STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP002557 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM F. BOKENYI,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Polk County Circuit Court, the Honorable Molly E. GaleWyrick, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Where the prosecutor agreed to cap his sentence recommendation at the high end of the presentence report and the presentence recommended three to four years of confinement, did the prosecutor impermissibly undercut the recommendation of four years' confinement by:

(1) arguing that the penalty classifications for the crimes, which provided for maximum sentences totaling 26 years, did not do justice to the seriousness of Mr. Bokenyi's offenses;

(2) endorsing the victim's wish that she and their 11-year-old son be allowed to live without fear of Bokenyi getting out and harming them while the child is still growing and in school; and

(3) recounting and labeling "most frightening" Bokenyi's threat, which was made to a jailer, that when he gets out he intends to shoot up some cops and anyone else who gets in his way?

The circuit court concluded the comments did not constitute a breach of the plea agreement and denied Bokenyi's postconviction motion seeking resentencing before a different judge.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. Mr. Bokenyi anticipates that the issue will be sufficiently addressed in the briefs. Because the issue involves the application of well-established principles to the facts of this case, publication is not warranted.

STATEMENT OF THE CASE AND FACTS

The state charged William F. Bokenyi with ten crimes arising from an incident when, while holding two knives, Bokenyi threatened his wife and son who called 911 while barricaded in a bedroom. (1:3-4; 7). When the police arrived, Bokenyi came to the door with the knives held down to his side. (1:3). Bokenyi slammed the door, disobeyed the officers' orders and continued making threats. (1:3; 59:16-18). When Bokenyi walked toward the officers while still holding the knives and after having been tased, an officer fired his gun and shot Bokenyi, who fell to the floor moaning in pain. (1:3; 59:19-20). For several weeks Bokenyi was hospitalized and treated at a nursing home before he was well enough to be transported to the jail. (64:2).

Bokenyi has a long history of mental illness. (25:9-10; 60:11, 16-20, 28-30). A doctor appointed by the court to evaluate Bokenyi's ability to conform his conduct to the law diagnosed Bokenyi with major depressive disorder, "[f]eatures" of bipolar disorder and "[f]eatures" of generalized anxiety disorder. (10:7). According to the presentence report (PSI), Bokenyi first received mental health services in 1996 after a similar incident in Ashland in which Bokenyi was also shot by police. That time Bokenyi pointed

a gun at an officer after firing into the floor of the second-floor apartment Bokenyi shared with his wife. (25:5). Bokenyi was convicted of first-degree recklessly endangering safety and placed on probation, which he successfully completed. (*Id*.).

While jailed on the charges in this case, Bokenyi was transferred to Mendota Mental Health Institution for several weeks because he was chronically on suicide watch at the jail. (*Id*. at 10). After an adjustment of medications, Bokenyi was reportedly doing better. (*Id*.). At the time of sentencing Bokenyi was on ten medications. (*Id*).

Ultimately, the parties entered into a plea agreement under which Mr. Bokenyi pled guilty to three crimes – first-degree recklessly endangering safety, intimidation of a victim and failure to comply with an officer's attempt to take the person into custody – and the seven other counts were dismissed and read in. (61:3-8). In addition, as part of the plea agreement, the state agreed to cap its sentence recommendation "at the high end range of the PSI." (*Id*. at 3). When the parties entered into the plea agreement they did not know what the PSI would recommend, as the PSI had not yet been prepared. (65:13-14). At the end of the plea hearing, the court ordered the Department of Corrections to prepare a PSI and scheduled a sentencing hearing. (23; 61:18-20).

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 the other two counts the PSI recommended withheld sentences and probation terms of five years and three years, respectively, consecutive to the sentence on the first count. (*Id*.).

The court began the sentencing hearing by correctly reciting the penalty classifications and the maximum terms of imprisonment, including the respective maximum terms of confinement and supervision, for each of the three convictions. (60:3). The penalties totaled 26 years' imprisonment, of which 14 years could be ordered as initial confinement. (*Id*).

