STATE OF WISCONSIN

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

District II

Case No. 2014AP001392-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

JOHNNY MILLER,

Defendant-Appellant

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ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION
ENTERED ON OCTOBER 15, 2013, THE HONORABLE
ALLAN TORHORST PRESIDING,
ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY.

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# REPLY BRIEF OF APPELLANT

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MARK S. ROSEN
ROSEN AND HOLZMAN, LTD.

400 W. Moreland #C
Waukesha, WI 53188
1-262-544-5804
Attorney for Defendant-Appellant

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## ARGUMENT

### I. THE RESPONDENT'S BRIEF'S CASE LAW DOES NOT ASSIST THE STATE IN THE PRESENT SITUATION. THIS CASE LAW IS IRRELEVANT TO THE FACTS PRESENT IN MR. MILLER'S CASE.

The State has relied upon one case for its proposition that the State's conduct at sentencing that is relevant to this present appeal did not violate the plea agreement. This conduct was that the State at the sentencing hearing had asked the sentencing court to defer Defendant's eligibility for the Earned Release Program (henceforth "E.R.P."). Defendant had objected on the basis that this was part of the plea agreement and had not been discussed as part of the plea bargain. The Defendant had never bargained for this request by the State. Immediately after this request by the State, and only upon this request, the trial court had deferred Defendant's eligibility for the E.R.P. until after he had completed Count One of the two sentenced Counts. The initial confinement sentence for Count One was six years. The initial confinement portion of the two Counts, combined, was eight years. Hence, the court's deferral of the E.R.P. resulted in Defendant not being eligible for this early release program until after he had served six years of the total of eight years of initial confinement. Otherwise, Defendant would have been immediately eligible for this program.

The Respondent's sole case cited to support its proposition that the State had not breached the plea agreement is State vs. Bowers, 280 Wis.2d 534, 696 N.W.2d 255 (Ct. App. 2005). However, this case is inapplicable to the present situation.

In Bowers, the State at sentencing had recommended that the

sentence in that case run consecutive to a sentence that Bowers was serving on another case. However, this recommendation was not one of the terms of the plea agreement. Defendant, via Motion for Resentencing, had argued that the State had materially and substantially breached the plea agreement by making this recommendation. State vs. Bowers, 280 Wis.2d 534 at 538-539.

In Bowers, the Court of Appeals had defined the issue before it as being whether or not the State has breached the plea agreement when the parties' plea agreement and negotiations did not consider the issue of concurrent or consecutive sentences and the State had proceeded to recommend consecutive sentences to the sentencing court. Id. at 547. In Bowers, as the Respondent has amply indicated, the Court did not find the State's conduct as violative of the plea agreement. Id. at 550-551. However, the facts in Bowers are materially different from the case here.

In Bowers, the State's consecutive recommendation had no effect on the sentence in the case itself before the trial court for sentencing. In that case, the State had followed its recommendation of two years of initial confinement plus three years of extended supervision. After some confusion, the State had made this recommendation. Id. at 538-539. The State did not attempt to undermine its recommendation in that case before the court for sentencing. Hence, the State had abided by the plea agreement in making this recommendation without any attempt to undermine it.

Merely, the State had recommended how this agreement should relate to a totally different case. As the Court itself had phrased the issue before it, Bowers merely applied to whether or not the State had violated the plea agreement by recommending a consecutive sentence to a completely different case not before the sentencing court when the plea agreement did not discuss such a recommendation. Bowers does not apply to the issue of whether or not a breach of plea agreement occurs when the presented breach affects the sentence of the case at sentencing itself. However, this issue directly applies to Defendant's case here. In Defendant's case, the State's breach of the plea agreement affected the fundamental structure of the sentence of the case at hand for sentencing. Hence, Bowers is inapplicable to the present situation.

The issue here does not involve whether or not Defendant's sentence should run consecutive or concurrent to another case. Defendant's issue is whether or not the State's conduct in recommending that the trial court defer E.R.P. had undermined the plea agreement in the present case. Hence, the Respondent has misapplied and misinterpreted Bowers.

