should be for the crimes in Mr. Finley's case. The circuit court allowed a mistake to justify a modification from the maximum sentence the court legally imposed. Mr. Finley is aware of no other scenario in which it is it acceptable for a mistake by the parties to rewrite the law. The court found the maximum was necessary in this case, and the legislature alone sets the maximum penalties allowable by law. *See* ***Spannuth***, 70 Wis. 2d at 367; *see also* ***State v. Sittig***, 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977)("a court's refusal to impose a mandatory sentence or fashion a sentence within limits prescribed by the legislature constitutes an abuse of discretion by the court and also usurpation of the legislative field.")

Mr. Finley contends the court of appeals' analysis was correct in finding that § 973.13 only applies in situations where a sentence imposed was in excess of that authorized by law. In Mr. Finley's case, the original sentence imposed was the lawful maximum, within the amount "authorized by law" and within the "extent of the maximum term authorized by statute." As such, § 973.13 does not apply.

3. Circuit courts have limited authority to modify a sentence

A circuit court's limited inherent authority to modify a criminal sentence does not include modification because the circuit court and prosecutor misinformed the defendant of the maximum penalty at the plea hearing.

Wisconsin circuit courts have inherent authority to modify criminal sentences but only "within certain constraints." ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. "[A] circuit court's inherent authority to modify a sentence is a discretionary power that is exercised within defined parameters." ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524 *abrogated by* ***State v. Harbor***, 2011 WI 28. These defined parameters allow for sentence modification: 1) in order to correct formal or clerical errors or an illegal or void sentence; 2) to modify based on a new factor; or 3) to modify if the sentence is unduly harsh or unconscionable. ***Id***. A court cannot base a sentence modification on reflection and second thoughts alone. ***State v. Wuensch***, 69 Wis. 2d 467, 474, 480, 230 N.W.2d 665 (1975).

Nowhere within these carefully "defined parameters" is the authority to modify a sentence because the parties misinformed the defendant of the correct maximum penalty at the plea hearing. Mr. Finley's original sentence was not illegal, as argued *supra*. The misinformation cannot render it unduly harsh and unconscionable—especially when the circuit court intended the legislature's legal maximum to be imposed. Nor does the misinformation amount to a "new factor." Indeed, the state has not argued that the authority to modify a sentence based on misinformation at a plea hearing lies within any of these "defined parameters."

Finally, the circuit court's own rationale for sentence modification is not supported by law. The circuit court in this case modified Mr. Finley's sentence "in the interests of justice," even though it originally believed justice required that Mr. Finley receive the maximum penalty. While the state has not argued that a court has the authority to modify a sentence under this standard, the "interest of justice" standard is inapplicable to the case at hand, as it is used for determining whether a defendant is entitled to a new trial, not to a sentence modification. *See* Wis. Stat. § 805.15(1) ("A party may move to set aside a verdict and for a new trial...because of newly-discovered evidence, or in the interest of justice.")

Therefore, the circuit court did not have the authority to modify Mr. Finley's sentence.

4. The state's reliance on outside jurisdictions interpreting Federal Rule of Criminal Procedure 11 or similar provisions does not support its argument that commutation is an appropriate remedy for an unknowing plea under the ***Bangert*** standard.

The state cites several federal cases interpreting Federal Rule of Criminal Procedure 11, and out-of-state cases interpreting similar provisions, for the proposition that "where the sentence conforms to precisely what the defendant understood to be the maximum sentence to which he exposed himself by his plea, the defendant understood the consequences of his plea." (Petitioner's brief, p. 13). The state's reliance on this rule is misplaced, as case law interpreting Rule 11 does not support commutation as an appropriate remedy for an unknowing plea under ***Bangert.***

The relevant provision of Rule 11 states that at the time of the plea, the court must communicate to the defendant personally any maximum possible penalty, including the imprisonment, fine and term of supervised release. Fed. R. Crim. P. 11(b)(1)(H). However, any violation of Rule 11 will not necessarily invalidate a guilty plea. Violations of Rule 11 are subject to the harmless error test, and a violation is harmless "if it does not affect [the defendant's] substantial rights." ***Id.***

The outside authority relied on by the state is distinguishable because most of these cases involve a court's failure to inform the defendants about a mandatory "special parole term." *See* ***United States v. Sheppard***, 588 F.2d 917 (4th Cir. 1978); ***United States v. Rodrigue***, 545 F.2d 75 (8th Cir. 1976); ***Bachner v. United States***, 517 F.2d 589 (7th Cir. 1975); ***United States v. Iaquinta***, 719 F.2d 83 (4th Cir. 1983); ***Bell v. United States***, 521 F.2d 713 (4th Cir. 1975); ***Aviles v. United States***, 405 F. Supp. 1374 (S.D.NY. 1975); ***United States v. Lewis***, 875 F.2d 444 (5th Cir. 1989). A special parole term does not have an effect on the period of a defendant's incarceration unless the defendant violates conditions of his parole. ***Bachner v. United States*** 517 F.2d 589, 597 (7th Cir. 1975).

The use of this harmless test further distinguishes the cases cited by the state. The cases cited by the state use this harmless error test to determine that despite the misinformation regarding the maximum penalty the defendants faced upon conviction, because those defendants received a sentence they were verbally informed they could get, it did not affect the defendant's substantial rights. In applying the harmless error test, these courts found that the defendant would have to show that he would not have pled had he received the correct information. *See* ***Commonwealth***

v. Barbosa, 2003 PA Super 77, 818 A.2D 81, ¶18 (remanding to determine whether defendant knew the maximum and whether any mistake was material to his decision to enter the plea); ***Cole v. State***, 850 S.W.2d 406, 409 (Mo. Ct. App. 1993) (a showing that defendant would have gone to trial had he known the correct maximum "is required to demonstrate prejudice."); ***Bell v. United States***, 521 F.2d 713, 715 (4th Cir. 1975) (acknowledging invalidation of the plea is required when the sentence and the special parole term exceed the maximum sentence a defendant was told he could receive, but failure to inform defendant of special parole term harmless error because the defendant received a sentence within the maximum he was told).

The state's citation to these other authorities in jurisdictions that employ a harmless error test does little to support its argument that commutation is proper under ***Bangert***. ***Bangert*** employs a limited harmless error test. A violation of ***Bangert*** or other mandated duties under 971.08 is only harmless if the state can show that the defendant otherwise knew the information he did not correctly receive. *See* ***State v. Lagundoye***, 2004 WI 4, ¶¶40-44, 268 Wis. 2d 77, 674 N.W.2d 526 (describing as "harmless error" the situation of a defendant who knows the immigration consequences of a plea despite not being informed). The state has repeatedly failed to show, and has conceded, that Mr. Finley did not know the proper maximum punishment in this case. (Petitioner's Brief, pp. 7-8). This does not satisfy ***Bangert***'s limited harmless error test.

Rather, the ***Bangert*** test requires the state to show the guilty plea was knowing, voluntary, and intelligent, thereby acknowledging that the duties specified in § 971.08 and case law are material to the defendant's decision to plead guilty. For these reasons, the state's reliance on outside authority

using a harmless error test where the defendant was misinformed about the maximum but received a sentence within the incorrect maximum he was informed, does not support the remedy of commutation under a ***Bangert*** analysis.

E. Assuming the circuit court has the authority to commute the sentence, this Court should not allow sentence commutation as an alternative to plea withdrawal when the defendant has established a ***Bangert*** violation and the state has failed to prove that the defendant otherwise knew the correct information.

Despite the lack of any authority for a circuit court to modify the maximum penalties imposed by the legislature due to misinforming the defendant of the correct maximums penalties at the plea hearing, assuming for the sake of argument that the circuit court does have such authority, this Court must still determine whether commutation is appropriate under these circumstances.

To begin, a court process that allows erroneous information to re-write the law is inappropriate. The circuit court's remedy of commutation in essence "sanctions" the misadvice it provided at the plea hearing. Allowing misadvice to change the legislature's adopted maximum penalties undermines confidence in the criminal justice system.

Furthermore, contrary to the state's assertions, sentence commutation cannot remedy an unknowing plea, and plea withdrawal in Mr. Finley's case will not result in a "windfall." Rather, the sole remedy of plea withdrawal will continue to incentivize circuit courts to pay the "'utmost solicitude' to the plea hearing colloquy. ***Brown***, 2006 WI 100, ¶33 *quoting* ***Boykin v. Alabama***, 395 U.S. 238, 243-44 (1969).