Next, the court inquired whether the victim, Sherri Bokenyi, who by then was divorced from Mr. Bokenyi (63:3), wished to make a statement. (60:4). The prosecutor responded that Sherri had given him a letter and asked him to read it, which the prosecutor did, as follows:

> '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 parentheses MB close parentheses [sic], 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. Sherry [sic] Bokenyi.'

(*Id*. at 5; App. 103).

After reading the victim's letter, the state moved onto its sentencing argument, which consumes approximately ten pages of the transcript and in which the prosecutor discussed the seriousness of the offense, the character of the defendant and the need to protect the public. (*Id*. at 5-15; App. 103-13). The prosecutor concluded his argument by making a recommendation consistent with the plea agreement and PSI. (*Id*. at 14-15; App. 112-13). Specifically, the state recommended four years' confinement and four years' extended supervision on the first count. (*Id*. at 14; App. 112). On the other two counts the state recommended withheld

sentences and terms of probation as recommended in the PSI. (*Id*. at 15; App. 113).

The defense recommended 18 months' confinement with concurrent probation and asked the court to order mental health treatment, including placement in a residential facility, as a condition of probation. (*Id*. at 22-23).

The court imposed concurrent sentences of imprisonment on all three counts. (34; 40; 60:31-32; App. 101-02). The controlling sentence, imposed on the conviction for endangering safety, consists of seven years and five months of confinement followed by five years of extended supervision, for a total sentence of 12 years' and five months' imprisonment. (60:31). On the other two counts the court imposed five years' confinement and supervision on the conviction for intimidation of a victim and one year confinement and supervision on the conviction for failing to comply with an officer. (*Id*. at 31-32).

Subsequently, Mr. Bokenyi filed a postconviction motion seeking resentencing before a different judge, alleging that three portions of the prosecutor's sentencing argument undercut the bargained for recommendation and, thereby, constituted a breach of the plea agreement. Specifically, the motion alleged that the prosecutor breached the agreement by: (1) as part of his discussion of the seriousness of the offenses, reciting the maximum penalties, which total 26 years, and asserting that even the penalty classifications did not "really do them justice"; (2) in his sentencing argument, repeating and endorsing the wishes of the victim, Sherri, that she and their son be allowed to live without fear of Mr. Bokenyi while their 11-year-old son is still growing up and in school; and (3) immediately before making his sentence recommendation, recounting and labeling as "most

frightening" statements Mr. Bokenyi made to a jailer that when he gets out he intends to "'shoot up some cops'" and anyone else who gets in his way. (45:5).

The motion further alleged that trial counsel was ineffective in failing to object to the prosecutor's sentencing arguments and by failing to consult with Mr. Bokenyi about whether he wanted to object and request a new sentencing hearing. (*Id*. at 9-10). At the postconviction hearing, trial counsel testified that he did not object because he did not think the prosecutor's arguments constituted a breach of the plea agreement. (65:15). For that same reason, he did not consult with Mr. Bokenyi about whether to object and seek a new sentencing. (*Id*. at 15-16).

The court concluded that the prosecutor's comments did not constitute a material and substantial breach of the plea agreement. (65:45-54; App. 114-23). The court denied Mr. Bokenyi's postconviction motion. (*Id*. at 53-54; App. 113-14).

ARGUMENT

The Prosecutor's Comments at Sentencing Breached the Plea Agreement by Suggesting That a Harsher Sentence than the Bargained for Recommendation Was Appropriate, and Trial Counsel Performed Deficiently by Failing to Object to the Breach.

A. Introduction.

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 Art. I, § 8 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d

258, 271, 558 N.W.2d 379 (1997). Once he gave up his "bargaining chip" by pleading guilty to three crimes, due process required the prosecutor to perform his end of the bargain. ***Id***.

The prosecutor was obligated to make the promised sentence recommendation even if the PSI's recommendation, which set the cap for the state's recommendation, may have been lower than the prosecutor anticipated when he entered into the agreement. The prosecutor was also obligated to refrain from making comments covertly 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 prosecutor failed to live up to his obligation. 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 Bokenyi's ex-wife and their son, and to protect the public generally.

If this court agrees that the prosecutor breached the plea agreement, it should further hold that trial counsel was ineffective in failing to object and that Mr. Bokenyi is entitled to resentencing before a different judge.

