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 and Order Entered in the Polk County Circuit Court, The Honorable Molly E. GaleWyrick, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

ARGUMENT

This brief addresses each issue presented by the state but in a different order. Although the state's challenge to ***State v. Sprang***, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, was its hook for seeking review, the holding it objects to – counsel's duty to consult with his or her client – does not come into play here, where counsel failed to recognize the breaches and, therefore, had no strategic reason for not objecting. Having missed the breaches altogether, counsel was deficient but had nothing about which to consult with his client.

Because the court can resolve this case without addressing ***Sprang***, this brief puts up front the dispositive issues of: (1) whether the court of appeals correctly held that the state materially and substantially breached the plea agreement three times in its sentencing argument by suggesting that the court should impose a harsher sentence than the agreement called for; and (2) whether the court of appeals correctly held that trial counsel was ineffective in failing to recognize the "egregious" breaches. ***State v. Bokenyi***, No. 2012AP2557-CR, unpublished slip op. at ¶31 (Ct. App. June 18, 2013). Addressed last is the holding in ***Sprang***, which, as shown below, is consistent with long-recognized constitutional principles governing guilty pleas and the enforcement of plea agreements.

I. The Court of Appeals Correctly Held That Three Times in Its Sentencing Argument the State Materially and Substantially Breached the Plea Agreement by Comments Suggesting That the Court Should Impose a Harsher Sentence than the Bargained for Recommendation.

A. Introduction and standard of review.

William Bokenyi has a due process right to the enforcement of the plea agreement he negotiated with the state, a right guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997).

> … when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello v. New York, 404 U.S. 257, 262 (1971).

A minor or technical breach of the precise terms of the agreement will not warrant a remedy. ***State v. Bangert***, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). But when, as here, the defendant has shown that a breach occurred and the breach is material and substantial, he is entitled to relief. ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945. "A material and substantial breach of a plea agreement is one that violates the terms of the agreement and defeats a benefit for the non-breaching party." ***Id***. at ¶14.

The state's promise to cap its sentence recommendation "at the high end of the PSI" (61:3) was a benefit Mr. Bokenyi was entitled to receive once he entered into the plea agreement, gave up his right to a jury trial and

pled guilty to three felonies. Given the PSI's recommendation,[1] the prosecutor was obligated to recommend a confinement term of no more than four years even if the PSI's recommendation was lower than the prosecutor anticipated when he entered into the agreement. The prosecutor was also obligated to refrain from making comments suggesting that the four-year confinement term it was bound to recommend was insufficient. *See* ***State v. Williams***, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733.

The court of appeals was correct: The prosecutor did not live up to his obligation. ***Bokenyi***, slip op. at ¶¶17-27. Three of his arguments at sentencing suggested that a confinement term of more than four years was necessary to address the seriousness of the offenses, to protect Mr. Bokenyi's ex-wife and their son, and to protect the public generally.

Whether the prosecutor's comments constitute a material and substantial breach of the plea agreement is a question of law reviewed *de novo*. ***Williams***, 249 Wis. 2d 492, ¶20. Although the terms of the plea agreement and historical facts of the state's conduct that allegedly constitute a breach are questions of fact, here the terms of the plea agreement and the state's conduct are undisputed, as both are set forth in the transcripts. This court made clear that "the interpretation of the written transcript of the prosecutor's

[1] The PSI recommended three to four years' confinement followed by three to four years' extended supervision on the conviction for first-degree recklessly endangering safety. (25:13). On convictions for intimidation of a victim and failure to comply with an officer's attempt to take the person into custody the PSI recommended withheld sentences and probation terms of five years and three years, respectively, consecutive to the first count. (*Id*.).

comments … is a question of law to be determined independently …, not a question of fact to be given deference." ***Id***. at ¶35.

Although the focus of this court's review must be on the transcript of the sentencing hearing, the state defends the prosecutor's conduct at sentencing, in part, by relying upon the prosecutor's explanation at the postconviction hearing. (State's brief at 27-29). The court should disregard that argument. The prosecutor's thought process and intentions heading into sentencing and at sentencing are irrelevant, as defense counsel pointed out at the postconviction hearing. (65:45). It doesn't matter whether the prosecutor had an intention or design to breach the agreement. It doesn't matter if the prosecutor believes his comments supported the bargained for recommendation. "That the prosecutor did not intend to breach the agreement or that a breach was inadvertent 'does not lessen its impact.'" ***Williams***, 249 Wis. 2d 492, ¶52, *quoting* ***Santobello***, 404 U.S. at 262.

In its brief, the state says it provides that information "not to excuse an unintended breach" but to somehow show that the prosecutor's comments actually supported the recommendation of four years' confinement. (State's brief at 28-29). The state's reliance on the prosecutor's after-the-fact explanation is misplaced. This court's determination of whether the prosecutor's comments breached the plea agreement must be based upon what the prosecutor said at sentencing in the context of the entire sentencing proceeding. ***Williams***, 249 Wis. 2d 492, ¶46.

As established below, what the sentencing transcript shows is that not once, not twice, but three times the prosecutor made comments suggesting that a confinement

term of more than four years was necessary to address the seriousness of the offense and to protect the public.

B. Three times in its sentencing argument the state suggested that a confinement term of more than four years was needed, comments constituting a material and substantial breach of the plea agreement.

The principles governing this court's review of the prosecutor's conduct in this case are well established.

- Although a prosecutor need not enthusiastically recommend a plea agreement, the prosecutor "'may not render less than a neutral recitation of the terms of the plea agreement.'" ***Williams***, 249 Wis. 2d 492, ¶42, *quoting* ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986).

- "'End runs'" around a plea agreement are prohibited. ***Williams***, 249 Wis. 2d 492, ¶42, *quoting* ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278. "'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***.