1. Sentence commutation fails to remedy the harm of an unknowing plea.

The guilty plea decision is frequently influenced by "imponderable questions for which there are no certain answers." ***Brady v. United States***, 397 U.S. 742, 756 (1970). The state argues, "When the defendant knows when he enters the plea that he could get the sentence he ultimately gets, the defendant knowingly takes the risk that by pleading guilty or no contest he could get that very same sentence." (Petitioner's Brief, p. 14). The state's argument that "this is simply common sense" ignores reality and oversimplifies the myriad reasons why individual defendants choose to plead guilty. (Petitioner's Brief, p. 14). It is impossible for a defendant, like Mr. Finley, to realistically assess what his sentence might be, and therefore to knowingly enter his plea, when he believed the maximum to be lower than it was.

While a defendant is told that the court could sentence him to the maximum, part of his decision on whether to enter a plea could center on if he believes his case warrants the maximum. Hypothetically, a defendant who decides to plead guilty and is misinformed of the maximum, might be doing so because he believes the facts of his case do not warrant the maximum. Moreover, if that same defendant comes to learn that the true maximum is higher than he thought, and the remedy is to commute the sentence down to the maximum he was informed he could get, this does little to make the plea he entered knowing. The "reduced" maximum was the very maximum that he did not believe he would get, which led him to enter a plea. His decision might have been different, had he known the maximum penalty was actually higher. It is impossible for a defendant to enter into a knowing plea if he is unable to assess what his sentence might be because he believed the maximum to be lower than it was.

Again, under ***Bangert***, we need not look into the defendant's thought processes as to why he pled; rather, the standard only asks that it be affirmatively shown that at the time of his plea, the defendant knew the correct ramifications of his plea and the rights he gives up in foregoing a trial. ***Bangert***, 131 Wis. 2d at 278-79.

The reasoning for this affirmative showing demonstrates the importance this Court has routinely placed on the plea-taking process. Part of the beauty of the ***Bangert*** test is its inherent acknowledgement that the guilty plea decision is influenced by "imponderable questions for which there are no certain answers." ***Brady v. United States***, 397 U.S. 742, 756 (1970). Therefore, by mandating that the guilty plea be affirmatively shown as knowing, voluntary, and intelligent, ***Bangert*** acknowledges that the duties specified in § 971.08 and case law are generally material to the defendant's decision to plead guilty.

Furthermore, reducing a sentence to a period of incarceration that a defendant was told he could receive does little to ensure that the plea was knowing, voluntary, and intelligent *at the time the plea was entered*. ***Bangert***, 131 Wis. 2d at 269 (The defendant's understanding must be measured at the time the plea is entered). The ***Bangert*** test does not concern itself with the after-effects of a plea, such as a possible defense at trial, the victim's feelings, or eventual sentence imposed, in making the determination of whether or not the plea was knowingly, voluntarily and intelligently entered to begin with. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 153-54 ("The potential outcome of evidence does not

display the defendant's understanding or knowledge of his rights or the charges against him.")[10]

Finally, other cases have rejected a sentencing remedy to "correct" a problem with a plea. In ***Padilla***, the district court failed to accurately inform the defendant of the maximum penalties he was facing, including the mandatory minimums likely applicable to his case. *See* ***United States v. Padilla***, 23 F.3d 1220, 1221 (7th Cir. 1994). The court held that "ignorance about the necessity…of serving many years in prison strikes us as an informational lack so serious that unless strong indications to the contrary are apparent from the record a court should presume it influenced a defendant's decision to plead guilty." ***Id.*** at 1222. The defendant, however, sought resentencing in accordance with his purported understanding of the plea agreement. ***Id.*** at 1224. In finding that withdrawal of the guilty plea was the only appropriate remedy, the Seventh Circuit stated resentencing was not an option:

> Padilla, however, is not entitled to a more favorable sentence than the one he got, which was in accordance with the law and not precluded by the terms of the plea agreement. What he is entitled to is an opportunity to start over, since his decision to plead guilty was not accompanied by an adequate explanation of likely mandatory penalties.