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

A breach of the plea agreement must be material and substantial to provide a defendant with a basis for a remedy. ***Williams***, 249 Wis. 2d 492, ¶38. A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained. ***Id***. "'End

runs'" around a plea agreement are prohibited. ***Id***. at ¶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.

Whether a prosecutor's sentencing argument constitutes an end run around the bargained for recommendation typically involves a "fine line." ***State v. Liukonen***, 2004 WI App 157, ¶10, 276 Wis. 2d 64, 686 N.W.2d 689. Nevertheless, several principles are clear.

- First, although the 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, 389 N.W.2d 40 (Ct. App. 1986).

- Second, 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. ***State v. Sprang***, 2004 WI App 121, ¶24, 274 Wis. 2d 784, 683 N.W.2d 522.

- Third, 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.

- Fourth, whether the prosecutor intended to breach the agreement is irrelevant, as is whether the prosecutor's comments actually influenced the sentencing court. ***Williams***, 249 Wis. 2d 492, ¶52; ***Liukonen***, 276 Wis. 2d 64, ¶13 n.2, *citing* ***Santobello v. New York***, 404 U.S. 257, 262-63 (1971).

Here, the prosecutor's comments at sentencing crossed the line by implying that the court should impose more than the four years' confinement he was bound to recommend given the PSI's recommendation. Specifically and as developed below, the prosecutor undercut the negotiated recommendation by: (1) arguing that the penalty classifications for the offenses, which provided for maximum sentences totaling 26 years, did not "really do … justice" to the seriousness of Bokenyi's offenses; (2) adopting as his own the wishes of Bokenyi's ex-wife that she and their 11-year-old son be allowed to live without fear of Bokenyi getting out and doing them harm while the child is still growing and in school; and (3) recounting and labeling as "most frightening" statements Bokenyi made to a jailer that when he gets out he intends to "'shoot up some cops'" and anyone else who gets in his way.

Whether the prosecutor's comments constitute a material and substantial breach of the plea agreement is a question of law reviewed independently by this court. ***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 transcripts. The supreme court made clear that "the interpretation of the written transcript of the prosecutor's comments … is a question of law to be determined independently …, not a question of fact

to be given deference …." ***Id***. at ¶35. Consequently, this court determines *de novo* whether the prosecutor's comments discussed below constitute a breach of the plea agreement.

1. 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***[1] 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. ***Liukonen***, 276 Wis. 2d 64, ¶10 ("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 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; App. 106). 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

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

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; App. 106-07).

The prosecutor undercut its agreement to recommend no more than four years' confinement by arguing that the maximum penalties, which totaled 26 years, did not do justice to the seriousness of the offenses. After all, if 26 years was inadequate, then the eight-year sentence – four years' confinement and four years' extended supervision – that the state was bound to recommend given the PSI's recommendation certainly did not comport with the state's view of the gravity of the crimes.

The circuit court found no breach because it concluded the prosecutor was referring not to the maximum penalties but to the "classification system". (65:48; App. 117). " … [H]e's specifically talking about the A through I classification system not doing justice to how serious the conduct was in this particular case." (*Id*. at 48-49; App. 117-18). That reasoning is both factually and legally flawed. Factually, the prosecutor referred not just to the classification but specifically recited the maximum term of imprisonment for each of the three crimes, which totaled 26 years. Legally, the classification system is a system of specifying the penalty

applicable to a particular crime. *See* Wis. Stat. § 939.50 (penalty classifications for felonies). The classifications and penalties 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 this court held constituted a material and substantial breach. ***Liukonen***, 276 Wis. 2d 64, ¶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 of 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 "crossed the 'fine line'" 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 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 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; App. 103). 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.

(*Id*. at 13; App. 111). The prosecutor's endorsement of Sherri's desire 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.