Bowers does state that its facts and its issue must be distinguished from State vs. Deilke, 274 Wis.2d 595, 682 N.W.2d 945 (2004). In that case, Defendant had collaterally attacked some prior O.W.I. convictions, thereby resulting in fewer O.W.I. convictions on his record. However, he had earlier pled to an

O.W.I. case where the State, as part of plea negotiations, had agreed to dismiss those convictions. The State, after the successful collateral attack, had sought to vacate the plea agreement and reinstate the dismissed O.W.I. charges. The State had argued that the Defendant had violated the plea agreement by his collateral attack. This, even though the earlier plea agreements never discussed such a collateral attack, or prohibited the Defendant from making such an attack. State vs. Deilke, 274 Wis.2d 595 at 601-602.

In Deilke, the Supreme Court had agreed with the State. The Court indicated that in decisions that have reviewed the contention that a plea agreement has been breached, the conduct that was held to be a breach never was explicitly mentioned as an act a party in the agreement was constrained from taking. Accordingly, the Court concluded that the lack of a specific instruction to Deilke in regard to a subsequent attack of the convictions was not dispositive. Id. at 611-612.

In Deilke, the Supreme Court had cited two cases to support its position that the lack of a specific instruction in a plea agreement is not controlling as to whether or not a breach of that agreement had occurred. First, was State vs. Matson, 268 Wis.2d 725, 674 N.W.2d 51 (Ct. App. 2003). In that case, the Court of Appeals had concluded that an investigating officer's letter to the court recommending that the sentence be longer than was agreed to

in the plea bargain was a material and substantial breach of the plea bargain. The second cited case was State vs. Williams, 249 Wis.2d 492, 637 N.W.2d 733 (2002). In that case, the Supreme Court had concluded that a prosecutor's "less than neutral" presentation of the plea bargain had breached the plea agreement. State vs. Deilke, 274 Wis.2d 595 at 611-612. The Respondent had cited Williams in its Brief. The Respondent had cited this case for its holding that the State cannot perform end runs around its plea agreements. (Resp. Brf. 9).

Williams also had stated that 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. State vs. Williams, 249 Wis.2d 492 at 518.

Here, contrary to the Respondent, the State had clearly committed an "end run" around its plea agreement. Although the Respondent accurately indicates that the issue of eligibility of E.R.P. was not discussed in the plea agreement, the Supreme Court in Deilke has indicated that the presence of such an issue is not dispositive. Hence, Respondent's argument fails that simply because the issue of E.R.P. was not part of the plea agreement then the State had not violated the plea agreement.

Furthermore, the State's conduct in the present situation clearly is an "end run" around the plea agreement. The E.R.P.

eligibility is means to reduce one's sentence. The State's conduct has ensured that Defendant must serve more incarceration than otherwise was possible. This is a more severe sentence than before the State's conduct at issue here. Respondent is incorrect in its Brief for arguing otherwise. (Resp. Brf. 9). Hence, the State's breach of the plea agreement was material and substantial.

## CONCLUSION

As indicated within this Reply Brief and within Appellant's original Brief, the State had materially and substantially violated the plea agreement at sentencing. The State's recommendation that the trial court should defer Defendant's eligibility for the E.R.P. was an illegal "end run" around the plea agreement. Contrary to the Respondent, Defendant is entitled to a new sentencing hearing.

Based upon this present Reply Brief, and the arguments raised in Appellant's Brief, Defendant respectfully requests that this Court vacate the Judgment of Conviction, reverse Defendant's sentencing hearing, and order a resentencing in front of a different sentencing judge.

Dated this 23rd day of October, 2014.

Respectfully Submitted,

Mark S. Rosen
State Bar No. 1019297

Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188
ATTN: Mark S. Rosen
(262) 544-5804

CERTIFICATION

I hereby certify that the Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny Miller, 2014AP001392 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is eight (8) pages.

Dated this 23rd day of October, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Appellant's Reply Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Johnny Miller, Case No. 2014AP001392 CR is identical to the text of the paper brief in this same case.

Dated this 23rd day of October, 2014, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant