STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

WILLIAM F. BOKENYI,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE MOLLY E. GALEWYRICK, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE ISSUES

1. Did the prosecutor's sentencing argument breach the plea agreement by undermining the agreed-upon sentencing recommendation?

The circuit court held that the prosecutor's remarks did not breach the plea agreement.

The court of appeals held that three of the prosecutor's statements breached the plea agreement.

2. Was defense counsel ineffective for failing to object to the alleged breach of the plea agreement?

The circuit court did not address this issue.

The court of appeals held that defense counsel's failure to recognize the State's breach fell below an objective standard of reasonableness and that prejudice was presumed. The court of appeals additionally held that defense counsel was ineffective under *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, for not consulting with the defendant when foregoing objections to the prosecutor's remarks.

3. The court of appeals held in *Sprang* that when defense counsel does not consult with the defendant when foregoing an objection to a breach of the plea agreement, counsel performs deficiently because that is "tantamount to entering a renegotiated plea agreement without [the defendant's] knowledge or consent." *Id.*, ¶29.

Should this court overrule the court of appeals' decision in *Sprang*?

The circuit court did not address this issue.

The court of appeals held that it was bound by *Sprang* under *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997).

STATEMENT OF THE CASE

This case is before the supreme court on a petition by the State of Wisconsin seeking review of an unpublished decision of the court of appeals. The court of appeals' decision reversed a judgment of conviction and an order denying postconviction relief entered in Polk County Circuit Court.

Defendant-appellant William F. Bokenyi was charged initially with ten criminal counts: first-degree reckless endangerment; two counts of felony intimidation of a victim; failure to comply with an officer's attempt to take a person into custody; three counts of attempted battery of a peace officer; disorderly conduct as an act of domestic abuse; resisting an officer; and negligent handling of a weapon (1:1-2; 7:1-2). The charges arose from an incident in which Bokenyi repeatedly threatened to kill his wife and nine-year-old son, who barricaded themselves in a bedroom and called 911 (1:2-4). Bokenyi's wife reported that as Bokenyi tried to break down the door, he repeatedly asked them, "which one of you should die first" (1:3-4).

When the first responding officer arrived, he identified himself and told Bokenyi to open the door (1:3). Bokenyi responded, "Fuck you, you will have to come in and kill me" (*id.*). Bokenyi then opened the door, holding two knives in his hand (*id.*). The officer ordered Bokenyi to drop the knives and get on the floor; Bokenyi responded with another obscenity and slammed the door (*id.*). The officer heard Bokenyi yell, "Fuck you, I'm going to kill you woman" (*id.*).

Two other officers arrived and police kicked in the door (*id.*). Bokenyi approached them with two knives in his hands (*id.*). After Bokenyi ignored the officers' command to drop the knives, one of the officers fired his Taser (*id.*). Although the Taser's probes struck Bokenyi in the chest and the Taser activated, it appeared to have no effect on him (*id.*). After Bokenyi took a step towards the officers, one of them shot Bokenyi with his service weapon (*id.*).

Pursuant to a plea agreement, Bokenyi pled guilty to first-degree recklessly endangering safety, felony intimidation of a victim, and failure to comply with an officer's attempt to take him into custody, and the other counts were dismissed and read in (34:3; 61:17). The State agreed that its sentencing recommendation "would be capped . . . at the high end range of the PSI" (61:3).

The PSI recommended three to four years of initial confinement and three to four years of extended supervision on the reckless endangerment charge (25:13). On the other two counts, the PSI recommended that the court withhold sentence and place Bokenyi on probation for five and three years, respectively, concurrent

with each other and consecutive to the sentence on the first count (*id.*).

At the sentencing hearing, prior to making his sentencing argument, the prosecutor read a letter Bokenyi's wife had written, which stated:

> It has been a long wait for this day, yet I'm still nervous and scared. I want [Bokenyi] to serve time due to him that justifies his behavior. But also I want him to get help while he is in prison. Myself and our son … are afraid for the day [Bokenyi] will get let out because we are unsure of what he would be capable of doing. I prefer that we could live fearlessly while our son . . . [who is] only 11 is growing and in school.

(60:5; Pet-Ap. 119.)

In his sentencing argument, the prosecutor discussed the seriousness of the offenses, describing in detail Bokenyi's conduct on the night the offenses took place (60:6-7; Pet-Ap. 120-21. The prosecutor then stated:

> The three convictions that he is being sentenced on today [are] a first degree reckless endangerment, a 12 and a half year felony, and intimidation of a victim, a 10 year felony[,] and failure to comply with a law enforcement officer, a 3 and a half year felony. I think the felony classifications obviously indicate the extreme seriousness of these offenses that night. But to be honest, I don't think they really do them justice in terms of how serious this was.

(60:8; Pet-Ap. 122.)

The prosecutor noted that Bokenyi had a history of "homicidal thoughts or ideations" toward his wife and son (*id*.). He said that "although these are three felonies and these are very serious crimes, I don't think to be honest with you that they even come close to telling what could have happened that night . . . and just in and of itself the seriousness of what did happen that night." (60:8-9; Pet-Ap. 122-23). The prosecutor stated that Bokenyi's offenses were extremely serious because the incident happened in front of couple's child and involved weapons (60:9; Pet-Ap. 123).

The prosecutor then discussed Bokenyi's character (*id*.). He noted that Bokenyi had behaved similarly in a 1996 incident (*id*). He also discussed Bokenyi's history of mental illness, which included suicidal and homicidal thoughts and hospitalizations (60:11; Pet-Ap. 125). The prosecutor said that what was most concerning about Bokenyi's character was that "not only does he not . . . seem to have any remorse, but he seems to have absolutely no clue as to the impact that this offense has had on his wife and child" (60:12; Pet-Ap. 126).

The prosecutor argued that when considering the interests of rehabilitation and the need to protect the public, the protection of the public should be paramount (60:13; Pet-Ap. 127). He asked the court to impose a sentence that would protect Bokenyi's wife and son. The prosecutor stated:

> They have a right, as she says in her letter, to live fearlessly while their son is growing up and in school. She has a right to live not

> in fear that Mr. Bokenyi, when he gets out, is going to come looking for her and to finish what he's attempted at least one other time before.

(*Id.*)

The prosecutor also described an incident that occurred while Bokenyi was in presentence custody:

> What is again perhaps the most frightening for me is to read an incident report from the Polk County Jail on February 11th of 2011. A jailer by the name of Laurie Flandrena, worked a long time at the jail, indicates that on the above date I was doing med pass in the maximum part of the jail. Inmate Bokenyi came out for the evening meds and I asked him how he was doing. He stated okay, but he was still here and that he could not wait for the time that he was out of here so he could "shoot up some cops." I asked him why he would do that. He said they all deserved it. And making conversations with him I stated that wouldn't he rather just get out and enjoy being out [than] risk coming back in. He stated that next time he would not be coming back, and he would also shoot anyone who got in his way while he was shooting at the cops.

(60:14; Pet-Ap. 128.) He concluded by stating that "[t]here is an absolute necessity to protect the public from William Bokenyi" (*id.*).

The prosecutor then recommended, consistent with PSI's recommendation, that the court sentence Bokenyi to four years of initial confinement and four years of extended supervision on the first-degree recklessly

endangering safety conviction (*id.*). On the two remaining counts, the prosecutor recommended that the court withhold sentence and impose the terms of supervision consistent that were recommended in the PSI (60:15; Pet-Ap. 129).

The court sentenced Bokenyi to concurrent terms of imprisonment on each of the three counts (60:31-32). On the first-degree recklessly endangering safety count, the court sentenced him to seven years and five months of initial confinement and five years of extended supervision (60:31). The court imposed concurrent sentences of five years of initial confinement and five years of extended supervision on the intimidation of a victim count, and one year of confinement and one year of extended supervision on the charge of failing to comply with an officer (60:31-32).

Postconviction proceedings. Bokenyi filed a postconviction motion for resentencing in which he argued that the prosecutor's sentencing remarks breached the plea agreement by arguing 1) that "[t]he maximum penalties don't do justice to the seriousness of the crimes" (45:5); 2) that "[t]he victims should be able to live without fear of Mr. Bokenyi until their son, age 11, is grown and out of school" (45:6); and 3) that "'Mr. Bokenyi said he intended to 'shoot up some cops' when released" (45:8). He also argued that his trial counsel was ineffective for failing to object to those alleged breaches and, citing *Sprang*, ¶¶28-274 Wis. 2d 784, 29, that counsel was ineffective for failing to consult with him about whether to object (45:9).

At the hearing on the postconviction motion, Bokenyi's lawyer testified he did not object to the prosecutor's statements because he did not think that any part of the prosecutor's argument breached the plea agreement and, therefore, that there was no legal basis for objecting (65:15). He acknowledged that he had not discussed with Bokenyi the possibility of objecting (*id.*).

The circuit court held that the prosecutor's comments did not constitute a material and substantial breach of the plea agreement (65:53-54; Pet-Ap. 139-40). The court said that had defense counsel objected to the prosecutor's remarks, it would not have sustained the objection (65:46; Pet-Ap. 132). With respect to the prosecutor's statement that penalties do not do justice to the seriousness of the crimes, the court said that the prosecutor was "not talking about the 26 years not doing justice to the crimes. He's talking about the classification system, the A, B, C, D, E, F, G, H, I" (65:48; Pet-Ap. 134). The court acknowledged that the prosecutor could have made the point more artfully, but concluded that it did not "think he's saying oh, good Lord, Judge, the total potential penalty is 26 years and even that doesn't do justice to Mr. Bokenyi's conduct. That's not what he's saying" (65:49; Pet-Ap. 135).

Regarding the prosecutor's reference to Bokenyi's wife's wishes, the court stated that it was proper for the prosecutor to convey the victim's wishes (65:50; Pet-Ap. 136). It said that "restating what the victim's rights are without augmenting them in some fashion, without increasing them in some way, like I absolutely

agree with Mrs. Bokenyi that this sentence needs to provide her and her son with a peace of mind that he won't be out until their son is an adult, he didn't do that" (65:51; Pet-Ap. 137). The court concluded that "[i]t's a relatively short amount of the total sentencing argument and I just don't think it gets to the level of material and substantial" (*id.*).

With regard to the prosecutor's statement about Bokenyi's conduct in jail, the court held that the prosecutor was entitled to provide relevant negative information that had come to light after the plea agreement (65:52; Pet-Ap. 138). The court agreed that it would have been better had the prosecutor not described that information as being the "most frightening," but concluded that "it's hard for me to par[s]e out a couple of words from hundreds of words in a sentencing argument and conclude that this is a material and substantial breach" (*id.*).

Court of appeals decision. The court of appeals reversed. *State v. William F. Bokenyi*, no. 2012AP2257-CR, unpublished slip op. at ¶1 (Ct. App. June 18, 2013); Pet-Ap. 101-02. It held that the prosecutor's sentencing argument "crossed the line in three respects." *Id.*, ¶17; Pet-Ap. 108. "First, the prosecutor materially and substantially breached the plea agreement when he recited the maximum penalties for Bokenyi's convictions and then stated the felony classifications for those offenses 'indicate[d] the extreme seriousness of [the] offenses' but did not 'really do them justice in terms of how serious this was.'" *Id.* The court of appeals held that "[t]he clear message of the prosecutor's remarks was that the maximum penalties for Bokenyi's

convictions, which totaled twenty-six years of imprisonment, were insufficient given the seriousness of Bokenyi's conduct." *Id.*, ¶20; Pet-Ap. 109.

Second, the court of appeals held, "[t]he prosecutor also materially and substantially breached the plea agreement by endorsing Sherri's request that she and her son be able to live without fear of Bokenyi being released from custody until her son, who was then eleven years old, reached adulthood." *Id.*, ¶21; Pet-Ap. 109. The court of appeals noted that "as the prosecutor had previously reminded the court, Sherri's son was only eleven at the time of sentencing. Consequently, the court would have had to sentence Bokenyi to over six years of initial confinement to fulfill Sherri's request, without accounting for any presentence credit Bokenyi would receive." *Id.*, ¶22; Pet-Ap. 110. The court of appeals held that "[b]y endorsing Sherri's request, the prosecutor therefore undermined the State's recommendation that the court impose an eight-year sentence including only four years of initial confinement." *Id.*

Third, the court of appeals held, "the prosecutor materially and substantially breached the plea agreement during his discussion of the jail incident report from February 11, 2011, in which Bokenyi threatened to 'shoot up some cops' and anyone else who got in his way." *Id.*, ¶23; Pet-Ap. 110. The court held that the prosecutor "breached the plea agreement by editorializing about the jail incident report in a way that undercut the State's eight-year sentence recommendation." *Id.*

Having concluded that "the State materially and substantially breached its plea agreement with Bokenyi in three respects," the court next considered whether Bokenyi received ineffective assistance when his attorney failed to object to the breaches. *Id.*, ¶28; Pet-Ap. 113. The court noted that "[o]rdinarily, to prevail on an ineffective assistance claim, a defendant must establish both that counsel performed deficiently and that the deficient performance prejudiced the defense." *Id.*, ¶29; Pet-Ap. 113. However, the court held, "if a defendant establishes that his or her attorney performed deficiently by failing to object to a material and substantial breach of the plea agreement, we presume counsel's deficient performance was prejudicial." *Id.* (citing *State v. Howard*, 2001 WI App 137, ¶¶25-26, 246 Wis. 2d 475, 630 N.W.2d 244).

The court of appeals concluded that Bokenyi's trial attorney performed deficiently for two reasons. The court wrote:

> Bokenyi's trial attorney did not have a valid strategic reason for failing to object to the State's breaches of the plea agreement. Instead, counsel testified at the postconviction hearing he simply did not think the prosecutor's comments breached the agreement, so he did not believe he had any legal basis to make an objection. Counsel's failure to recognize the State's breaches fell below an objective standard of reasonableness. A long line of cases holds that the State breaches the plea agreement when its sentencing remarks undercut the bargained-for recommendation by insinuating that the defendant deserves a harsher sentence. While it may not always be clear whether a prosecutor's remarks breach the plea agreement, the prosecutor's

> remarks in this case were particularly egregious, and Bokenyi's attorney should have recognized that a breach occurred. We therefore conclude counsel performed deficiently by failing to object.
>
> In addition, Bokenyi's attorney did not consult with him about the decision not to object. The State concedes that, under *Sprang*, this constitutes deficient performance. *See Sprang*, 274 Wis. 2d 784, ¶¶27-29. The State argues *Sprang* was wrongly decided, but this court lacks the power to overrule, modify, or withdraw language from a previously published court of appeals' decision. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We are therefore bound by *Sprang*.

Id., ¶¶31-32 (some citations omitted); Pet-Ap. 114-15.

The court of appeals held that "[b]ecause Bokenyi's attorney performed deficiently by failing to object to the State's material and substantial breaches of the plea agreement, we presume counsel's deficient performance prejudiced Bokenyi." *Id.*, ¶33; Pet-Ap. 115. "Bokenyi therefore received ineffective assistance of counsel," the court concluded, "and he is entitled to resentencing before a different judge." *Id.* The court of appeals reversed the judgment of conviction and the order denying postconviction relief and remanded for resentencing. *Id.*

ARGUMENT

In its petition for review, the State identified three issues that it asked this court to review: 1) whether the prosecutor's sentencing

argument breached the plea agreement; 2) whether defense counsel was ineffective for failing to object to the alleged breach of the plea agreement; and 3) whether the court should overrule the court of appeals' decision in *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522. The petition stated that while the State disagreed with the court of appeals' resolution of the first two issues, those issues, standing alone, likely would not warrant supreme court review. The State asked the court to grant review to determine whether *Sprang* was wrongly decided because only this court has the authority to overrule, modify, or withdraw language from a published court of appeals decision. *Cook*, 208 Wis. 2d at 189-90.

Because the State views the issue of whether *Sprang* should remain the law in Wisconsin as the primary issue presented by this case, it will first argue that *Sprang* was wrongly decided and should be overruled. The State will then argue that the prosecutor's sentencing argument did not breach the plea agreement and that Bokenyi's counsel was not ineffective, therefore, for failing to object to the prosecutor's remarks. Finally, the State will argue that even if the court agrees with Bokenyi that the prosecutor's remarks crossed the fine line between permissible and impermissible argument, counsel did not perform deficiently by failing to object.

I. *SPRANG* WAS WRONGLY DECIDED AND SHOULD BE OVERRULED.

The court of appeals held in *Sprang* that even though defense counsel had valid strategic reasons for choosing not to object to sentencing remarks by the prosecutor that breached the plea agreement, counsel nevertheless performed deficiently by not consulting with the defendant about foregoing an objection. *See Sprang*, 274 Wis. 2d 784, ¶¶27-28. *Sprang* thus established a new rule that requires counsel to consult with the defendant about foregoing objections to a prosecutor's sentencing remarks regardless of whether counsel has a valid strategic reason not to object. *See State v. Liukonen*, 2004 WI App 157, ¶20, 276 Wis. 2d 64, 686 N.W.2d 689 (remanding for a *Machner* hearing to determine counsel's reason for not objecting and citing *Sprang* for the proposition that there was "a distinct ineffective assistance issue that may prove to be dispositive on remand. Even if Liukonen's trial counsel had a sufficient strategic reason for failing to object to the breach and, thus, did not perform deficiently, Liukonen may nonetheless be entitled to resentencing if his counsel did not consult with him about foregoing an objection."). For the reasons that follow, the court of appeals' reasoning in *Sprang* was faulty and its holding erroneous.

The issues before the court of appeals in *Sprang* were the same issues that were before the court of appeals in this case. Sprang, like Bokenyi, contended that the prosecutor's sentencing argument breached the plea

agreement by undercutting the sentencing recommendation that the State agreed to make. *See Sprang*, 274 Wis. 2d 784, ¶¶14-24. And because Sprang's lawyer, like Bokenyi's lawyer, failed to object to the prosecutor's remarks, the court of appeals also had to determine whether counsel was ineffective for failing to object. *See id.* at ¶12, 25-29.

The court of appeals held in *Sprang* that the prosecutor's remarks breached the plea agreement, *see id.*, ¶24, but it also held that defense counsel had valid strategic reasons for choosing not to object, *see id.*, ¶¶26- 27. A determination that counsel had a valid strategic reason for his or her actions ordinarily would lead a reviewing court to conclude that counsel did not perform deficiently. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984); *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983); *State v. Oswald*, 2000 WI App 2, ¶71, 232 Wis. 2d 62, 606 N.W.2d 207.

However, the court of appeals held in *Sprang* that counsel had performed deficiently because he did not consult with the defendant about foregoing an objection. The court explained:

> We agree with the State that defense counsel had valid strategic reasons for choosing not to object to the prosecutor's remarks. However, we have already concluded that those remarks constituted a breach of the negotiated plea agreement. When defense counsel made the decision to forego an objection, he did not consult with Sprang regarding this new development or seek Sprang's opinion in the matter. Thus, Sprang had no input into a situation where the original plea agreement, which limited

the State to arguing for conditions of probation, had morphed into one in which the State could suggest that the court impose a prison sentence without probation. As such, the plea agreement to which Sprang pled no longer existed.

That defense counsel failed to consult Sprang as to the new agreement violates the holding of *State v. Woods,* 173 Wis. 2d 129, 132-33, 141, 496 N.W.2d 144 (Ct. App. 1992). There, the defendant entered into plea agreement which permitted the State to seek a two-year sentence consecutive to an existing juvenile court placement. *Id.* at 133. However, just prior to sentencing and without the defendant's knowledge, defense counsel and the prosecutor agreed that the State would ask for a two- to three-year consecutive sentence. *Id.* at 135-36. The prosecutor did so at sentencing, and the defendant's attorney did not object to the prosecutor's sentencing request, which was contrary to the plea agreement entered into by the defendant. *Id.* at 135. On appeal, we held that a guilty plea is a personal right of the defendant and that the defendant was entitled to withdraw his plea on grounds that defense counsel's failure to object had resulted in a renegotiated plea agreement to which the defendant was never a party. *Id.* at 141. We held that "a defendant's attorney cannot renegotiate the plea without the knowledge or consent of his or her client." *Id.*

Here, the strategic decision by Sprang's defense counsel to forego an objection to the State's breach of the plea agreement without consulting Sprang was tantamount to entering a renegotiated plea agreement without Sprang's knowledge or consent. It is on this basis that we conclude that defense counsel's performance was deficient. Because counsel's deficient performance involved a breach of a plea

> agreement, Sprang is automatically prejudiced. *See Howard,* 246 Wis. 2d 475, ¶26.

Sprang, 274 Wis. 2d 784, ¶¶27-29 (footnotes omitted).

Thus, the court of appeals held in *Sprang* that although defense counsel did not perform deficiently by failing to object to the prosecutor's sentencing argument, counsel did perform deficiently by failing to consult with the defendant about foregoing an objection. *See id*., ¶29. The court reasoned that "the strategic decision by Sprang's defense counsel to forego an objection to the State's breach of the plea agreement without consulting Sprang was tantamount to entering a renegotiated plea agreement without Sprang's knowledge or consent." *Id*. The court considered that situation to be comparable to *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), a case in which the plea agreement called for the State to seek a two-year consecutive sentence but "just prior to sentencing and without the defendant's knowledge, defense counsel and the prosecutor agreed that the State would ask for a two- to three-year sentence." *Sprang*, 274 Wis. 2d 784, ¶28.

The State respectfully suggests that the comparison to *Woods* was flawed. In *Woods*, the defendant pled guilty to armed robbery pursuant to a plea agreement that required the State to recommend that Woods receive a two-year sentence that would run consecutive to his juvenile disposition. *Woods*, 173 Wis. 2d at 133. Prior to the sentencing hearing, the prosecutor

and defense counsel had a discussion in which the prosecutor told defense counsel that he did not know if the court would go along with his recommendation because of negative information about Woods in the presentence investigation report. *Id*. at 134-35. Defense counsel suggested that the prosecutor recommend a two- to three-year sentence because the court might be more willing to accept that recommendation. *Id*. at 135. The prosecutor told defense counsel that he would make that recommendation and defense counsel said that that was acceptable. *Id*.

At the sentencing hearing, the prosecutor recommended a sentence of two to three years consecutive to the juvenile disposition Woods was serving. *Id*. at 133. Neither Woods nor defense counsel objected. *Id*. at 134.

The court of appeals held that Woods was entitled to withdraw his guilty plea. *See id*. at 140-42. As relevant here, the court of appeals held that Woods' plea "was not knowing and voluntary because his attorney failed to inform him of the renegotiated sentence recommendation, and failed to gain Woods' agreement to that modification." *Id*. at 141. "Because the decision to plead guilty is a personal right of a defendant," the court held, "a defendant's attorney cannot renegotiate the plea without the knowledge and consent of his or her client." *Id*.

Woods involved an explicit renegotiation of the plea agreement by defense counsel. *Sprang*, in contrast, involved counsel's failure to object to the prosecutor's sentencing argument. Those situations are not comparable.

Because a plea agreement is analogous to a contract, courts draw upon contract principles in determining the rights of the parties to a plea agreement. *See State v. Bowers*, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. Under contract law, "the existence of an agreement which is in substitution or modification of a previous contract must be established in the same way as any other contract." *Kohlenberg v. American Plumbing Supply Co.,* 82 Wis. 2d 384, 393, 263 N.W.2d 496 (1978). "'No one will be held to have surrendered or modified any of his contract rights unless he is shown to have assented thereto in a manner that satisfies the requirements of a valid contract.'" *Id*. (quoted source omitted).

This court has long recognized that, as a matter of contract law, "the failure to object cannot be considered a modification of the contract." *Shearer v. Dunn County Farmers Mut. Ins. Co.,* 39 Wis. 2d 240, 247, 159 N.W.2d 89 (1968) (citing, inter alia, *Shakman v. United States Credit System Co*. 92 Wis. 366, 66 N.W. 528 (1896)); *see also Affordable Erecting, Inc. v. Neosho Trompler, Inc.,* 2006 WI 67, ¶43, 291 Wis. 2d 259, 715 N.W.2d 620 ("Although silence or non-action generally cannot be construed as acceptance, this court has previously concluded that when a party's silence leads others to believe that the offer has been accepted, acceptance may be inferred if the party's conduct causes others to change their position to their detriment, satisfying the elements of equitable estoppel.") (citations omitted).

A failure to object to a prosecutor's sentencing argument may result in a forfeiture of

the objection, which is why examining the issue under an ineffective assistance analysis is appropriate. *See State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 ("The absence of any objection warrants that we follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'") (quoted source omitted). The failure to object does not, however, constitute an affirmative assent to a modification of the plea agreement. And it is difficult, if not impossible, to imagine a situation in which a defendant's failure to object to a prosecutor's sentencing argument could cause the State to change its position to the State's detriment, implicating the doctrine of equitable estoppel.

The flaw in *Sprang*'s holding is particularly apparent when it is applied to the factual setting exemplified by this case, in which defense counsel's failure to object was based on his belief that there was no legal basis for an objection (65:15). It is one thing to require counsel to consult with the defendant when counsel recognizes that the prosecutor's argument arguably breached the plea agreement but decides to forego an objection. But when counsel does not object because he or she does not believe there is any legal basis for an objection, what is there to consult about with the defendant? Is counsel required to say to the defendant, after each of the prosecutor's statements in what may be a lengthy argument, "I don't see any basis for objecting to that remark, but I have to ask you whether you agree with my decision not to object"?

The burden that *Sprang* places on defense counsel is substantial. This court has held that when making its sentencing argument, "[t]he State must balance its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement." *State v. Williams*, 2002 WI 1, ¶44, 249 Wis. 2d 492, 637 N.W.2d 733. "Thus," the court has observed, "the State must walk 'a fine line' at a sentencing hearing." *Id.* (footnote omitted). "A prosecutor may convey information to the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement. That line is fine indeed." *Id.*

Throughout the prosecutor's sentencing argument, defense must continually evaluate whether any given remark has crossed that fine line and decide whether to object. If counsel faithfully adheres to *Sprang*'s command, every time the prosecutor makes a remark that counsel recognizes might arguably cross that line, counsel must stop the proceedings to consult with the defendant about whether to object. And, as this case illustrates, even if counsel does not recognize a potential argument, counsel still will be deemed to have performed deficiently if he or she fails to consult with the defendant.

Sprang imposes a significant and impractical burden on defense counsel at sentencing. It also makes it substantially easier for a defendant to prevail on a claim that counsel was ineffective at sentencing, contrary to the usual principles governing ineffective assistance claims, because it does not matter under *Sprang* if counsel had a valid strategic reason for not objecting. *Sprang* achieves both of those results

based on the legally unsound rationale that when defense counsel fails to object to a prosecutor's argument that undermines the agreed-upon sentencing recommendation, that is "tantamount to entering a renegotiated plea agreement." *Sprang*, 274 Wis. 2d 784, ¶29.

For these reasons, the State believes that *Sprang* was wrongly decided and that this court should overrule it.

II. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S SENTENCING ARGUMENT.

Bokenyi argued in the court of appeals that his lawyer was ineffective for failing to object to statements that the prosecutor made at sentencing that constituted an "end run" around the plea agreement. *See* Bokenyi's court of appeals brief at 7-9. For the reasons discussed below, the prosecutor's comments did not violate the plea agreement by covertly urging the circuit court to impose a sentence greater than the bargained-for recommendation. Because the failure to raise a meritless objection does not constitute ineffective representation, *see State v. Reynolds,* 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996), Bokenyi's attorney was not ineffective for failing to object to those comments. Moreover, even if the court were to agree with Bokenyi that the prosecutor's sentencing argument crossed the fine line between proper and improper argument, it should nevertheless conclude that Bokenyi has failed to show that

counsel's failure to object fell outside the range of competent representation.

A. Applicable legal standards.

Ineffective assistance of counsel. A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The trial court's findings of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the trial court's conclusions. *Id.*

Breach of plea agreement. An accused has a constitutional right to the enforcement of a negotiated plea agreement. *Williams,* 249 Wis. 2d 492, ¶37. An agreement by the State to recommend a particular sentence may induce an accused to give up the constitutional right to a jury trial. *Id*. Consequently, once an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights require fulfillment of the bargain. *Id*.

"End runs" around a plea agreement are prohibited. *Id.*, ¶42. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." *Id.* (source omitted).

An actionable breach must not be merely a technical breach; it must be a material and substantial breach. *Id.*, ¶38. A material and substantial breach is a violation of the terms of the plea agreement that defeats the benefit for which the accused bargained. *Id.* When the breach is material and substantial, a plea agreement may be vacated or an accused may be entitled to resentencing. *Id.*

An appellate court reviews the circuit court's determination of historical facts, such as the terms of the plea agreement and the State's conduct that allegedly constitutes a breach, under the clearly erroneous standard of review. *Id.*, ¶20. Whether the State's conduct constitutes a substantial and material breach of the plea agreement is a question of law that is reviewed de novo. *Id.*

B. The prosecutor's sentencing argument did not breach the plea agreement.

Under the plea agreement, the State agreed to cap its sentencing recommendation "at the high end range of the PSI" (61:3). At the sentencing hearing, the State requested that the court sentence Bokenyi to four years of initial

confinement and four years of extended supervision on the reckless endangerment count and asked the court to withhold sentence and place Bokenyi on probation on the other two counts (60:14-15; Pet-Ap. 128-29).

Bokenyi does not argue that the prosecutor's request for that sentence violated the plea agreement. Rather, he argues that the prosecutor made an "end run" around the agreed-upon recommendation by making comments during his sentencing argument that "impl[ied] that the court should impose more than the four years' confinement he was bound to recommend given the PSI's recommendation." Bokenyi's court of appeals brief at 9.

To understand why Bokenyi's argument lacks merit, it is necessary to view the prosecutor's remarks in the context of the entire sentencing hearing. *See Williams*, 249 Wis. 2d 492,¶ 46. The charges in this case arose from an incident in which Bokenyi threatened to kill his wife and nine-year-old son, who barricaded themselves in a bedroom and called 911 (1:2-4). When police arrived, Bokenyi refused to open the door, telling the officer who first arrived, "Fuck you, you will have to come in and kill me" (1:3). Bokenyi then opened the door, holding two knives in his hand (*id*.). The officer ordered Bokenyi to drop the knives and get on the floor; Bokenyi responded with another obscenity and slammed the door (*id*.). The officer heard Bokenyi yell, "Fuck you, I'm going to kill you woman" (*id*.).

After police officers kicked in the door, Bokenyi approached them with two knives in his hands (*id*.). He ignored the officers' command to

drop the knives, prompting one of them to fire his Taser, but the Taser had no apparent effect (*id*.). After Bokenyi took a step towards the officers, one of them shot Bokenyi (*id*.).

Under the plea agreement, Bokenyi pled guilty to first-degree recklessly endangering safety, felony intimidation of a victim, and failure to comply with an officer's attempt to take him into custody, and seven other counts were dismissed and read in (34:3; 61:17). As noted, the State agreed that its sentencing recommendation "would be capped . . . at the high end range of the PSI" (61:3).

Bokenyi has a long history of serious mental illness. He has been diagnosed with major depressive disorder and exhibits features of bipolar disorder and generalized anxiety disorder (10:7). Bokenyi first received mental health services in 1996 after a similar incident in Ashland in which Bokenyi pointed a gun at an officer after firing into the floor of the second floor apartment Bokenyi shared with his wife. (25:5).

While he was jailed in this case, Bokenyi was transferred to Mendota Mental Health Institution because he was chronically on suicide watch at the jail (25:10). At the time of sentencing Bokenyi was on ten medications. (*Id*).

The prosecutor explained at the postconviction hearing that based on numerous discussions with defense counsel prior to sentencing, he knew that defense counsel's sentencing recommendation "was going to be for a very short period of further incarceration, taking into account the time that Mr. Bokenyi had

served up to that point and he was basically asking for mental health treatment and for a release[] therefrom a short time later" (65:32). He said that he had "no inkling" whether the court would agree with defense counsel's position that Bokenyi "needed mental health counseling and then was free to be released, or if the court was going to agree with the PSI and the state that a long term incarceration, and I do consider 4 years to be a long term incarceration, which was the recommendation[,] was appropriate" (*id.*). The prosecutor explained that because the parties held "totally opposite" views of whether further incarceration was necessary, and because he had prosecuted "numerous reckless endangerments where persons have been placed on probation and given jail time," "the state had no choice but to argue vociferously in terms of the position on the PSI" (65:35).

The prosecutor's expectation about defense counsel's sentencing argument proved to be correct. Defense counsel began his argument with a lengthy discussion of Bokenyi's mental health problems and his current mental state (60:15-20). Counsel asked the court to impose an initial confinement term of eighteen months, which he acknowledged was "pretty close" to the time Bokenyi already had spent in pretrial confinement, and requested that Bokenyi's extended supervision include mandatory mental health treatment (60:22-23).

The State recognizes that whether the prosecutor intended to breach the plea agreement is irrelevant. *See Williams*, 249 Wis. 2d 492, ¶52. The reason the State has provided this background is not to excuse an unintended breach

of the agreement but to explain why there was no breach at all because the prosecutor's comments did not convey an implicit suggestion that the trial court should exceed the recommended sentence but instead supported the State's recommendation of a four-year term of initial confinement. *See id*., ¶46 (when determining whether a prosecutor's remarks breached a plea agreement, the court must examine the entire sentencing proceeding).

The prosecutor's sentencing argument runs for more than ten pages of transcript (60:5-15; Pet-Ap. 119-29). From that argument, Bokenyi has plucked three statements that, he contends, "amount[ed] to a material and substantial breach of the plea agreement." Bokenyi's court of appeals brief at 7. Because those comments did not imply that the prosecutor was asking the court to impose a sentence longer than the sentence recommended by the PSI, which the prosecutor explicitly asked the circuit court to impose (60:14-15; Pet-Ap. 128-29), this court should reject Bokenyi's claim.

"The maximum penalties don't do justice to the seriousness of the crimes." The prosecutor began his sentencing argument with a discussion of relevant sentencing factors, starting with the seriousness of the case (60:5-7; Pet-Ap. 119-21). The prosecutor described those facts in detail (60:6-7; Pet-Ap. 120-21). Bokenyi does not take issue with that discussion. *See* Bokenyi's court of appeals brief at 10 ("The state was free to discuss in detail and in strong language the facts of the offense as it did."). Rather, Bokenyi claims that the ensuing comment by the prosecutor on the

seriousness of the offenses violated the plea agreement.

> The three convictions that he is being sentenced on today is a first degree reckless endangerment, a 12 and a half year felony, and intimidation of a victim, a 10 year felony[,] and failure to comply with a law enforcement officer, a 3 and a half year felony. I think the felony classifications obviously indicate the extreme seriousness of these offenses that night. But to be honest, I don't think they really do them justice in terms of how serious this was.

(60:8; Pet-Ap. 122.)

In its oral decision denying Bokenyi's postconviction motion, the court explained why the prosecutor's comments did not imply that it should impose a more severe sentence than the recommended sentence.

> I then went back and read multiple times the actual transcript regarding the first incident that counsel for Mr. Bokenyi highlights, which is about [assistant district attorney] Mr. Steffen, as part of his discussion of the first Gallion factor, recites the maximum penalties, which total 26 years. This is what he said . . ., "I think the felony classifications obviously indicate the extreme seriousness of these offenses that night. But to be honest, I don't think they really do them justice in terms of how serious this was," close quote. He's not talking about the 26 years not doing justice to the crimes. He's talking about the classification system, the A, B, C, D, E, F, G, H, I. So I think that when you look at it in the context which it is -- was uttered, he's specifically talking about the A through I classification system not doing justice to how

> serious the conduct was in this particular case. And again, you know, could we be more artful? Could all of us be more artful in our arguments? Yes, we could. But I don't think that says what you think it says, [postconviction counsel] Miss Hagopian. I don't think he's saying oh, good Lord, Judge, the total potential penalty is 26 years and even that doesn't do justice to Mr. Bokenyi's conduct. That's not what he's saying.

(65:48-49; Pet-Ap. 134-35.) The State agrees with the postconviction court's reading of the prosecutor's comment.

Bokenyi argues that the court's analysis was incorrect because "the prosecutor referred not just to the classification but specifically recited the maximum term of imprisonment for each of the three crimes." Bokenyi's court of appeals brief at 11. However, the court's statements at the time of sentencing confirm that it understood the prosecutor to have been referring to the classification system:

> I agree with the state that this is a very serious crime. It's a Class F felony but that doesn't do it justice. You instilled trauma into a child's brain and he will never forget it, and I hope at some point will be able to make some sense of it. But this is an incredibly serious offense. It argues for a prison sentence.

(60:26.)[1]

[1]The State cites the sentencing court's contemporaneous comments not for the purpose of demonstrating that the prosecutor's remarks had no effect on the sentencing court but to demonstrate that the postconviction court's understanding of the meaning of the prosecutor's argument was correct.

Bokenyi has compared the prosecutor's comments in this case to those in *Liukonen*. *See* Bokenyi's court of appeals brief at 12. In *Liukonen*, the prosecutor argued that "the more I argue today, I realize that Mr. Liukonen I think got an extreme break by the system here," and that "the defendant, even if the Court goes along with the proposed sentence recommendation, I think will be getting a tremendous break from the system, but it has been agreed to and the State will make the recommendation as agreed to by myself and the two assistant D.A.'s." *Liukonen*, 276 Wis. 2d 64, ¶15. The court of appeals concluded – and the State conceded – that those comments "communicated to the circuit court that the prosecutor was making the plea agreement recommendation because he was bound to do so, not because he thought it constituted an appropriate prison term." *Id*.

The postconviction court correctly found in this case, however, that the prosecutor's comments about the offense classification not doing justice to the seriousness of the offenses did not suggest that the prosecutor was reluctantly making the agreed-upon recommendation only because he was bound to do so. This court should conclude, therefore, that the prosecutor's comment did not represent a material and substantial breach of the plea agreement.

"The victims should be able to live without fear of Bokenyi getting out of custody until his 11-year-old son is grown and out of school." At the outset of the sentencing hearing, the prosecutor, with the court's permission, read a letter that Bokenyi's wife had written in which she stated:

> It has been a long wait for this day, yet I'm still nervous and scared. I want Bill to serve time due to him that justifies his behavior. But also I want him to get help while he is in prison. Myself and our son . . . are afraid for the day Bill will get let out because we are unsure of what he would be capable of doing. I prefer that we could live fearlessly while our son MB only 11 is growing and in school. Thank you.

(60:5; Pet-Ap. 119.)

Bokenyi does not contend that the prosecutor breached the plea agreement by reading that letter. *See* Bokenyi's court of appeals brief at 13. Rather, he contends that the following remarks by the prosecutor that refer to that letter breached the agreement:

> Finally, there's the need to protect the public or the public's interest in rehabilitation of the defendant and I think this overwhelmingly comes down to the protection of the public interest. The protection of the public, being Sherry Bokenyi and their son. They have a right, as she says in her letter, to live fearlessly while their son is growing up and in school. She has a right to live not in fear that Mr. Bokenyi, when he gets out, is going to come looking for her and to finish what he's attempted at least one other time before.

(60:13; Pet-Ap. 127.)

Bokenyi argues that because his son was eleven years old at the time of sentencing, the prosecutor's reference to Ms. Bokenyi's desire to "live fearlessly" while their son was in school implied that a confinement period of more than four years was necessary. *See* Bokenyi's court of

appeals brief at 14-16. The postconviction court explained why it did not agree with that assessment:

> I think [the prosecutor is] allowed to repeat the victim's wish. Wisconsin has a tradition, at least in the ten years I've been on the bench, of putting great emphasis on victim's rights. . . . I don't think restating what the victim's rights are without augmenting them in some fashion, without increasing them in some way, like I absolutely agree with Mrs. Bokenyi that this sentence needs to provide her and her son with a peace of mind that he won't be out until their son is an adult, he didn't do that. It's a relatively short amount of the total sentencing argument and I just don't think it gets to the level of material and substantial.

(65:50-51; Pet-Ap. 136-37.) Again, the State agrees with the postconviction court's analysis.

Bokenyi compares the prosecutor's comment to those in *Williams*. *See* Bokenyi's court of appeals brief at 15. However, this court's opinion in *Williams* highlighted repeated comments by the prosecutor that suggested that the prosecutor was giving only lip service to the plea agreement. *See Williams*, 249 Wis. 2d 492, ¶26-29, 47-50. In this case, in contrast, the circuit court was correct that the prosecutor's passing reference to the victim's wishes did not rise to the level of a material and substantial breach of the plea agreement.

"'Most frightening' is Mr. Bokenyi's threat to shoot up some cops when he's released." Near the conclusion of his sentencing argument, the prosecutor made the following remarks:

> What is again perhaps the most frightening for me is to read an incident report from the Polk County Jail on February 11th of 2011. A jailer by the name of Laurie Fandrena, worked a long time at the jail, indicates that on the above date I was doing med pass in the maximum part of the jail. Inmate Bokenyi came out for the evening meds and I asked him how he was doing. He stated okay, but he was still here and that he could not wait for the time that he was out of here so he could quote "shoot up some cops" end quote. I asked him why he would do that. He said they all deserved it. And making conversations with him I stated that wouldn't he rather just get out and enjoy being out then [sic] risk coming back in. He stated that next time he would not be coming back, and he would also shoot anyone who got in his way while he was shooting at the cops. There is an absolute necessity to protect the public from William Bokenyi.

(60:14; Pet-Ap. 128.)

Bokenyi does not contend that the prosecutor breached the plea agreement by conveying to the court information about the threats Bokenyi made while in jail. He acknowledges that the plea agreement did not and could not prevent the prosecutor from providing relevant information to the sentencing court. *See* Bokenyi's court of appeals brief at 18. Rather, he complains that the prosecutor suggested that the recommended sentence was inadequate by "editorializing about how frightening he viewed Mr. Bokenyi's threats." *Id*.

"[N]othing prevents a prosecutor from characterizing a defendant's conduct in harsh terms, even when such characterizations, *viewed*

in isolation, might appear inconsistent with the agree-on sentencing recommendation." *Liukonen*, 276 Wis. 2d 64, ¶10. The *Liukonen* court noted that in *State v. Ferguson*, 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991), "where the prosecutor agreed to recommend probation with an imposed and stayed sentence, there was no plea breach even though the prosecutor characterized the offenses as 'the most perverted of all perverted sex acts' and stated, 'this is the sickest case that I have seen or read about. If I refer to this defendant as "sleaze," I think that would be giving him a compliment.'" *Liukonen*, 276 Wis. 2d 64, ¶10 (quoting *Ferguson*, 166 Wis. 2d at 319-20, 325). The prosecutor's description of Bokenyi's threats as "frightening" pales in comparison to the "editorializing" in *Ferguson* that this court found not to have breached the plea agreement.

The prosecutor's remarks, viewed in context, did not convey a "covert message to the circuit court that a more severe sentence was warranted than that which had been recommended." *Williams*, 249 Wis. 2d 492, ¶51. Rather, the prosecutor's sentencing argument was aimed at persuading the court that what would in effect be a time-served disposition that Bokenyi was seeking was inappropriate and that a period of additional incarceration – that is, a four-year term of initial confinement – was necessary. Accordingly, the court should conclude that the prosecutor's sentencing remarks did not represent a material and substantial breach of the plea agreement.

C. Even if the prosecutor's argument crossed the "fine line" between acceptable and unacceptable argument, defense counsel did not perform deficiently by failing to object.

If this court were to agree with Bokenyi that the prosecutor's comments crossed the "fine line" between acceptable and unacceptable argument, the question remains whether trial counsel's failure to object constituted deficient performance. To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687.

In *Harrington v. Richter*, 131 S.Ct. 770 (2011), the Supreme Court emphasized that "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Id*. at 788 (quoted source omitted).

With respect to the deficient performance prong of the *Strickland* test, the Court explained:

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Id. at 788 (citations omitted).

Bokenyi argued below that trial counsel performed deficiently because counsel's judgment that there was no legal basis for an objection was wrong. *See* Bokenyi's court of appeals reply brief at 3. He argued that if he had established a material and substantial breach of the plea agreement, counsel performed deficiently because a long line of cases establishes that a prosecutor may not make comments that undercut the bargained for recommendation and counsel is expected to know the relevant law. *See id*. at 3-4.

That argument fails to adequately take into account the exercise of professional judgment that defense counsel must engage in when determining whether a prosecutor's argument conveyed a "covert message to the circuit court that a more severe sentence was warranted than that which had been recommended." *Williams*, 249 Wis. 2d 492, ¶51. As this court has explained:

> The State must balance its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement. Thus, as the court of appeals has written, the State must walk "a fine line" at a sentencing hearing. A prosecutor may convey information to the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement. That line is fine indeed.

Id., ¶44 (footnote omitted).

There may be situations in which any competent defense lawyer would recognize that the prosecutor's sentencing argument is contrary to the agreed-upon sentence recommendation. *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), is one such case. Under the plea agreement in *Smith*, the prosecutor agreed to make no sentencing recommendation. *Id.* at 262. At the sentencing hearing, however, the prosecutor recommended that Smith be sentenced to fifty-eight months in prison, and defense counsel did not object. *Id.* The court concluded that "defense counsel's failure to immediately object to the prosecutor's sentence recommendation, a recommendation that clearly breached Smith's plea agreement, was not reasonable conduct within professional norms and constitutes deficient performance." *Id.* at 274-75.

But when the prosecutor's argument approaches the fine line separating proper and improper argument, competent lawyers may reasonably disagree about whether the line has been crossed. It does not necessarily follow from the fact that a reviewing court subsequently determines that the line was crossed that the

lawyer who failed to object performed "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

This case illustrates that point. The postconviction judge, who also presided at sentencing (60:1; 65:1; Pet-Ap. 118, 130), made the following observation:

> First and foremost I have to candidly tell you that had [trial counsel] objected, I don't believe I would have sustained the objection. What we all have to remember is that in the heat of a court hearing one does not have the luxury of a transcript. . . . So we all have the benefit of hindsight and with hindsight I am certain that most of us would redraft what we have said a very significant percentage of the time. We'd say, oh my gosh, that wasn't as clear as I wished it would have been. It wasn't as eloquent as I wished I would have been. It wasn't grammatically correct. We don't have that luxury when we're in the middle of a sentencing. And so it wasn't until I sat down with [postconviction counsel's] brief that I really understood what it was -- what the argument was based on. When I simply saw the notice that this was coming, I wondered what possible concerns there might be. But when I read through the transcript and read through the brief, I could see how one would reach the conclusions that she had reached.

(65:46-47; Pet-Ap. 132-33.)

The court concluded, however, that after reading the sentencing transcript "multiple times," it did not interpret the prosecutor's remarks about the maximum penalties as Bokenyi did (65:48-49; Pet-Ap. 134-35). The court also disagreed with Bokenyi's reading of the other

statements that Bokenyi claimed undermined the plea agreement (65:51-54; Pet-Ap. 137-40).

The court of appeals, of course, agreed with Bokenyi's interpretation of the prosecutor's remarks, concluding the prosecutor's sentencing argument "crossed the line in three respects." *Bokenyi*, slip op. at ¶17; Pet-Ap. 108. But because Bokenyi's counsel did not object, the ultimate issue is not whether the remarks crossed the line but whether counsel performed deficiently by not objecting.

It is the defendant's burden to demonstrate that his or her lawyer performed deficiently. *See Strickland*, 466 U.S. at 687-88 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness."). There is a strong presumption, moreover, that defense counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690; *see also State v. Mayo*, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115 ("We give 'great deference to counsel's performance, and, therefore, a defendant must overcome a strong presumption that counsel acted reasonably within the professional norms.'") (quoted source omitted). Thus, "the test for effective assistance of counsel is not the legal correctness of counsel's judgments, but rather the *reasonableness* of counsel's judgments under the facts of the particular case *viewed as of the time of counsel's conduct*." *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

Accordingly, the court should reject Bokenyi's contention that all he need do to establish deficient performance is to demonstrate that counsel's judgment was, in hindsight, wrong. Because Bokenyi has not overcome the presumption that his lawyer acted in the reasonable exercise of professional judgment when he determined that there was no legal basis for an objection, this court should conclude that Bokenyi has not shown that his lawyer performed deficiently.

CONCLUSION

For the reasons stated above, the court should reverse the decision of the court of appeals.

Dated this 6th day of January, 2014.

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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 9,824 words.

_____
Jeffrey J. Kassel
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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 6th day of January, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

WILLIAM F. BOKENYI,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE MOLLY E. GALEWYRICK, PRESIDING

APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains; (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with

a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 6th day of January, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General