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[10] The state's argument that the "competing consideration" of the interests of finality of criminal convictions should weigh into whether a defendant is allowed to withdraw his plea is another reference to plea withdrawal under the manifest injustice test. (Petitioner's Brief, p. 10); *See* ***Taylor***, 2013 WI 34, ¶48. The interest in finality is a proper consideration under the manifest injustice test; but does little to help with the inquiry of whether a defendant's plea was knowing, voluntary, and intelligent under ***Bangert***.

Padilla, 23 F.3d at 1224. Because the defendant "disavow[ed] the only relief that is appropriate to the error he assigns," the court affirmed his conviction and sentence. ***Id.*** at 1224-25.

Similarly, in ***Woods***, as part of the negotiated plea, the state recommended that the defendant's adult court sentence run consecutive to the juvenile court disposition he was already completing. ***State v. Woods***, 173 Wis. 2d 129, 133, 496 N.W.2d 144 (Ct. App. 1992). Consistent with the agreement, the court imposed the defendant's adult court sentence consecutive to his juvenile court disposition. ***Id.*** at 134. However, because there is no law permitting an adult court sentence to run consecutive to a juvenile court disposition, the sentence was void. ***Id.*** at 138-39. Postconviction, the state argued that the defendant should not be allowed to withdraw his plea, and instead asked the court to modify the sentence by voiding the portion that mandated it be served consecutive to the juvenile disposition. ***Id.*** at 142. The court declined and held that plea withdrawal was the only proper remedy:

> Simply resentencing Woods, or even allowing him to maintain his guilty plea while renegotiating the sentence recommendation, would fail to correct the error that rendered his guilty plea infirm in the first place. The appropriate solution is to return the parties to their positions prior to any error.

Woods, 173 Wis. 2d at 142.

Padilla and ***Woods*** demonstrate that changing the sentence does not fix the infirmity of the plea. In Mr. Finley's case, his unknowing plea cannot later be made knowing by a sentence reduction. Unlike ***Padilla***, Mr. Finley is not asking for a sentence "more favorable than the one he got." *See*

Padilla, 23 F.3d at 1224. Rather, the state is attempting to force that remedy upon him. Mr. Finley should be offered "an opportunity to start over" in order to "correct the error that rendered his guilty plea infirm in the first place." *See* ***Padilla***, 23 F.3d at 1224; *see also* ***Woods***, 173 Wis. 2d at 142.

For these reasons, plea withdrawal is the only proper remedy that protects the constitutional requirement that a plea be knowing, voluntary, and intelligent.

2. Allowing Mr. Finley to withdraw his plea would not result in a "Windfall."

The state characterizes Mr. Finley's plea withdrawal remedy as a "windfall." (Petitioner's brief, p. 14). If Mr. Finley were allowed to withdraw his guilty plea, the plea agreement is also vacated. *See* ***State v. Woods***, 173 Wis. 2d at 142 (after plea withdrawal, parties return to their positions prior to any error). Because all of the dismissed and read-in charges would be reinstated, Mr. Finley would be facing a maximum punishment of 53 years in the Wisconsin Prison System, comprised of 39.5 years of initial confinement, followed by 13.5 years of extended supervision. [11] This does not meet any definition of a "windfall."

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[11] Mr. Finley was originally charged with first degree reckless endangerment, with a dangerous weapon; substantial battery; strangulation and suffocation; and false imprisonment, all as an act of domestic abuse. (2). The state later added the repeater enhancer pursuant to Wis. Stat. § 939.62, to each charge. (12). For the one count of substantial battery, as a repeater, Mr. Finley is subject to a maximum penalty of five years and six months of initial confinement, followed by two years of extended supervision. *See* Wis. Stat. § 940.19(2); Wis. Stat. §§ 973.01(2)(b)9 and 973.01(2)(d)6; Wis. Stat. § 939.62(1)(b). For the one count of strangulation and suffocation, and one count of false imprisonment, Mr. Finley is subject to seven years of initial confinement, followed by three years of extended supervision, on each count.

If Mr. Finley took the case to trial and was convicted, or accepted a different plea, the state would no longer be required to cap its recommendation at ten years of initial confinement. As such, Mr. Finley opens himself to great risk of additional imprisonment if allowed to withdraw his guilty plea. This risk is present in many cases, because most plea agreements involve the dismissal of charges, and/or sentence recommendation caps. Mr. Finley's request for plea withdrawal, a remedy that puts him back to the position he was in before his plea agreement and facing significant incarceration time, is by no means a "windfall."

3. Mandating Plea Withdrawal rather than Sentence Commutation will ensure that circuit courts and district attorneys continue to adhere to their duties under ***Bangert*** and § 971.08.

The duties embodied in ***Bangert*** and § 971.08 are designed to assist the circuit court in making the constitutionally required determination that the defendant's plea is voluntary. ***Bangert***, 131 Wis. 2d at 261. Allowing

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See Wis. Stat. § 940.235(1); Wis. Stat. § 940.30; Wis. Stat. §§ 973.01(2)(b)8 and 973.01(2)(d)5; Wis. Stat. § 939.62(1)(b). For the one count of first degree reckless endangerment, with a dangerous weapon, as a repeater, Mr. Finley is subject to 18.5 years of initial incarceration and five years of extended supervision. *See* Wis. Stat. § 941.30(1); Wis. Stat. §§ 973.01(2)(b)6m and 973.01(2)(d)4; Wis. Stat. § 939.63(1)(b); Wis. Stat. § 939.62(1)(c). Brown County Case No. 11-CM-953 was also dismissed and read-in, pursuant to the plea agreement. (44). This case involved one count of resisting or obstructing an officer, as a repeater, which would subject Mr. Finley to a maximum penalty of one year and six months of initial confinement, and six months of extended supervision. Wis. Stat. § 946.41(1); Wis. Stat. § 939.62(1)(a).

sentence modification rather than plea withdrawal in cases involving ***Bangert*** violations will reduce the incentive for circuit courts to fulfill these duties at the plea hearing. The ***Bangert*** philosophy holds just as true today as it did in 1986:

> We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude." Such solicitude will serve to forestall postconviction motions, which have an even more detrimental effect on a trial court's time limitations than do properly conducted plea hearings.

Bangert, 131 Wis. 2d at 278-79 (citations omitted). Furthermore, the burden-shifting nature of the ***Bangert*** procedure is meant to "encourage the prosecution to assist the trial court in meeting its sec. 971.08 and other expressed obligations." ***Brown***, 2006 WI 100, ¶40, n. 24 *citing* ***Bangert***, 131 Wis. 2d at 275.

In this case, the state had three opportunities to affirmatively show that Mr. Finley knew the correct maximum punishment: the plea hearing, the first postconviction hearing, and the second postconviction hearing. All three times, the state failed to meet its burden. Now, after repeated failure, it should not be allowed to create a new remedy in order to save the infirm plea.

Finally, the state's proposed procedure is unworkable and impractical—the state's suggestion of commutation in "ordinary cases" and plea withdrawal in "exceptional cases" will be difficult for circuit courts to apply in practice. (Petitioner's Brief, p. 16). What constitutes an ordinary case requiring commutation in contrast to an exceptional case

requiring plea withdrawal? Who gets to decide between plea withdrawal and commutation? The state's proposed remedy will leave the plea withdrawal canon in constant flux, with less finality and more litigation.

The ***Bangert*** test is simple, has worked for decades, and includes checks along the way to ensure that the finality of the plea is respected if the process has conformed to the constitutional standards. But when the process fails, it rightly allows for plea withdrawal. This Court should reinforce plea withdrawal as the sole remedy for a ***Bangert*** violation in order to protect a defendant's due process rights to a knowing, voluntary, and intelligent plea, as well as ensure that the prosecution and circuit court continue to follow the required procedures of ***Bangert*** and § 971.08 at the plea colloquy .

CONCLUSION

The court of appeals reached the correct result in this case. Therefore, Mr. Finley, by counsel, respectfully requests that the Court affirm the court of appeals' opinion and remand to the circuit court with instructions to grant Mr. Finley's postconviction motion for plea withdrawal.

Dated this 1st day of March, 2016.

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 8,013 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of March, 2016.

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STATE OF WISCONSIN

SUPREME COURT

Case No. 2014AP2488-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

TIMOTHY L. FINLEY, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT III,
REVERSING A JUDGMENT AND ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
THE HONORABLE WILLIAM M. ATKINSON, PRESIDING

REPLY BRIEF FOR PLAINTIFF-RESPONDENT-PETITIONER

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S U P R E M E C O U R T

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ARGUMENT

Reduction of a defendant's sentence is a proper remedy for misinforming him about the maximum penalty.

This appeal is not about "protect[ing] the plea-taking process," as Finley thinks. Brief for Defendant-Appellant at 2.

This appeal involves only the appropriate remedy for the admitted error in taking Finley's plea.

In *State v. Bangert*, 131 Wis. 2d 246, 252, 272-76, 389 N.W.2d 12 (1986), this court adopted a remedy for defects in the plea acceptance process. This court is free to modify its adopted remedy to cover a kind of error it has not expressly considered in previous cases.

Finley attempts to blame the State for this error. Brief for Defendant-Appellant at 4.

But the blame plainly lies with Finley's attorney who added up the several applicable penalties wrong in the first place, and with the circuit court which repeated counsel's mathematical mistake (63:3; 90:4; 93.2:12, 15). Defense counsel has an obligation to correctly inform his client of the consequences of a plea, while the ultimate duty to comply with plea procedures falls squarely on the court. *Bangert*, 131 Wis. 2d at 278-79 & n.6.

The prosecutor may have some responsibility for the mistake, *see Bangert*, 131 Wis. 2d at 279, but only because he did not correct it, not because he made it.

Thus, Finley makes another mistake when he asserts that the "state's argument here is that when it makes a mistake . . . the state gets to choose the remedy that is most convenient for the state." Brief for Defendant-Appellant at 4.

Actually, the State is offering the remedy for the mistake made by Finley's attorney and the court that is most equitable for everyone concerned in this case. Since the mistake is primarily attributable to Finley, *see Coleman v. Thompson*, 501 U.S. 722, 752 (1991), he should not get to choose the remedy that is most convenient for him.

Finley errs again when he accuses the State of conflating the manifest injustice test. Brief for Defendant-Appellant at 7.

The State is not basing its argument in this case on the manifest injustice test. Rather, the State is focusing on the development of a rule for a particular factual situation. *See State v. Taylor*, 2013 WI 34, ¶ 66, 347 Wis. 2d 30, 829 N.W.2d 482 (Prosser, J., concurring).

The fact that there is no manifest injustice when a defendant's sentence does not exceed that stated as possible by the court, *State v. Reppin*, 35 Wis. 2d 377, 385 n.2, 151 N.W.2d 9 (1967) (quoting tentative ABA Standard 2.1(a)(ii)(3)); III American Bar Association Standards for Criminal Justice, Pleas of Guilty, commentary to present Standard 14-2.1(b)(ii)(C) at p.14-57 (2d ed. 1986 supp.), is just one component of the State's argument for a rule regarding the proper remedy for a misstatement of the maximum penalty.

Finley suggests no reason why the absence of a manifest injustice is not one factor that can properly be considered in determining the appropriate remedy for the misstatement.

The authority cited above shows that Finley is wrong when he asserts that "a *Bangert* violation is in and of itself a manifest injustice." Brief for Defendant-Appellant at 8. A failure to advise a defendant of the correct maximum penalty is a manifest injustice only when the sentence imposed exceeds the sentence the defendant is told he can get.

Finley misses the State's point when he questions whether *Taylor* and *State v. Cross*, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64, support the State's argument. Brief for Defendant-Appellant at 9-11.

Bangert stated that "when a defendant establishes a denial of a relevant constitutional right, withdrawal of the plea is a matter of right," and the court "has no discretion . . . in such an instance." *Bangert*, 131 Wis. 2d at 283.

However, the State's point regarding *Taylor* and *Cross* is that these more recent cases hold that a defendant's failure to know the correct maximum penalty is not necessarily a due process violation. *Taylor*, 347 Wis. 2d 30, ¶ 33 & n.8; *Cross*, 326 Wis. 2d 492, ¶¶ 29-30, 33, 36-37. Indeed, as Finley correctly notes, *Cross* indicated that a misstatement about the maximum penalty may not even be a *Bangert* violation, much less a due process violation. Brief for Defendant-Appellant at 9.

So as the State argued in its opening brief, if a defendant's failure to know and understand the correct maximum penalty is not a per se violation of the defendant's constitutional rights, then withdrawal of his plea is not a per se remedy for the entry of his plea without such knowledge.

Finley has no response to this logic.

Finley incorrectly asserts that the State relied on Wis. Stat. § 973.13 in the court of appeals. Brief for Defendant-Appellant at 11. The State never even mentioned this statute in its arguments in either of the two appeals pursued by Finley.

But as long as Finley brought it up, he should have explained why the rationale of the statute, i.e., that an error in misstating the maximum sentence can be cured by reduction of the sentence, should not apply when the maximum stated is lower than the actual maximum just as it applies when the maximum stated is higher than the actual maximum. *See Cross*, 326 Wis. 2d 492, ¶¶ 34-35.

Reducing a defendant's sentence obviously does not change the statutory maximum penalty, as Finley contends. Brief for Defendant-Appellant at 14-15.

The maximum penalty is not the only penalty established by statute for an offense. It is only the top of a range of penalties. A court has discretion to impose a sentence anywhere within the range. *Hanson v. State*, 48 Wis. 2d 203, 206-07, 179 N.W.2d 909 (1970).

But there are limits. A court is always constrained to impose the minimum amount of confinement consistent with sentencing objectives. *State v. Gallion*, 2004 WI 42, ¶¶ 44-45, 270 Wis. 2d 535, 678 N.W.2d 197. Furthermore, similarly to the situation in this case, a sentence previously imposed is presumed to be the maximum that could be imposed when a defendant is resentenced following a successful attack on the first sentence. *State v. Sturdivant*, 2009 WI App 5, ¶ 8, 316 Wis. 2d 197, 763 N.W.2d 185.

The remedy of reducing a defendant's sentence to the maximum he is told he could get does not change the maximum statutory penalty. It simply limits the court's discretion to impose a sentence within the range established by the legislature. This might have the practical effect of lowering the available maximum penalty, but it does not actually change the maximum.

Finley contends that reduction of a sentence because of a miscalculation would result in the legislature's authority being ignored, the victim's input not being fully considered and the court's original sentencing intent being thwarted. Brief for Defendant-Appellant at 15.

If it would do any of these things, it would be to much less an extent than withdrawing a plea, resulting in the

sentence being completely erased and the conviction along with it.

The only remedy that avoids the problems raised by Finley is allowing his original maximum sentence to stand.

Contrary to Finley's view, Brief for Defendant-Appellant at 16-17, this case is not about the inherent authority of a circuit court to modify a sentence. This case is about the authority of the supreme court to fashion a remedy that involves modification of a sentence.

In any event, the remedy of reducing a sentence when the defendant has been incorrectly advised of, but sentenced to, the actual maximum fits all three of the instances where the circuit court has inherent authority to modify a sentence. *See generally State v. Dowdy*, 2010 WI App 158, ¶ 12, 330 Wis. 2d 444, 792 N.W.2d 230. Reducing the sentence corrects a sentence that is illegal because it exceeds the maximum the defendant was told he could get. Reduction is based on a new factor, i.e., the correct maximum which was unknown or overlooked at the time of the original sentence. And reduction corrects a sentence that is unduly harsh because the defendant was not told he could get a sentence that severe.

Finley criticizes the cases from other jurisdictions cited by the State because most of them involve a failure to inform the defendant about a special parole term that does not affect the period of incarceration unless the defendant violates his parole. Brief for Defendant-Appellant at 18.

If Finley means to suggest that in Wisconsin the court does not have to correctly inform the defendant about the extended supervision portion of a bifurcated sentence, but only the period of incarceration, he cites no authority to support such a rule.

Finley also says that the State's federal cases are inapposite because they rely on Fed. R. Crim. P. 11, which is subject to a harmless error test that is not sanctioned by *Bangert*.

But this court had this to say about Rule 11 in *Cross*:

> Finally, we see an analogue in Federal Rule of Criminal Procedure 11, which governs pleas. The rule specifies that a court accepting a guilty plea must inform the defendant and ensure the defendant understands "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed. R. Crim. P. 11(b)(1)(H). Unlike the Wisconsin Statutes, the federal rules specifically require that the defendant know and understand the "maximum" penalty. Yet, Rule 11(h) states that any "variance from the requirements of the rule is harmless error if it does not affect substantial rights." By clear implication, the failure of the defendant to know and understand the precise maximum is subject to a harmless error test. It is not a per se violation of the defendant's due process rights.
>
> It is clear, then, that a defendant's due process rights are not necessarily violated when he is incorrectly informed of the maximum potential imprisonment.

Cross, 326 Wis. 2d 492, ¶¶ 36-37.

Finley's contention that only the remedy of plea withdrawal will "incentivize" courts to pay attention at plea proceedings, Brief for Defendant-Appellant at 20, conflicts with his previous argument that reduction of a sentence because of a miscalculation would result in the court's original sentencing intent being thwarted. Brief for Defendant-Appellant at 15.

Having their original sentencing intent thwarted would likely give most judges an incentive to get the maximum penalties right in future cases.

Finley argues that a defendant cannot assess the sentence he may actually get when he is misinformed about the maximum. Brief for Defendant-Appellant at 21-22.

Although a decision to plead guilty may be influenced by many imponderables, there is only one ponderable involved in this case, i.e., the maximum penalty that could be imposed on a defendant who admits his guilt. A defendant is entitled to know only the maximum sentence he could possibly get, not the lesser sentence he will actually get. *See Cross*, 326 Wis. 2d 492, ¶ 29 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

Moreover, under Finley's hypothetical, if a defendant does not think he will actually get a sentence as severe as the sentence he is told is the maximum, he would have the same thoughts where the maximum sentence is even greater than the lesser incorrect maximum he did not think he would get.

Finley's argument about the expected sentence actually underscores the State's concern that a defendant will attempt to use misinformation about the maximum penalty as an excuse to withdraw a plea when the real reason he wants to withdraw the plea is that he did not get the particular sentence below the maximum that he thought he would get.

United States v. Padilla, 23 F.3d 1220 (7th Cir. 1994), which Finley cites, Brief for Defendant-Appellant at 23, is plainly inapposite here. The error in that case was the failure to advise the defendant about a mandatory minimum penalty, which could not be corrected by reducing the defendant's sentence below the penalty that had to be imposed by law.

Here, the maximum sentence is not mandatory and can be reduced to any penalty in the range below the maximum.

Finley's reliance on *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), is also misplaced because the error there, i.e., imposition of a sentence that was not authorized by law, could not be corrected by reducing a sentence that was void in the first place.

Finley complains that a remedy that calls for reduction of the sentence in most cases but allows for withdrawal of a plea in exceptional cases is unworkable. Brief for Defendant-Appellant at 27-28.

Yet, this court has repeatedly indicated that reversal in the interest of justice in exceptional cases is a workable test. *See, e.g., State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60; *State v. Burns*, 2011 WI 22, ¶ 25, 332 Wis. 2d 730, 798 N.W.2d 166; *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996). *See also Bangert*, 131 Wis. 2d at 292 (where either specific performance of a plea bargain or withdrawal of the plea is available as a remedy, the remedy chosen is in the discretion of the court).

CONCLUSION

The entry of Finley's plea was defective because he was misadvised that the maximum penalty was lower than the actual statutory maximum, and he was then sentenced to the actual maximum he did not know he could get. The question on this appeal involves the proper remedy for this error.

The State respectfully submits that the proper remedy is reduction of Finley's sentence to the maximum he was told and believed he could get when he entered his plea.

When Finley entered his plea, he was told he could be given a sentence of as much as 19.5 years. Finley knowingly took the risk that he could be sentenced to 19.5 years in prison when he entered his plea. Finley has not satisfactorily explained why it would be unfair in any way to correct the error in misinforming him about the maximum sentence by conforming his sentence to the sentence he was informed and believed he could get when he pleaded.

This remedy puts Finley back in exactly the position he believed he was in when he entered his plea without unnecessarily infringing on the interests of the State, the victim, and the witnesses in the finality of Finley's conviction.

It is therefore respectfully submitted that the decision of the court of appeals should be reversed, and that the judgment and order of the circuit court should be reinstated and affirmed.

Dated: March 16, 2016.

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 2,442 words.

Dated this 16th day of March, 2016.

_____

Thomas J. Balistreri
Assistant Attorney General

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