- While the prosecutor may provide relevant negative information, his or her comments may not insinuate that the state is distancing itself from its recommendation or casting doubt on its own sentence recommendation. ***Sprang***, 274 Wis. 2d 784, ¶24, *citing* ***Williams***, 249 WI 492, ¶50 & ***State v. Naydihor***, 2004 WI 43, ¶28, 270 Wis. 2d 585, 678 N.W.2d 220.

- The prosecutor's affirmation of the plea agreement will not necessarily overcome comments covertly suggesting that a more severe sentence than that recommended is warranted. ***Williams***, 249 Wis. 2d 492, ¶51.

Applying those principles, the court of appeals correctly held that the state materially and substantially breached its plea agreement with Mr. Bokenyi in three respects.

1. The prosecutor's comment that the maximum penalties don't do justice to the seriousness of the crimes.

The state did not begin its sentencing argument by stating the bargained for recommendation, nor was it required to do so. Rather, the prosecutor listed the three ***Gallion***[2] factors and provided a detailed description of the incident giving rise to the charges. The state was free to discuss in detail and in strong language the facts of the offense as it did. ***State v. Liukonen***, 2004 WI App 157, ¶10, 276 Wis. 2d 64, 686 N.W.2d 689 ("nothing prevents a prosecutor from characterizing a defendant's conduct in harsh terms"), *citing* ***State v. Ferguson***, 166 Wis. 2d 317, 319-20, 479 N.W.2d 241 (Ct. App. 1991).

However, after describing the offenses, the prosecutor turned to the maximum penalties, which the court had correctly recited only moments before, and commented as follows:

> 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

[2] ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

> 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). In the next paragraph, the prosecutor referred to Mr. Bokenyi's history of homicidal thoughts towards his ex-wife and son and, following that, reiterated the prosecutor's belief that the crimes to which Bokenyi pled guilty and their penalties did not fully reflect the seriousness of the offenses.

> So 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 what might have happened that night and just in and of itself the seriousness of what did happen that night. It's all exacerbated by this all happening in front of this couple's child. He was I believe 10 at the time when this happened. He's now 11.

(60:8-9).

The prosecutor undercut its agreement to recommend no more than eight years' imprisonment (four years' confinement plus four years' supervision) by arguing that the maximum penalties, which totaled 26 years, did not do justice to the seriousness of the offenses. The court of appeals was right.

> The 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. The prosecutor's remarks therefore undermined the State's recommendation that Bokenyi be sentenced to only eight years' imprisonment. After all,

> if the State believed sentences totaling twenty-six years were insufficient punishment for Bokenyi's crimes, an eight-year sentence was certainly inadequate.

Bokenyi, slip op. at ¶20.

This court should reject, as did the court of appeals (***id***. at ¶¶18-19), the circuit court's conclusion that there was no breach because the prosecutor was referring not to the maximum penalties but to the "classification system." (65:48). The circuit court's reasoning is "both factually and legally flawed." ***Bokenyi***, slip op. at ¶18.

Factually, the prosecutor did not merely refer to the felony classification but specifically recited the maximum term of imprisonment for each of the three crimes, which totaled 26 years. The prosecutor did so even though at the outset of sentencing, moments before his argument, the court had correctly recited the maximum penalties. (60:3-4, 8).

The state argues that the sentencing court believed the prosecutor was referring to the classification system because in its sentencing decision the court said, "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." (60:26). But, as the court of appeals correctly determined, "the reason the felony classification exists is to specify the maximum penalties applicable to the different crimes." ***Bokenyi***, slip op. at ¶19, *citing* Wis. Stat. § 939.50 (penalty classifications for felonies). As a legal matter, there is no support for the distinction drawn by the circuit court between the felony classifications and the maximum penalties for each class. The two are synonymous. To say that the classifications did not do justice to the seriousness of the offenses is the same as saying that the applicable maximum penalties did not do justice to the seriousness of Mr. Bokenyi's crimes.

The prosecutor's lament that the penalties did not do justice to the seriousness of the offenses is analogous to the prosecutor's comments in ***Liukonen***, which constituted a material and substantial breach. ***Liukonen***, 276 Wis. 2d 64, ¶¶9 & 13. There, the plea agreement substantially reduced Liukonen's exposure by dismissing penalty enhancers and one charge altogether. ***Id***. at ¶3. In addition, the prosecutor agreed to cap his sentencing recommendation at a total of 17 years' incarceration. ***Id***. In his sentencing argument, the prosecutor commented that the more he looked at the case, he realized that Liukonen got an "extreme break" and a "tremendous break" but the state would make the recommendation agreed to. ***Id***. at ¶4.

The court of appeals held that the prosecutor breached the agreement by "implicitly arguing that the court should impose a sentence exceeding the recommended sentence." ***Id***. at ¶13. In ***Liukonen***, as in this case, the prosecutor "used language suggesting he now thought the agreement was too lenient." ***Id***. at ¶14. While the prosecutor in ***Liukonen*** complained about the "break" the defendant had received, here the prosecutor complained that the penalties for the three crimes to which Bokenyi pled guilty did not "do them justice in terms of how serious this was."

Perhaps there would be no breach if the prosecutor had gone on to argue that, despite the gravity of the offenses, other mitigating facts relevant to Mr. Bokenyi's character and risk to his family and others warranted a lesser sentence than the maximum penalties the prosecutor found lacking. But, as shown below, that did not occur. The prosecutor made comments about Bokenyi's character and risk that further undercut the negotiated recommendation.

2. The prosecutor's comment that 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 beginning of the sentencing hearing, the prosecutor informed the court that Sherri Bokenyi had asked him to read a letter she had written. (60:4). With the court's permission, the prosecutor read the letter which included statements that she and her 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.

(*Id*. at 5). Mr. Bokenyi does not contend that the prosecutor breached the agreement by reading Sherri's letter at the outset of the hearing. *See*, *e.g.*, ***State v. Harvey***, 2006 WI App 26 ¶¶33-41, 289 Wis. 2d 222, 710 N.W.2d 482 (prosecutor did not breach agreement to make no specific sentencing recommendation by presenting the statements of the victim's sister and fiancé, who both requested the maximum sentence). Rather, the breach occurred when the prosecutor in his sentencing argument repeated Sherri's wish and adopted that wish as his own when discussing the need to protect the public.

> 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 [sic] 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). The prosecutor's endorsement of Sherri's request that Bokenyi be confined until the child is an adult is incompatible with the four-year confinement term the state was obligated to recommend given the PSI's recommendation. The court of appeals correctly held that this argument also constituted a material and substantial breach of the plea agreement. ***Bokenyi***, slip op. at ¶¶21-22.

The comments cannot be dismissed as a "passing reference to the victim's wishes" as the state urges. (State's brief at 34). In her letter Sherri expressed fear of what Bokenyi, her ex-husband, might do to her and their son when he is released from custody. Sherri asked that she and her son be allowed to live without that fear while their son, who was only 11, was growing up. A confinement term of at least seven years would be needed to keep Bokenyi in custody until the child is 18. Sherri was free to make that request even though it called for a longer confinement term than the state was bound to recommend. ***Harvey***, 289 Wis. 2d 222, ¶42 (victim "has an absolute right" to make a statement at sentencing); ***State v. Clement***, 153 Wis. 2d 287, 302, 450 N.W.2d 789 (Ct. App. 1989) (plea agreement applied only to the prosecutor's recommendation). But the state was not. The prosecutor breached the agreement by adopting as his own Sherri's request that Bokenyi be confined until the son is grown.

In his sentencing argument, the prosecutor not only referenced Sherri's letter, which he had read to the court a few minutes earlier, he joined in Sherri's request that, while the child is still growing up and in school, she and their son not have to live "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). The prosecutor had already reminded the court in his argument that the child was only 11. (*Id*. at 9). The four-year confinement term that the prosecutor was bound to recommend was inadequate to satisfy that request. It would provide for Bokenyi's release when the child was only 15. A longer confinement term – a term of at least seven years – was needed to fulfill what the prosecutor described as Sherri's right to live without fear of Bokenyi's release while their son is growing up and still in school.

It was the prosecutor's adoption of Sherri's sentiment as his own that crossed the line and undercut the plea agreement, just as in ***Williams***. There, at issue were the prosecutor's comments about negative information obtained from the defendant's ex-wife and contained in the PSI. ***Williams***, 249 Wis. 2d 492, ¶26. This court agreed with Williams that the prosecutor breached the agreement by appearing to adopt the unfavorable information from the ex-wife and PSI as her own opinion of the defendant, rather than merely relaying the information to the court. ***Id***. at ¶¶45-48. The supreme court "reasoned that by adopting the information in the presentence investigation report as her own opinion, the prosecutor created the impression that she was arguing against the negotiated terms of the plea agreement." ***Sprang***, 274 Wis. 2d 784, ¶17, *citing* ***Williams***, 249 Wis. 2d 492, ¶48. Further, the supreme court held that the "prosecutor's affirmation of the plea agreement was not adequate to overcome the prosecutor's 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.

By endorsing Sherri's request that Mr. Bokenyi be locked up until the child is 18, the prosecutor was arguing against the sentence recommendation negotiated in the plea agreement. The message conveyed was that a confinement term of at least seven years, not the bargained for recommendation of four years, was necessary to protect the public, or at least to protect Sherri and their son. The comments are actually more egregious than those in ***Williams*** because here the opinion adopted by the prosecutor went directly to how long Bokenyi should be confined. The prosecutor's subsequent recitation of the negotiated recommendation was insufficient to overcome the prosecutor's not-so-covert message that more time was warranted.

3. The prosecutor's comment that "most frightening" is Bokenyi's threat to shoot up some cops when he's released.

Shortly after endorsing the victim's request and while still discussing the need to protect the public, the prosecutor recounted and labeled "most frightening" a jail incident report describing an exchange between a jailer and Mr. Bokenyi.[3] During that exchange, Bokenyi reportedly threatened upon his release to "shoot up some cops" and anyone else who gets in his way while he is shooting at the cops. Immediately before reciting the negotiated recommendation of four years' confinement, the prosecutor argued:

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[3] At the postconviction hearing, the circuit court incorrectly believed the jail incident occurred after Mr. Bokenyi pled guilty. (65:52). At sentencing, the prosecutor said the incident report was dated February 11, 2011, which was seven months before entry of the guilty pleas. (60:14; 61). Whether the prosecutor was aware of the jail incident when he negotiated the plea agreement is unclear.

> 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 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 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). In the next paragraph, the state recommended four years' confinement.

> On County 1 the state requests a sentence of 8 years. 4 of initial confinement and 4 of extended supervision.

(*Id*.).

The court of appeals correctly held that the manner in which the prosecutor described and editorialized about the jail incident report undercut the negotiated recommendation. ***Bokenyi***, slip op. at ¶¶23-27. If the state viewed Bokenyi's comments as a serious threat to kill police officers and others who get in his way, a confinement term of four years would seem grossly inadequate. Yet, the prosecutor signaled that he viewed Bokenyi's threat as serious because he labeled this incident as "perhaps the most frightening for me" and asserted that there is "an absolute necessity to protect the

public from William Bokenyi." (60:14). For the third time, the prosecutor's argument cast doubt on the negotiated recommendation and implied that a harsher term of confinement was warranted.

It is well understood that a plea agreement that attempts to keep relevant information from the sentencing judge is against public policy and unenforceable. ***Grant v. State***, 73 Wis. 2d 441, 448, 243 N.W.2d 186 (1976). But while the prosecutor has a duty to give the court relevant sentencing information, it must do so in a way that honors the plea agreement. ***State v. Duckett***, 2010 WI App 44, ¶9, 324 Wis. 2d 244, 781 N.W.2d 522.

> The State must balance its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement. Thus … 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.

Williams, 249 Wis. 2d 492, ¶44 (footnote omitted).

