STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT X

Case No. XXXXAPXXXX-CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN SMITH,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
Entered in the Bay County Circuit Court,
The Honorable Grover Cleveland, Presiding

NO-MERIT BRIEF OF DEFENDANT-APPELLANT PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

ISSUES PRESENTED

1. Did the circuit court correctly deny the defendant's motion to suppress his statements?

2. Was the defendant's no contest plea knowingly, intelligently and voluntarily entered?

3. Did the circuit court misuse its discretion or otherwise err when it sentenced the defendant?

STATEMENT OF THE CASE AND FACTS

In this case, on August 13, 2009, the state filed a criminal complaint charging Mr. Smith with the following three counts: 1) party to a crime of first degree intentional homicide by use of a dangerous weapon, as a repeater, 2) party to a crime of attempted first degree intentional homicide by use of a dangerous weapon, as a repeater, and 3) party to a crime of armed robbery as a repeater. (1:1-11). The original complaint listed Joey Ramone as Mr. Smith's co-defendant. The state then filed an amended criminal complaint on August 19, 2009, adding another co-defendant, Enrique Iglesias. (8:1-12). On September 4, 2009, the state filed an information listing the same three counts in the criminal complaint, as well as six counts of false imprisonment, party to a crime, use of a dangerous weapon, as a repeater. (11:1-4). On January 20, 2011, the state filed an amended information listing the same nine counts in the original information. (74). On February 4, 2011, the state filed a second amended information listing two counts: 1) felony murder, party to a crime, in the commission of an armed robbery, repeater, and 2) first degree reckless injury, party to a crime, use of a dangerous weapon, as a repeater. (83).

According to the amended complaint, on July 26, 2009, Danny's, a bar, was robbed. (8). According to witnesses, two men robbed the bar, one with a gun, and one with a knife. (*Id.* at 4-5). The man with the gun, later identified as Joey Ramone, shot and killed a Danny's employee. (*Id.* at 3). Mr. Ramone also shot the manager, who lived. (*Id.* at 5).

During the police investigation, a witness told police that he heard two professed gang members, known as "Doog" and "Flip" talking about robbing Danny's. (*Id.*).

Eventually, police talked to Mr. Smith's brother, Robert Smith, who told police his brother is known as "Doog." (*Id*. at 6). Robert said his brother denied committing the robbery but said he was smoking a blunt in a church parking lot during the robbery and after the robbery they ran towards the train tracks and fled the area. (*Id.*).

A man named John Waters told the police that Mr. Ramone and Mr. Smith who entered Danny's and committed the robbery. (*Id.* at 8). Mr. Waters and his girlfriend were involved in driving these men after the robbery. (*Id.*). About a week later, the girlfriend told the police that there was a third person involved, known as "Reaper." (*Id.*). Mr. Waters also made a supplemental statement to police, that "Reaper" was also involved, and that it was "Reaper" who he saw with Mr. Ramone in his garage after the robbery, not Mr. Smith. (*Id.*). Both Mr. Waters and his girlfriend told the police they did not mention "Reaper" being involved at first, because he had threatened them. (*Id.*).

The police also talked to Mr. Smith. (*Id.* at 8-9). He said he was not near Danny's when the robbery occurred and that he had "nothing to do with it."(*Id.* at 9). Mr. Smith said he received a phone call from Mr. Waters stating that the

robbery went bad and they all met in Mr. Waters's garage. (*Id.*). Then, Mr. Smith, Mr. Waters and his girlfriend, Mr. Ramone, and "Reaper," who was later identified as Enrique Iglesias, got into a car and Mr. Iglesias was dropped off. (*Id.*). The girlfriend then took Mr. Smith and Mr. Ramone to a train station, but because they missed the train, they went to a motel. (*Id*.).

Police eventually spoke to Mr. Iglesias. (*Id.* at 10-11). Mr. Iglesias told police that he and Mr. Smith robbed Danny's. (*Id.* at 11). Mr. Iglesias he was the one with the knife and Mr. Smith had the gun and shot the two males. (*Id.*).

A preliminary hearing took place on August 27, 2009. (108:1-103). Mr. Waters testified that a couple of weeks before the robbery Mr. Smith, Mr. Ramone and Mr. Iglesias were at Mr. Waters's house and were talking about robbing Danny's. (*Id.* at 64). Mr. Waters said Mr. Ramone got a gun and both Mr. Smith and Mr. Iglesias touched the gun. (*Id.*). Mr. Waters said that Mr. Smith did not go into Danny's, but that Mr. Smith was communicating via a walkie-talkie with Mr. Ramone before the robbery. (*Id.* at 94). However, Mr. Waters admitted that he never saw any walkie-talkies. (*Id.* at 99). Mr. Smith was the lookout, according to Mr. Ramone.

On December 14, 2009, defense counsel filed a motion to suppress Mr. Smith's statements to police. (21). Defense counsel asserted that Mr. Smith requested an attorney while being questioned, and although questioning ceased, the police did not contact the public defender's office. (21:2). Defense counsel also asserted that Mr. Smith's statements were coerced because the police used Mr. Smith's mother as a go-between to insist that Mr. Smith talk to the police. (*Id.*). And

lastly, defense counsel asserted the police conducted one interview of which there were no reports or evidence suggesting Miranda warnings were given. (*Id.*). The facts regarding these statements will be addressed in the argument below.

On February 4, 2011, Mr. Smith, who was represented by counsel, entered into a plea agreement, that he plead to the two counts in the second amended information and that the third count in the original information, party to a crime of armed robbery, as a repeater would be dismissed and read-in. (116:3). In addition, counts four through nine in the amended information were going to be dismissed. (*Id.* at 4). The sentencing recommendation was that the state retained a free hand to argue all facts and circumstances, but that it would recommend any prison time imposed on counts one and two to be concurrent to each other. (*Id.*) In addition, Mr. Smith agreed to testify against any of the co-defendants. (*Id.*) Mr. Smith accepted the plea agreement. (*Id.*)

The court accepted Mr. Smith's no contest pleas, pursuant to the plea agreement and ordered a presentence report. (*Id.* at 21-23).

At the sentencing hearing on December 2, 2011, the state followed the agreement stated on the record at the plea hearing. (117:9-10, 17, 22). Specifically, the state recommended 36 years of imprisonment on count one, and asked the court to make any sentence it imposed on count two concurrent to count one. (*Id.* at 22). Defense counsel asked the court to sentence Mr. Smith to 12-to-15 years of confinement followed by an unspecified term of extended supervision, and the sentences on both counts be concurrent. (*Id.* at 34). Mr. Smith exercised his right to allocution. (*Id.* at 34-35).

Ultimately, on count one, the court sentenced Mr. Smith to 50 years of imprisonment, consisting of 40 years of initial confinement, followed by 10 years of extended supervision. (*Id.* at 39). On count two, the court sentenced Mr. Smith to 25 years of imprisonment, consisting of 15 years of initial confinement, followed by 10 years of extended supervision, concurrent to count one.(*Id.* at 40).

This is a no-merit brief filed in accordance with ***Anders v. California***, 386 U.S. 738 (1967) and Wis. Stat. Rule 809.32.

ARGUMENT

I. The Circuit Court Correctly Denied the Defendant's Motion to Suppress His Statements.

The first issue presented is whether the circuit court correctly denied Mr. Smith's motion to suppress his statements. Counsel believes there is no potential merit to a challenge to the admissibility of Mr. Smith's statements to the police.

The court held a hearing on the motion to suppress Mr. Smith's statements on March 4, 2010, which was continued on April 16, 2010. (113; 123). At the hearing on March 4, 2010, the state presented waivers of rights and agreement to speak to officers, signed by Mr. Smith before each interview. (*Id.* at 39).

In addition, the state presented testimony from Detective James Friendly, who had the lead in interviewing Mr. Smith. (*Id.* at 78-102). Detective Friendly testified that he read Mr. Smith his constitutional rights from a form and Mr. Smith signed the waiver on each of the three occasions the

detective talked to Mr. Smith. (*Id.* at 79-95). During the second interview with Mr. Smith, after ten minutes Mr. Smith asked for an attorney and the detective ceased the interview. (*Id.* at 91). Then, later that day, Mr. Smith requested to talk to the detective and the detective met with Mr. Smith for the third time. (*Id.* at 92). Detective Cheeseman was also present at that time. (*Id.* at 93). Detective Friendly read Mr. Smith "his rights again off a waiver of rights form" and Mr. Smith signed the form. (*Id.* at 93-94). All three interviews were audio and visually recorded. Detective Friendly typed a two-page statement, which Mr. Smith signed, based on the third interview. (*Id.* at 97-99). Mr. Smith did not request an attorney during the course of Detective Friendly taking the statement. (*Id*. at 102).

Mr. Smith's mother also testified at the motion hearing on March 4, 2010. (*Id.* at 125-151). She testified that the police came to her house and told her she should speak to her son and that the police thought he was not guilty, but that they needed to speak to him. (*Id.* at 128). She testified that she talked to her son for one-and-a-half to two hours at the police station. (*Id.*). She told her son to talk to the police and she wanted her son to turn himself in. (*Id.* at 131,139). She also testified that her other son was communicating with the police to get Mr. Smith to turn himself in. (*Id*. at 142).

The motion hearing was continued on April 16, 2010. Detective Cheeseman testified that Mr. Smith wanted to talk to his mom after the second interview and that was the reason they brought her to the police department. (123:26-28). Detective Cheeseman said he did not tell Ms. Smith's mother to tell Mr. Smith anything nor did he tell her to tell Mr. Smith that he "needed to cooperate or anything to that effect." (*Id.* at 30-31).

Detective Cheeseman also testified that he talked to Mr. Smith a fourth time, for follow-up, on July 30th, for ten to fifteen minutes without advising him of his Miranda warnings. (*Id.* at 40). The state told the court it did not intend to introduce statements from that fourth interview into evidence. (*Id*. at 42).

After hearing argument by both parties, the circuit court denied the motion to suppress Mr. Smith 's statements. (*Id.* at 50-53). The court concluded that Mr. Smith was advised of his Miranda rights and "freely, voluntarily, and knowingly" gave up his rights and spoke to officers. (*Id.* at 51). The court also concluded that when Mr. Smith requested an attorney, that request was honored and contact was reinitiated at the request of Mr. Smith. (*Id.*). The circuit court further concluded that there was no misconduct by the police in obtaining the statements, and that the state met its burden of proof as to the voluntariness of the statements. (*Id*. at 53).

In reviewing the voluntariness of a statement, the court examines the application of constitutional principles to historical facts. ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. This court defers to the circuit court's findings of fact. ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). The application of the law to those facts is a question of law this court reviews independently. ***Id.***

A defendant's statement is voluntary if it is:

> the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.

Hoppe, 261 Wis. 2d 294, ¶36.

"The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Id.***, ¶37. The court applies a totality of the circumstances test to decide whether a defendant's statement is voluntary. ***Id.***, ¶38.

Under this case law, and given the evidence presented at the suppression hearing, counsel is of the view that there is no merit to the argument that Mr. Smith's statements were coerced, or the product of improper pressure.

II. The Plea Was Entered Knowingly, Voluntarily and Intelligently.

The second issue presented is whether Mr. Smith's pleas were knowingly and voluntarily entered. Counsel has determined that any claim that the pleas were not knowingly and voluntarily entered would be without arguable merit.

A guilty plea, voluntarily and understandingly made, waives all non-jurisdictional defects and defenses. ***Belcher v. State***, 42 Wis. 2d 299, 308-09, 166 N.W.2d 211, 216 (1969). This record discloses no jurisdictional defects, and undersigned counsel is not aware of any jurisdictional grounds for challenging the pleas in this case. And, the record made at the plea hearings shows that Mr. Smith's pleas were knowing and voluntary.