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; App. 111). The prosecutor had already reminded the court in his argument that the child was only 11. (*Id*. at 9; App. 107). 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 "fine line," 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. The supreme court agreed with Williams that the prosecutor breached the agreement by appearing to adopt as her own view the unfavorable information from the ex-wife and PSI, rather than merely relaying the information to the court. ***Id***. at ¶¶45-48. The 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, at least Sherri and their son. 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. "[M]ost frightening" is Mr. 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.[2] 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 as follows:

> 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

[2] At the postconviction hearing, the circuit court incorrectly believed the jail incident occurred after Mr. Bokenyi pled guilty. (65:52; App. 121). 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; App. 112). Whether the prosecutor was aware of the jail incident when he negotiated the plea agreement is unclear.

> 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; App. 112). 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 manner in which the prosecutor described and editorialized about the jail incident report undercut the negotiated recommendation. 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; App. 112). 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 Mr. Bokenyi's threats.

This court has recognized that, 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. If the prosecutor was determined to highlight the threat and label it "most frightening", he needed to offer some explanation why the negotiated recommendation was nevertheless appropriate. That did not occur.

Three times in his sentencing argument the prosecutor made comments casting doubt on the confinement term he was bound to recommend given the recommendation of the PSI. Each of the three arguments suggested that a longer term of confinement was needed. The prosecutor did not abide by the terms of the plea agreement.

C. Trial counsel's failure to object to the breach or to consult with Mr. Bokenyi about whether to object constitutes ineffective assistance of counsel.

If the court agrees that the prosecutor's comments constituted a material and substantial breach of the plea agreement, it should also hold that trial counsel was ineffective for failing to object. The record establishes that counsel did not object nor did he consult with Mr. Bokenyi about objecting because he did not believe the prosecutor's comments amounted to a breach of the plea agreement. If, as shown above, trial counsel was wrong, his failure to object constitutes ineffective assistance and Mr. Bokenyi is entitled to relief.

Ordinarily, a defendant must prove both deficient performance and prejudice in order to establish that he was denied the effective assistance of counsel. ***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 breache[s] the plea agreement." ***Smith***, 207 Wis. 2d at 281-82. Prejudice is presumed if the defendant establishes deficient performance. ***Liukonen***, 276 Wis. 2d 64, ¶19.

An attorney's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. This court reviews *de novo* whether an attorney performed deficiently. ***Sprang***, 274 Wis. 2d 784, ¶25.

Trial counsel testified at the postconviction hearing that he did not object at sentencing to the prosecutor's argument because he did not believe that any part of the prosecutor's argument constituted a breach of the plea agreement. (65:15). He did not have a strategic reason for not objecting. Rather, he did not think he had any legal basis to object to the prosecutor's comments. (*Id*.). For that same reason, counsel testified that he did not discuss with Mr. Bokenyi whether he wanted to object to the prosecutor's arguments and request a new sentencing hearing. (*Id*. at 15-16).

If this court concludes that the prosecutor's comments did constitute a breach of the plea agreement, it should also conclude that counsel was deficient for failing to object or, at a minimum, for failing to consult with Mr. Bokenyi about whether he wanted to object. *See* ***Sprang***, 274 Wis. 2d 784, ¶27. When the prosecutor breaches the agreement by suggesting that a harsher sentence is warranted, the agreement has effectively "morphed" into a new agreement that the defendant must personally sanction. ***Liukonen***, 276 Wis. 2d 64, ¶21, *citing* ***Sprang***, 274 Wis. 2d 784, ¶28. Accordingly,

even a strategically sound reason for foregoing an objection is deficient if made without consulting the defendant. ***Id***.

Here, trial counsel made no objection and did not consult with Mr. Bokenyi. Deficient performance is established, and prejudice is presumed.

The "preferred" remedy for a breach of the plea agreement is the remedy Mr. Bokenyi requested below and renews here: resentencing before a different judge. ***State v. Howard***, 2001 WI App 137, ¶¶36-37, 246 Wis. 2d 475, 630 N.W.2d 244. He should receive what he bargained for, a sentencing at which the prosecutor refrains from making comments that undercut the negotiated sentence recommendation. Due process demands fulfillment of the bargain.

CONCLUSION

For the reasons set forth above, Mr. Bokenyi respectfully requests that the court reverse the judgment of conviction and order denying postconviction relief, and remand for resentencing before a different judge.

Dated this 15th day of February, 2013.

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 5,392 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 15th day of February, 2013.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of February, 2013.

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