That line was crossed when the prosecutor labeled as "most frightening" the jail incident report. Even the circuit court acknowledged "it would have been better" if the prosecutor "had not made his editorial statement about this being the most frightening". (65:52). The comment makes clear that the prosecutor did not view Mr. Bokenyi's statements as a meaningless rant but as a real threat against police officers and others. To avoid undercutting the negotiated recommendation, the prosecutor should have refrained from editorializing about how frightening he viewed Bokenyi's threats.

When presenting negative information a prosecutor may avoid a breach by also "effectively communicating to the sentencing court" that he or she still believes the recommended sentence is an appropriate sentence. ***Liukonen***, 276 Wis. 2d 64, ¶16. That did not happen here. The incongruity of the prosecutor's description of Mr. Bokenyi's threat and the prosecutor's recommendation of only four years' confinement is jarring. The state claims the remarks were made in anticipation of defense counsel's recommendation of 18 months' confinement, which was essentially time served, followed by extended supervision and mental health treatment. (State's brief at 36). As the court of appeals noted, "the State could have accomplished this purpose without breaching the plea agreement by either softening its comments or making it clear that its remarks were offered to discredit the defense's recommendation and support a four-year term of initial confinement." ***Bokenyi***, slip op. at ¶27. That did not occur.

The state likens the prosecutor's editorializing about the jail incident to the strong language used by the prosecutor in ***Ferguson***, which the court of appeals held did not constitute a breach. ***Ferguson***, 166 Wis. 2d at 325. But the language at issue in ***Ferguson*** is unlike the comment here for two reasons.

First, the prosecutor's admittedly strong language in ***Ferguson*** pertained to the offenses for which the defendant was being sentenced, specifically, two counts of first-degree sexual assault of a child. ***Id***. at 319-20. Here, the prosecutor also used strong language when describing Bokenyi's offenses (60:6-7), which Bokenyi concedes was fair game. At issue here are the prosecutor's comments not about the offenses but about statements Bokenyi made to a jailer months after the offenses were committed. The state was free

to bring those statements to the court's attention, but it had to do so in a way that honored the plea agreement. ***Williams***, 249 Wis. 2d 492, ¶44; ***Duckett***, 324 Wis. 2d 244, ¶9. The prosecutor did not honor the agreement but, rather, undercut it, by labeling Bokenyi's statements "most frightening" and offering no explanation why, in light of the threats that he found so frightening, the prosecutor nevertheless believed the recommendation was appropriate.

Second, in ***Ferguson***, the court of appeals concluded that the prosecutor's strong language supported the state's recommendation of imposed and stayed 20-year sentences – the maximum – for each conviction. ***Ferguson***, 166 Wis. 2d at 324. Here, the prosecutor was bound to recommend far less than the maximum, eight years' imprisonment versus a total maximum of 26 years. The prosecutor's description of the jail incident suggested that considerably more than four years' confinement was appropriate.

The prosecutor characterized as "the most frightening for me" Bokenyi's threat to shoot up some cops when he's released, along with anyone else who gets in his way, and asserted there is "an absolute necessity to protect the public from William Bokenyi." By signaling that he viewed Bokenyi's statements as a serious threat, the prosecutor was casting doubt on the four-year confinement term he was obligated to recommend given the PSI's recommendation. This is particularly so because that comment came on the heels of two other arguments suggesting that a longer confinement term was needed.

II. The Court of Appeals Correctly Held That Mr. Bokenyi Received Ineffective Assistance When Trial Counsel, for No Strategic Reason, Failed to Object to the State's Material and Substantial Breaches of the Plea Agreement.

A. Governing principles and standard of review.

If this court agrees that the state materially and substantially breached the plea agreement, it should affirm the court of appeals' conclusion that trial counsel's failure to object deprived Mr. Bokenyi of effective assistance of counsel. ***Bokenyi***, slip op. at ¶¶28-33.

The right to the effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution. ***State v. Domke***, 2011 WI 95, ¶34, 337 Wis. 2d 268, 805 N.W.2d 364. An ineffective claim presents a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. This court will uphold the circuit court's findings of fact unless clearly erroneous. ***Id***. Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law reviewed *de novo*. ***Id***.

In this case, although trial counsel testified at the ***Machner***[4] hearing, the circuit court did not reach the issue of counsel's performance because it concluded there was no material and substantial breach. (65:45-54). Consequently, there are no factual findings to which this court need defer.

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Ordinarily, a defendant must prove both deficient performance and prejudice in order to establish that he was denied effective assistance. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). But when a defendant alleges that trial counsel was ineffective for failing to object to a breach of the plea agreement, the defendant need not prove prejudice because he is "automatically prejudiced when the prosecutor materially and substantially breached the plea agreement." ***Smith***, 207 Wis. 2d at 282. "The breach of a material and substantial term of a plea agreement by the prosecutor deprives the defendant of a sentencing proceeding whose result is fair and reliable." ***Id***. at 281. Therefore, if the defendant establishes that counsel was deficient in failing to object to a material and substantial breach of the plea agreement, prejudice is presumed. ***State v. Howard***, 2001 WI App 137, ¶26, 246 Wis. 2d 475, 630 N.W.2d 244, *citing* ***Smith***, 207 Wis. 2d at 281.

B. Given the wealth of authority barring "end runs" around agreements, counsel performed deficiently by failing to recognize the "egregious" breaches.

Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness. ***Thiel***, 264 Wis. 2d 571, ¶19, *citing* ***Strickland***, 466 U.S. at 688. Mr. Bokenyi recognizes that reviewing courts give great deference to counsel's strategic decisions. ***Domke***, 337 Wis. 2d 268, ¶36. But, here, trial counsel had no strategic reason for not objecting to the prosecutor's breach. Counsel testified at the ***Machner*** hearing that he did not object because he did not believe that any part of the prosecutor's argument constituted a breach of the plea agreement. (65:15). He had no strategic reason for not

lodging an objection. He just didn't think he had any legal basis to object to the prosecutor's comments. (*Id*.).

On this record, the court of appeals properly held that counsel's "failure to recognize the State's breaches fell below an objective standard of reasonableness." ***Bokenyi***, slip op. at ¶31. As noted by the court of appeals, "[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." ***Id***. Indeed, the line of cases – with contributions from both this court and the court of appeals – spans some 27 years.

The first articulation of the principle in this state, along with a reversal and remand for resentencing, appears in 1986 in ***Poole***, where the court of appeals wrote the now familiar language that "a prosecutor may not render less than a neutral recitation of the terms of the plea agreement." ***Poole***, 131 Wis. 2d at 364. There, the prosecutor's comments breached the plea agreement by implying that the state would not have made the agreement had it been aware Poole's probation had been revoked in another case. ***Id***. In two cases following ***Poole***, although the court of appeals found no breach, it reaffirmed the principles that the state may not make "end-runs around" plea agreements, ***Ferguson***, 166 Wis. 2d at 322, and "may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***Hanson***, 232 Wis. 2d 291, ¶24.

Then, in 2002, this court reversed and remanded for resentencing in ***Williams***, holding that the prosecutor's statements at sentencing undercut the defendant's plea agreement, thereby resulting in a material and substantial breach. ***Williams***, 249 Wis. 2d 492, ¶59. In that case, like

Bokenyi's, the state made the recommendation called for under the agreement but made comments distancing itself from the recommendation, in particular, by adopting, as its own opinion of the defendant's character, information acquired from the PSI. ***Id***. at ¶¶46-50. "[T]he State's recitation of the plea agreement was less than neutral." ***Id***. at ¶47. Although in ***Naydihor***, 270 Wis. 2d 585, ¶8, this court affirmed the court of appeals' decision that there was no breach, the court reiterated that a defendant is entitled to a neutral recitation of the terms of the plea agreement, and the prosecutor may not suggest to the court that a harsher sentence is warranted. ***Id***. at ¶30.

Between this court's decision in ***Williams*** and Mr. Bokenyi's sentencing, the court of appeals in two cases held that the prosecutor's comments at sentencing amounted to a material and substantial breach of the plea agreement because they insinuated that the state was distancing itself from its recommendation, ***Sprang***, 274 Wis. 2d 784, ¶24, or suggested that the agreement was too lenient. ***Liukonen***, 276 Wis. 2d 64, ¶14.

Counsel is expected to know and apply governing law. *See*, *e.g.*, ***Thiel***, 264 Wis. 2d 571, ¶51 (counsel deficient where his interpretation of the governing statute "reflects a failure either to research or correctly interpret relevant portions of the law."). Counsel's representation fell below an objective standard of reasonableness when, despite the principles espoused in this long line of cases, counsel failed to recognize that three times in its sentencing argument the state made comments undercutting the recommendation the state was bound by under the plea agreement.

Unlike ***Williams***, this was not a close question. ***Williams***, 249 Wis. 2d 492, ¶52. The court of appeals was right, "the prosecutor's remarks in this case were particularly egregious". ***Bokenyi***, slip op. at ¶31. In one line of argument, the prosecutor argued the maximum penalties totaling 26 years did not do justice to the serious of the crimes. In another, the prosecutor adopted the victim's request that Bokenyi be locked up until their child, only 11, is an adult, a request requiring at least seven years' confinement. And in his final comments, the prosecutor characterized as "most frightening" and demanding that the public be protected Bokenyi's threat to shoot up some cops when he's released. None of those arguments is compatible with the four-year confinement term the prosecutor was obligated to recommend given that the state had tied its recommendation to the PSI.

C. The court should reject the state's argument that counsel is not deficient when counsel fails to recognize that the prosecutor's comments constitute a material and substantial breach of his client's plea agreement, thereby leaving the client with no remedy.

Without articulating what the standard would be, the state argues that counsel should not be found deficient for failing to object to a material and substantial breach of the plea agreement. (State's brief at 38-42). The state does not and could not tie its argument to counsel's strategic reason for not objecting, as there was none here. Rather, aside from cases where "any competent defense lawyer" would

recognize the breach,[5] the state seems to argue that it is simply asking too much for defense counsel to recognize "the fine line separating proper and improper argument …" (State's brief at 39). That would extend, apparently, even to remarks, as here, that are egregious. The court should reject the state's argument for the following three reasons.

First, the state's argument improperly minimizes defense counsel's duty to see that the plea agreement his or her client entered into with the state is fulfilled. As this court noted in ***Smith***, ***Strickland*** "outlined certain basic duties that an attorney owes the criminal defense client." ***Smith***, 207 Wis. 2d at 273-74.

> Among those is the duty "to bring to bear such skill and knowledge as will render the trial [or proceeding] a reliable adversarial testing process."

Id. at 274, *quoting* ***Strickland***, 466 U.S. at 688 (bracketed language in ***Smith***). When a defendant enters into a plea agreement and pleads guilty or no contest, the state is relieved of the burden to prove the defendant guilty at trial. ***State v. Wills***, 187 Wis. 2d 529, 537, 523 N.W.2d 569 (Ct. App. 1994), *affirmed* 193 Wis. 2d 273, 533 N.W.2d 165 (1995) ("A plea agreement induces a defendant to waive his or her fundamental right to a trial."). Defense counsel is relieved of his or her duty to represent the defendant at trial. At that point, the sentencing hearing becomes ground zero for the adversarial testing process. Perhaps foremost among counsel's duties at sentencing is an obligation to hold the

[5] The state cites ***Smith*** as such an example, where the prosecutor recommended 58 months' prison even though the agreement called for the state to make no sentencing recommendation. ***Smith***, 207 Wis. 2d at 262.

state to the recommendation it promised as inducement for the client's plea and waiver of his or her constitutional rights.

Consequently, it is not too much to ask that defense counsel know and apply the principles articulated in, among other cases, ***Poole***, ***Williams***, ***Sprang*** and ***Liukonen***. It is not too much to ask that defense counsel listen carefully to the prosecutor's argument to determine if it undercuts the bargained for recommendation and to make an objection if it does, unless the client chooses to proceed with the sentencing.

In ***Smith***, this court recognized that with some ineffective claims counsel's actions are based on "'informed strategic choices made by the defendant.'" ***Smith***, 207 Wis. 2d at 274, *quoting* ***Strickland***, 466 U.S. at 691. But the failure to object to a breach of the plea agreement is different:

> … the failure to object flew in the face of the "informed strategic choice" made by Smith earlier when he entered into the plea agreement. The failure to object constituted a breakdown in the adversarial system.

Id. If, as the state contends, counsel is not deficient when he or she fails to recognize a material and substantial breach of the client's plea agreement, the client loses the benefit of the bargain and has no remedy. This is so even though counsel's failure to object constituted "a breakdown in the adversarial system." ***Id***.

The state's claim is incompatible with well-established legal principles that: (1) "'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled'", ***id***. at 277-78, *quoting* ***Santobello***, 404 U.S. at 262; and (2) counsel's failure to

object to a material and substantial breach amounts to a breakdown in the adversarial system. ***Id***. at 274, *citing* ***Strickland***, 466 U.S. 691; *see also* ***State v. Franklin***, 2001 WI 104, ¶20, 245 Wis. 2d 582, 629 N.W.2d 289 (recognizing that "a breach, unobjected to by defense counsel, constitute[s] a deprivation" of the defendant's substantive right to enforcement of the agreement). As a legal matter, the state's claim must be rejected.

Second, as a practical matter, the state exaggerates the difficulty of recognizing a prosecutor's improper argument. Keep in mind that counsel's performance only becomes an issue if the defendant establishes that the state's argument constitutes a material and substantial breach of the plea agreement. *See* ***State v. Bowers***, 2005 WI App 72, ¶13, 280 Wis. 2d 534, 696 N.W.2d 255 ("There being no material and substantial breach of the agreement, counsel could not be said to have performed deficiently."). Technical or minor deviations from the terms of the plea agreement do not constitute a breach warranting a remedy. ***Deilke***, 274 Wis. 2d 595, ¶13; *see also* ***State v. Knox***, 213 Wis. 2d 318, 320, 570 N.W.2d 599 (Ct. App. 1997) ("inadvertent and insubstantial" misstatement of the plea agreement, which was promptly rectified, did not constitute a breach).

Counsel has no obligation to object unless the breach is material and substantial. And a breach is only material and substantial if it defeats a benefit for which the accused bargained. ***Deilke***, 274 Wis. 2d 595, ¶14.[6] It is not unreasonable to expect counsel to recognize a breach that is so significant it defeats a benefit the client is entitled to

[6] "Material and substantial," though appearing to have two parts, is a single concept focused on materiality. ***Id***. at ¶12 n.8. "A material breach can be one that deprives the non-breaching party of a benefit that party reasonably expected." ***Id***. at ¶13 n.9.

receive under the plea agreement, an agreement that in most instances counsel negotiated on the client's behalf. Reasonably prudent counsel should be capable of identifying when the prosecutor's comments undercut the recommendation that the state promised to make, and the client is entitled to receive, under the terms of the plea agreement.

Third, the fact that counsel must "exercise … professional judgment" in determining if the prosecutor's remarks constitute a material and substantial breach (state's brief at 38) is hardly reason to relieve counsel of his or her obligation to exercise judgment in an objectively reasonable manner. Counsel is expected to know and apply the governing law. ***Thiel***, 264 Wis. 2d 571, ¶51; *see also* ***State v. Felton***, 110 Wis. 2d 485, 504, 329 N.W.2d 161 (1983) (counsel deficient for not knowing and applying statute relevant to client's defense). As for prosecutors' comments that undermine the negotiated recommendation, the case law spans 27 years. Counsel should know and apply that law at his or her client's sentencing.

At trial, when counsel has failed to object to testimony that is inadmissible or closing argument that is improper under governing case law and counsel has no valid strategic reason for not objecting, the appellate courts have found counsel's performance deficient. In ***Domke***, this court held trial counsel performed deficiently by failing to object to a therapist's hearsay testimony, commenting that "a reasonable attorney would have been familiar with *Huntington*'s limitation on the medical diagnosis hearsay exception and would have objected to [the] hearsay testimony on that basis." ***Domke***, 337 Wis. 2d 268, ¶43. The governing rule was "not obscure or unsettled law." ***Id***. at ¶44, *citing* ***State v. Maloney***, 2005 WI 74, ¶28, 281 Wis. 2d 595, 698 N.W.2d 583 (counsel

is not required to argue an unsettled or unclear point of law). Nor are the legal principles governing the breach of plea agreements.

In ***State v. Zimmerman***, 2003 WI App 196, ¶¶43-46, 266 Wis. 2d 1003, 669 N.W.2d 762, counsel was deficient, in part, by failing to use a Wisconsin Supreme Court case in his challenge to the admissibility of hypnotically refreshed testimony. In ***State v. Banks***, 2010 WI App 107, ¶25, 328 Wis. 2d 766, 790 N.W.2d 526, counsel performed deficiently by failing to object to testimony and the prosecutor's remarks in closing argument referring to the defendant's refusal to voluntarily submit a DNA sample. These cases illustrate that when counsel's failure to object is objectively unreasonable in light of the governing case law, counsel's performance is appropriately deemed deficient. Counsel should be held to no lesser standard at sentencing, particularly when the failure to object strips the defendant of his right to enforcement of the plea agreement.

Under the state's argument, if counsel, with no strategic reason, fails to object to the prosecutor's comments that constitute a material and substantial breach, the client is apparently out of luck. The state has not fulfilled a material term of the agreement that induced the defendant's plea. The defendant's substantive due process rights have been violated by the breach. But because counsel erroneously concluded that there was no breach, the defendant has no remedy. The state's position runs afoul of ***Santobello***'s guarantee that "when a plea rests in any significant degree on a promise or agreement of the prosecutor … such promise must be fulfilled." ***Santobello***, 404 U.S. at 262, *see also* ***Smith***, 207 Wis. 2d at 281. As addressed below, because the state also seeks to overrule ***Sprang***, all of this can occur without

the defendant's knowledge and consent. The state's contention must be rejected.

The court of appeals correctly held that trial counsel performed deficiently by failing to recognize the prosecutor's material and substantial breach of the plea agreement. Because prejudice is presumed, Mr. Bokenyi was denied effective assistance of counsel, and he is entitled to resentencing before a different judge.[7]

III. The Court Should Reject the State's Request to Overrule ***Sprang*** Because Its Holding Does Not Apply Here, Where Counsel Had No Strategic Reason for Not Objecting, and Even If It Did, the Holding Is Correct.

A. Because counsel had no strategic reason for failing to object, this case is the wrong vehicle for considering the state's challenge to ***Sprang***.

This case is the wrong case for the court to consider the state's attack on ***Sprang***. The reason is simple. In ***Sprang***, counsel had valid strategic reasons for not objecting to the prosecutor's breach. ***Sprang***, 274 Wis. 2d 784, ¶27. Not so here. The ***Sprang*** holding that the state wants this court to overrule – counsel's duty to consult with his or her client – only comes into play if counsel had a valid strategic reason for not objecting.

[7] Although plea withdrawal is also a potential remedy for a breach of the plea agreement, specific performance – resentencing before a different judge – is the less extreme and preferred remedy. ***Howard***, 246 Wis. 2d 475, ¶37.

In ***Sprang***, the court of appeals held that the prosecutor's comments at sentencing constituted a material and substantial breach of the plea agreement. ***Id***. at ¶¶2 & 24. Although trial counsel did not make a formal objection, he began his sentencing argument by stating that he was concerned somebody might consider the prosecutor's remarks to be a violation of the plea agreement. ***Id***. at ¶11. At the ***Machner*** hearing, counsel testified he did not object, in part, because he was concerned as to which judge would be assigned if he objected and a new sentencing was ordered. ***Id***. at ¶26. The court of appeals held that counsel had "valid strategic reasons for choosing not to object to the prosecutor's remarks." ***Id***. at ¶27. Nevertheless, the court held that counsel performed deficiently by failing to consult with Sprang about whether he wanted to forego an objection and continue with the sentencing. ***Id***. at ¶¶27-29.

The rule the state seeks to overrule is this: Even though trial counsel has valid strategic reasons for not objecting to a material and substantial breach, counsel is deficient when he fails to consult with his client about whether to object and seek specific performance of the agreement (resentencing before a different judge) or whether to abandon the objection and continue with sentencing. Under that rule, a counsel's performance may be found deficient, although counsel identified the breach and had valid strategic reasons for not objecting, if he did not consult with the client. When, as here, counsel did not recognize the breach and, therefore, had no strategic reason for not objecting, the ***Sprang*** rule has no applicability.

In its challenge to ***Sprang***, the state spins a silly scenario where counsel does not recognize the prosecutor's breach but is still required to consult with the defendant about objecting to a breach the attorney doesn't recognize. (State's brief at 21). The state asks, "… 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?" (*Id*.). The answer: Nothing. ***Sprang*** does not require counsel to consult with the client when counsel does not recognize the breach. Its holding is triggered only when counsel recognized the breach but had valid strategic reasons for not objecting. That is not this case.

B. ***Sprang*** was correctly decided.

Sprang's duty of consultation is consistent with well-established constitutional principles governing guilty pleas and the enforcement of plea agreements.

The decision to plead guilty is one of a handful of "'fundamental decisions regarding the case'" over which the accused, not his lawyer, has "'the ultimate authority.'" ***State v. Gordon***, 2003 WI 69, ¶21, 262 Wis. 2d 380, 663 N.W.2d 765, *quoting* ***Jones v. Barnes***, 463 U.S. 745, 751 (1983). As the Supreme Court recognized in ***Boykin v. Alabama***, 395 U.S. 238, 242 (1969), a plea of guilty "is itself a conviction; nothing remains but to give judgment and determine punishment."

A guilty or no-contest plea waives "numerous fundamental rights that ensure a fair trial including the privilege against self-incrimination; the right to trial by jury; and the right to confront one's accusers." ***State v. Albright***, 96 Wis. 2d 122, 130, 291 N.W.2d 487 (1980). Consequently, when taking a plea, the court must address the defendant

personally and establish that he or she is entering the plea knowingly, voluntarily and intelligently. ***State v. Brown***, 2006 WI 100, ¶25, 293 Wis. 2d 594, 716 N.W.2d 906. For the plea to function as a valid waiver of constitutional rights, the plea must be an intentional relinquishment of known rights. ***Id***. at ¶29.

Although a host of constitutional rights are waived by entry of a guilty plea, the defendant acquires a constitutional right at that point, which is the due process right to the enforcement of the plea agreement that induced his or her plea.

> "Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled."

Smith, 207 Wis. 2d at 271, *quoting* ***Wills***, 187 Wis. 2d at 537. In ***Smith***, this court "recognized *Santobello* as holding that a defendant has a substantive right to the prosecution's fulfillment of the terms of a plea agreement and that a breach, unobjected to by defense counsel, constituted a deprivation of that substantive right." ***Franklin***, 245 Wis. 2d at 594; *see also* ***Deilke***, 274 Wis. 2d 595, ¶11 ("Once a plea agreement has been reached and a plea made, a defendant's due process rights require the bargain be fulfilled.").

These principles are the constitutional footing for ***Sprang***'s recognition that even if counsel has a strategic reason for not objecting to the prosecutor's breach of the plea agreement, it is the defendant, not counsel, who must decide whether to forego the objection. Only *the defendant*, not his or her attorney, can decide whether to enter into a plea agreement. Once the plea is entered, *the defendant* is

constitutionally guaranteed enforcement of the agreement. When the prosecutor has materially and substantially breached the agreement, *the defendant* must decide whether to give up his or her right to hold the state to the terms of the agreement by objecting and demanding specific performance. ***Sprang***'s holding is constitutionally sound.

In its challenge to ***Sprang***, the state ignores these constitutional principles. Instead, the state cites several civil cases for the proposition that as a matter of contract law silence or the failure to object will not, under most circumstances, be considered an agreement to modify the contract. (State's brief at 20). Relying on those contract cases, rather than the governing constitutional principles, the state labels "legally unsound" (State's brief at 22-23) ***Sprang***'s conclusion 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." ***Sprang***, 274 Wis. 2d 784, ¶29. Mr. Bokenyi's response is three-pronged.

First, the state's argument fails to recognize that constitutional principles trump contract principles when it comes to a defendant's substantive due process right to enforcement of a plea agreement. Although a plea agreement is analogous to a contract and courts will draw upon contract principles in plea cases, "the analogy is not precise." ***Deilke***, 274 Wis. 2d 595, ¶12. "The constitutional concerns undergirding a defendant's 'contract rights' in a plea agreement demand broader and more vigorous protection than those accorded private contractual commitments." ***State v. Scott***, 230 Wis. 2d 643, 655, 602 N.W.2d 296 (Ct. App. 1999); *see also* ***State v. Rivest***, 106 Wis. 2d 406, 413, 316 N.W.2d 395 (1982) (analogies to contract law not

determinative because "fundamental due process rights are implicated by the plea agreement"). The state's attack on ***Sprang*** carries little weight because it wholly disregards the governing constitutional principles.

Second, the contract principle relied upon by the state is not inconsistent with ***Sprang***. If the failure to object cannot be considered a modification of a contract, then counsel's failure to object cannot relieve the state of its obligation to fulfill the terms of the plea agreement. In other words, silence does not amount to a modification of the contract/plea agreement and, consequently, the state must perform as promised under the terms of the contract/plea agreement. That's what ***Sprang*** ensures. Under ***Sprang***, the state is relieved of its obligation of specific performance only if the defendant, after consultation with his or her attorney, agrees to forego an objection and thereby relieve the state of its duty to perform as the plea agreement demands, that is, a new sentencing where the state makes the negotiated recommendation without making comments which undermine that recommendation.

Third, ***Sprang***'s holding is consistent with criminal law cases holding that the terms of a plea agreement cannot be modified without the defendant's knowledge and consent. In ***State v. Paske***, 121 Wis. 2d 471, 472, 360 N.W.2d 695 (Ct. App. 1984), the court of appeals held the defendant waived any claim that the prosecutor breached the plea agreement by expressly choosing to proceed with sentencing after being informed that the prosecutor intended to change his sentence recommendation given the defendant's intervening escape conviction. Central to the court's decision was the fact that counsel had discussed the remedies, including plea withdrawal, with Paske, and Paske chose to proceed with sentencing. ***Id***. at 473.

> The state's proposed modification to the executory contract with Paske was unequivocally consented to and accepted by Paske when he reaffirmed his earlier pleas and spurned the state's offer not to object to any requested withdrawal of the pleas.

Id. at 475. Because Paske made a "fully and fairly" informed decision to proceed with sentencing despite the prosecutor's changed recommendation, his due process rights were not violated. ***Id***. at 474-75.

In ***State v. Woods***, 173 Wis. 2d 129, 141, 496 N.W.2d 144 (Ct. App. 1992), upon which ***Sprang*** relies, the court of appeals held that counsel cannot renegotiate the plea agreement without the client's knowledge and consent. Contrary to the state's claim, ***Sprang***'s reliance on ***Woods*** was not flawed. (State's brief at 18).

Both ***Woods*** and ***Paske*** stand for the unremarkable proposition that the material terms of a plea agreement cannot be modified without the defendant's knowledge and consent. ***Sprang*** correctly concluded that counsel's failure to object to a material and substantial breach of the plea agreement without consulting with Sprang was "tantamount" to a renegotiated plea agreement. ***Sprang***, 274 Wis. 2d 784, ¶29. Although there had been no lawful modification of the agreement, which would require the defendant's knowledge and consent, the defendant did not receive the benefit of a material term of the contract. When the state's argument at sentencing undercuts the recommendation it was bound to under the plea agreement, the original agreement has "morphed into one" in which the state is arguing for a sentence other than what the plea agreement demanded. ***Id***. at ¶27. In ***Sprang***, it was a prison sentence rather than probation. ***Sprang*** is consistent with ***Woods*** and ***Paske*** and,

most importantly, the constitutional principles underlying those decisions.

Sprang does not place an unreasonable burden on defense counsel by expecting counsel to (1) recognize a material and substantial breach of the plea agreement; and (2) once identified, consult with the client about his or her options. Counsel must carefully listen to the prosecutor's argument at sentencing and consider whether the remarks undermine the negotiated recommendation. That does not mean, as the state suggests (brief at 22), that counsel need stop the proceedings to consult with the defendant "every time the prosecutor makes a remark that counsel recognizes might arguably cross that line ….." Given that the remarks are judged in the context of the state's entire argument, *see* ***Naydihor***, 270 Wis. 2d 585, ¶31, counsel could reasonably wait until the end of the argument to make a final assessment as to whether there is an actionable breach. If there is, counsel should ask the court for a moment to consult with his or her client. The task is not so much a burden as it is the fulfillment of counsel's duty to see that the client does not unwittingly lose the benefit of the bargain that induced his or her plea.

CONCLUSION

Mr. Bokenyi respectfully requests that the court affirm the decision of the court of appeals, which reversed the judgment of conviction and order denying postconviction relief and remanded for resentencing before a different judge.

Dated this 27th day of January, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,612 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 27th day of January, 2014.

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