In order to withdraw a guilty or no-contest plea after sentencing, the defendant must prove by clear and convincing evidence that plea withdrawal is necessary to correct a "manifest injustice." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. In order to satisfy due process, a guilty or no contest plea must be entered

knowingly, voluntarily and intelligently. ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969); ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). When a plea is not knowingly, voluntarily and intelligently entered, a manifest injustice has occurred, and the defendant is entitled to withdraw the plea as a matter of right. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997).

The question whether a plea was knowingly and intelligently entered presents a question of constitutional fact. ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199. Although factual findings are not disturbed unless clearly erroneous, the appellate court reviews independently the question whether the plea satisfies the constitutional standard. ***Id***.

Relying upon Wis. Stat. § 971.08, ***Bangert*** and other case law, the supreme court has directed courts to address the defendant personally during a plea hearing and:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;

> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense (or offenses) with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (footnotes omitted).

A court may use a completed plea questionnaire form as a tool to ensure that the defendant's plea is knowingly and voluntarily entered, but the court may not rely entirely on the questionnaire as a substitute for "a substantive in-court plea colloquy." ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794. Rather, "the plea hearing transcript

must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in ***Brown***." ***Id***.

Here, the transcript of the plea hearing held on February 4, 2011, shows that the court engaged in a personal colloquy satisfying the duties listed in ***Brown***.

As to Mr. Smith's comprehension, the court ascertained that Mr. Smith was 25 years old and had eight years of schooling. (116:6). Although Mr. Smith said he has trouble writing, he said he can read English. (*Id.* at 6-7). The court asked Mr. Smith if his attorneys went over all of the information with him, including the information, to the plea agreement, to the plea questionnaire, and if they answered any questions he had. (*Id.* at 7). Mr. Smith said yes. (*Id.*). Mr. Smith said he was a United States citizen. (*Id.*). Mr. Smith also told the court he had not any alcohol, medication, or drugs within the last 24 hours and was not being treated for a mental illness. (*Id.*).

Because Mr. Smith was represented by counsel at the plea hearing, the advisements in ***Brown*** about a defendant's right to an attorney did not pertain to Mr. Smith's plea hearing. Moreover, Mr. Smith said he was satisfied with the assistance he had received from his attorneys. (*Id.* at 14).

The court referred to a sheet that was attached to the plea questionnaire, which listed the elements of the two offenses Mr. Smith was pleading to. (*Id.* at 9). Mr. Smith said he initialed the elements for each charge and his attorneys went over each element with him. (*Id.*). The court then went through the elements of each offense with Mr. Smith, including the party-to-a-crime elements for each offense and the dangerous weapon elements applicable to count two. (*Id.* at 10-13). Mr. Smith said he understood each element. (*Id.*). Due to his understanding of the elements of the offenses, Mr.

Smith would not be able to meet his burden under ***State v. Bangert***, 131 Wis. 2d at 267, that he did not know or understand the elements.

The court also explained the repeater allegations, telling Mr. Smith that the second amended information stated he was convicted of a class E felony, aggravated battery, in Cook County, Illinois, on or about January 20, 2005. (*Id.* at 6). Mr. Smith said that information was correct and he was convicted of that felony. (*Id*.).

The court informed Mr. Smith about the range of punishments he was facing and the direct consequences of his plea. (*Id.* at 15-18). Specifically, as to the range of punishments, the court informed Mr. Smith that the maximum penalty for count one, felony murder as a party to a crime, in the commission of an armed robbery, as a repeater was 61 years of imprisonment, consisting of 46 years of initial confinement and 15 years of extended supervision and/or a $100,000 fine. (*Id.* at 16-17). For count two, first degree reckless injury, party to a crime, use of a dangerous weapon, as a repeater, the court informed Mr. Smith that the maximum penalty was 36 years of imprisonment, consisting of 26 years of initial confinement and 10 years of extended supervision and/or a $100,000 fine. (*Id.* at 17). The court's descriptions of the maximum penalties were correct. Following the court's explanation of the penalties, Mr. Smith said he understood. (*Id.*).

The court also told Mr. Smith that, at sentencing, it could consider count three, which was dismissed and read-in. (*Id*. at 18). Mr. Smith said he understood. (*Id*.).

The court informed Mr. Smith that it was not bound by the recommendation pursuant to the plea agreement and it could sentence Mr. Smith to the maximum penalty for each

count, satisfying its duty under ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. (*Id.* at 18; App. 125). Mr. Smith said he understood. (*Id*.).

The court also reviewed with Mr. Smith the constitutional rights that he was giving up by pleading no contest. The court then explained the rights, asked Mr. Smith if he understood those rights and Mr. Smith answered affirmatively. (*Id.* at 7-9).

The court asked Mr. Smith if he had been promised anything besides the plea agreement or if he was forced in anyway to enter his no contest pleas. Mr. Smith said no. (*Id.* at 5).

As to a factual basis for the offense, Mr. Smith agreed that the court could rely on the factual statement in the criminal complaint as well as facts adduced at the preliminary hearing. (*Id.* at 14-15). The probable cause section of the complaint and the evidence elicited at the preliminary hearing are described in this brief's fact section, above.

The court found Mr. Smith's pleas to be knowing, voluntary, and intelligent and found a factual basis existed in the criminal complaint and testimony from the preliminary hearing. (116:21-23). The court then accepted Mr. Smith's no-contest pleas. (*Id.*).

The record shows that the court complied with its duties as outlined in ***Brown*** to establish that Mr. Smith's no-contest pleas were entered knowingly, voluntarily and intelligently.

Any claim that the pleas were not knowingly, voluntarily and intelligently entered, or that there was some

other manifest injustice in connection with Mr. Smith's no-contest pleas would be frivolous and without arguable merit.

III. The Circuit Court Did Not Misuse Its Discretion or Otherwise Err When It Sentenced the Defendant.

Any argument challenging the sentence imposed would be frivolous and without arguable merit. The sentence is legal and was imposed on the basis of accurate information. The sentence cannot be challenged as unduly harsh or as an erroneous exercise of discretion. Finally, there is no basis for seeking a sentence modification.

There is a strong public policy against interfering with the sentencing decision of a court and an equally strong presumption that the sentencing court acted reasonably. ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. The defendant bears the burden of showing that there was some unreasonable or unjustifiable basis for the sentence imposed. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). An appellate court has a duty to affirm a sentence if facts of record show it is sustainable as a proper exercise of discretion. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

The sentence imposed here is within the maximum set by the legislature. Having been convicted of one count of felony murder as a party to a crime, in the commission of an armed robbery, as a repeater, Mr. Smith was facing a maximum penalty of 61 years of imprisonment, of which 46 years could be ordered as initial confinement and 15 years as extended supervision and/or a $100,000 fine. *See* Wis. Stat. §§ 940.03, 943.32(2), 939.50(3)(c), & 939.62(1)(c). In addition, having been convicted of one count of first degree reckless injury, party to a crime, use of a dangerous weapon, as a repeater, Mr. Smith was facing a maximum penalty of 36

years of imprisonment, consisting of 26 years of initial confinement and 10 years of extended supervision and/or a $100,000 fine. *See* Wis. Stat. §§ 940.23(1)(a), 939.63(1)(b) 939.62(1)(c) & 939.50(3)(d).

Here, on count one, the court imposed 50 years of imprisonment, consisting of 40 years of initial confinement, followed by 10 years of extended supervision. (*Id.* at 39). On count two, the court sentenced Mr. Smith to 25 years of imprisonment, consisting of 15 years of initial confinement, followed by 10 years of extended supervision, concurrent to count one. (*Id.* at 40). This sentence is less than the maximum penalty. The terms of confinement and supervision were within the statutory maximum.

To properly exercise its discretion at sentencing, the court must explain the reasons for the sentence imposed. ***Gallion***, 270 Wis. 2d 535, ¶¶38-39 (citing ***McCleary v. State***, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971)).A sentencing decision should be based primarily on the following factors: the gravity of the offense, the character of the defendant, and the need for protection of the public. ***State v. Klubertanz***, 2006 WI App 71, ¶18, 291 Wis. 2d 751, 713 N.W.2d 116. The sentencing court may determine the amount of weight to give a particular factor in the case before it. ***Stenzel***, 276 Wis. 2d 224, ¶ 9.

The record shows that the court, when deciding upon the sentence to impose, considered the seriousness of the offense, the character of the defendant and the need to protect the public. (117:35-41). Any claim that the court erred in its exercise of discretion would be without arguable merit.

In terms of the character of the defendant, the court noted that Mr. Smith was 25 years old. (*Id.* at 36). The court discussed Mr. Smith's prior record, both juvenile and adult,

and noted the various times Mr. Smith had already been sent to prison. (*Id*. at 37-38). The court also mentioned Mr. Smith's gang involvement. (*Id.* at 38-39). The court discussed Mr. Smith's positive family and short employment history. (*Id.*). The court stated that Mr. Smith did not have any mental or emotional issues and has had some drug and alcohol issues. (*Id.* at 39).

The court also addressed the protection of the public and the seriousness of the offenses. The court stated this was a "horrendous" case, that the victim's family lost their son forever and the court did not know how the other victim lived, but stated that victim would "have problems that are never going to go away, physically, emotionally." (*Id.* at 37). The court also said that Mr. Smith was "a player in this case, where somebody ended up dying and somebody ended up receiving a major injury from a gunshot wound." (*Id*. at 36). Furthermore, the court said that the crimes were "vicious," "there was a weapon," "somebody died," and asked "What other worse facts can I say?" (*Id.* at 39). The court noted that Mr. Smith's role might not have been the same as Mr. Ramone's, but the effect was the same. (*Id*. at 37).

The court ordered the restitution that was requested, $178,046.27, joint and several with the other co-defendants, to be paid during Mr. Smith's period of supervision. (*Id.* at 40). The court granted Mr. Smith 855 days of presentence credit. (*Id.* at 42).

The court did not make Mr. Smith eligible for the Challenge Incarceration Program or the Earned Release Program because he was statutorily ineligible. (*Id.* at 25).

Any claim that the sentence imposed was unduly harsh or excessive, within the meaning of the legal standard, would

also be without arguable merit. To prevail on such a claim, the defendant must show that the sentence "'is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Stenzel***, 276 Wis. 2d 224, ¶21 (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). This court has said that a sentence which is within the limits of the maximum sentence, as is Mr. Smith's, does not violate the judgment of reasonable people. ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

A defendant also has a due process right to be sentenced on the basis of accurate information. ***United States v. Tucker***, 404 U.S. 443, 448 (1972). To establish a due process violation at sentencing, the defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied upon the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. The record does not reveal any inaccurate information that the court relied on at sentencing. Defense counsel did inform the court about a few factual errors in the presentence investigation report. (117:8-9).

Finally, undersigned counsel is not aware of any information qualifying as a "new factor" that could serve as grounds for seeking a sentence modification. *See* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828 (new factor defined as a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of sentencing, either because it was not then in existence or it was unknowingly overlooked by all of the parties).

CONCLUSION

For all the reasons set forth above, undersigned counsel respectfully requests, pursuant to Wis. Stat. Rule 809.32, that this court enter an order relieving her of further representation of the defendant in this matter.

Dated this 11th day of January, 2013.

Respectfully submitted,

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATION IN COMPLIANCE WITH 809.32(1)(b)

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 11th day of January, 2013.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 11th day of January, 2013.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant