STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1810-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOBY J. VANDENBERG,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING RESENTENCING, ENTERED IN THE DOOR COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. WEBER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Did defense counsel provide ineffective assistance at the sentencing hearing?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying well-established law.

INTRODUCTION

Toby J. Vandenberg took issue with his trial counsel's performance at the sentencing hearing, and moved for resentencing on that ground. The circuit court correctly denied Vandenberg's motion after a *Machner*[1] hearing. Counsel did not perform deficiently and Vandenberg was not prejudiced by counsel's performance.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Vandenberg with one count of operating while intoxicated, seventh offense; one count of operating a motor vehicle while revoked; and one count of operating with a prohibited alcohol concentration. (R. 13.) Vandenberg entered into a global plea agreement with the State that included the resolution of two other cases in which the State had charged him with three counts of felony bail jumping, one count of operating while revoked, and a refusal citation. (R. 16:2; 34:3.) In exchange for a plea of no contest to

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

the count of operating while intoxicated, seventh offense, the State agreed to dismiss and read-in the three counts of felony bail jumping and two counts of operating while revoked and to dismiss outright the count of operating with a prohibited alcohol concentration and the refusal citation. (R. 16:2; 34:3; 38:3–4.) The State further agreed to cap its sentencing recommendation at eight years' imprisonment. (R. 38:4.)

The court ordered a presentence investigation. (R. 17.) The presentence investigation highlighted many of Vandenberg's positive attributes, including his steady employment, his relationship with his father, and Vandenberg's responsible character when he was not drinking. (R. 18.) It also contained information relating to Vandenberg's care for a terminally ill friend, and how that friend's death caused Vandenberg to turn to alcohol as a coping mechanism. (R. 18:4–5, 26.) Vandenberg told the presentence writer that an appropriate sentence would be "one year in jail with Huber privileges along with three years probation, a fine, and plenty of community service." (R. 18:5.) The agent's impression of Vandenberg was that he is a "hard worker and good person when he is sober", but that it is apparent that he needs treatment in a confined setting. (R. 18:26.) The agent recommended that the court sentence Vandenberg to three years' initial confinement and two to three years' extended supervision. (R. 18:27.)

At sentencing, the court first informed the parties that it had the opportunity to review the presentence investigation "in detail." (R. 34:2.) When it came time for defense counsel's argument, counsel acknowledged the difficulty in arguing for leniency when someone is convicted of a seventh offense OWI, and that there was a "strong argument" that a mandatory minimum sentence of three years' confinement applied. (R. 34:9.) If the court believed it did apply, counsel recommended a term of confinement of "three years rather than four years." (R. 34:10–11.)

Counsel, however, argued in the alternative that the court should impose and stay a sentence because confinement has not addressed Vandenberg's treatment needs. (R. 34:9–10.) Counsel believed doing so would be a "novel" approach that may break Vandenberg's cycle of failures. (R. 34:9–11.) Counsel's argument was predicated on what counsel believed was a distinction between withholding a sentence and placing someone on probation and imposing and staying a sentence. (R. 34:11–12.) Counsel's alternative recommendation was "to the extent [the court] want[s] to be bold, . . . impose and stay the entire thing with the lengthy, lengthy period of [supervision], six, eight years . . . ." (R. 34:11.)

Vandenberg personally acknowledged that his prior attempts at sobriety had failed, but that he was trying and would continue to try to find something that worked for him. (R. 34:13.) He also asked the court to not order a prison sentence because "[i]t's pretty apparent that prison is not for personal growth and it's just a matter of corralling somebody, making it worse." (R. 34:16.)

The court acknowledged Vandenberg's sentiment that prison has not helped him, but explained that a longer prison sentence and the programming available there may assist with Vandenberg's recovery. (R. 34:21–22.) Regarding the request for an imposed and stayed sentence, the court concluded that it lacked authority to impose anything less than the mandatory minimum. (R. 34:23.)

The court concluded that a sentence of four years' initial confinement and four years' extended supervision was appropriate. (R. 34:23–25.)

Vandenberg filed a motion for resentencing, claiming ineffective assistance of counsel. (R. 28:1.) He argued that trial counsel was ineffective for asking the court to impose an illegal sentence and for not meaningfully advocating for him. (R. 28.)

The court held a *Machner* hearing at which both defense counsel and Vandenberg testified. (R. 40.) Before testimony, however, postconviction counsel argued that the court could find per se deficient performance and prejudice because counsel argued for an illegal sentence and failed to present mitigating sentencing factors. (R. 40:1–6.) The court rejected that argument for two reasons. First, it had read the presentence investigation, which contained mitigating factors—trial counsel did not have to "recite them again." (R. 40:7.) Second, the court explained, trial counsel argued for the three-year term of confinement and sought the imposed and stayed sentence as an alternative. (R. 40:7–8.)

Trial counsel testified that he argued for probation at the direction of his client, and did so knowing that the court was receptive to arguments related to addiction. (R. 40:11.) Counsel was seeking a "sort of activist decision in this particular case." (R. 40:11.) Counsel knew he was pushing the bounds of the law, but had researched the issue and "didn't think it was a ridiculous, insane argument." (R. 40:12–14, 24–25.) Based on counsel's experience with the sentencing judge, and the instruction from his client to seek probation, he decided to make the argument. (R. 40:13.)

Counsel further testified that he did make the recommendation for three years' confinement and believed that the alternative argument further supported his recommendation that Vandenberg should be confined for no more than three years. (R. 40:14.)

Regarding counsel's decision to highlight Vandenberg's inability to maintain sobriety after a prison sentence, counsel explained that he was attempting to highlight how the delay in getting treatment in a confined setting is inapposite with effective rehabilitation:

> [G]enerally the programs in prison, they're -- lengthier sentences you don't get into them right away. And then when defendants are . . . in prison but

> not in the programs, they're by de facto sober. And their recovery level and the way they respond to treatment after being sober without treatment for quite awhile tends to be deficient.
>
> So . . . I didn't think it mattered too much whether to say he failed over and over again in prison, and because just intellectually or logically whether he did or didn't, prison is what it is. He's got to get into a program.
>
> . . . .
>
> He'd been to prison, and it didn't work. And given his drinking history, it would be I think more effective, more in terms of his rehabilitation, to have him out on probation or some way to do that, whether it be, you know, staying this . . . case, amending it, having him do something, something creative, to allow him to go on probation, allow him to go back to his job, enter intensive rehabilitation, with huge consequences if he failed.
>
> I still believe that would have been the best for everybody, with the one risk being if he relapsed, drove again, and injured somebody. But if that were the case and if he relapsed, didn't injure somebody, well, then State gets their time, he gets his prison treatment.
>
> But other than that one concern of somebody being injured on the road, I still believe it -- being out of prison in intensive rehab and functioning in society in a sober way would be more . . . likely for him to prevail in maintaining a sober life for the rest of his existence.

(R. 40:21–23.)

Counsel further explained that he does not sugarcoat the severity of a seventh offense OWI conviction because doing so results in a loss of credibility with the court:

> It's true, for one. And secondly, . . . we're sitting here on a seventh offense OWI. My view is an attorney who comes in and starts sugarcoating the facts and the defendant based upon their . . . need to contradict the

> State's position loses credibility. And it's a dishonest approach. And it's not an effective approach either.
>
> [S]trategically I routinely acknowledge the weak points of the case or the facts of the case. I also believe that sentencing arguments are much more effectively addressed through rehabilitation. I don't find judges in most cases -- sexual assault cases, more heinous cases, then the punitive aspect of sentencing comes in more, but in most cases judges are much more concerned about rehabilitative components of the sentencing.
>
> So in cases like this, to come in here and say no big deal, it's been a lot of years, all that, I think would destroy credibility. And I . . . know for a fact that when you do that oftentimes the rest of what you say is ignored.

(R. 40:25–26.)

Vandenberg testified that counsel did not discuss the possible outcomes of the case with him, but that he knew he was going to prison. (R. 40:42–43.) He further testified that he was surprised that counsel advocated for probation at the sentencing hearing. (R. 40:46.)

The court ultimately denied Vandenberg's motion. The court explained that it had read the presentence investigation report in detail. (R. 40:59.) That report contained information painting Vandenberg as a "fine person." (R. 40:59–60.) The writer characterized Vandenberg as high-functioning and noted his steady employment. (R. 40:60.) The writer also spent time detailing Vandenberg's care for his friend who was terminally ill, and that he was a responsible, attentive person. (R. 40:60.) When the court read the presentence investigation, it was left with a "very good" impression of Vandenberg, "except for [his] issue with alcohol." (R. 40:60.)

The court further explained that it was familiar with trial counsel. (R. 40:61.) The court knew counsel to be the type of attorney that does not disagree with the State for the sake

of disagreement; rather counsel strategically agrees with the State at times when counsel believes it will result in credibility with the court. (R. 40:61.) The court did not find that to be deficient performance—one of the main functions of an attorney "is to have credibility with the court." (R. 40:61.)

The court was mindful that, in this case, trial counsel had to deal with extremely bad facts. (R. 40:61–62.) Vandenberg had six prior OWI convictions, and he was arrested for his seventh because he was driving erratically. (R. 40:61–62.) Vandenberg's blood alcohol content was .265, well over the limit. (R. 40:62.) There was also information that Vandenberg almost crashed into another vehicle, and thus, when trial counsel commented about the "tragedies happening with drunk drivers" the court viewed those comments "to be a reference to what might have happened in this case." (R. 40:63.)

This all highlighted, the court's "conundrum" about "what do you do with a[n] essentially good person like Mr. Vandenberg . . . he doesn't want to be addicted to alcohol, he doesn't want to be in this situation. So what do you do when he continually gets into a big machine and drives around?" (R. 40:62.) In sentencing Vandenberg, the court "ultimately came to the conclusion that . . . we've got to take Mr. Vandenberg off the streets." (R. 40:63.) That said, the court struggled with how long Vandenberg should be incarcerated; questioning whether four years was long enough. (R. 40:63–65.)

The court did not find that counsel's argument for probation amounted to deficient performance. The "argument about probation was very transparent." (R. 40:66.) The court understood counsel to be "arguing for three years [of confinement], and . . . the only way he could take a position that was more lenient than that was to somehow argue . . . probation. There was nothing else he could argue, but . . . ultimately that's where he wanted me to end up." (R. 40:67.)

"When you go to what his strategy was I thought it was fairly transparent that he wanted me to impose three years, which was a minimum." (R. 40:67.)

Moreover, the court noted the probation argument was a legal argument that the court took seriously. (R. 40:68–69.) Counsel was "trying to make a distinction between imposing a sentence and staying it versus withholding a sentence and putting Mr. Vandenberg on probation." (R. 40:68.) The court reasoned that if an attorney had argued for a patently illegal sentence alone, that may be deficient performance, but counsel's argument was not that. (R. 40:68–69.) Rather counsel argued for an "extreme position" to try to get the court to fall somewhere between that position and the State's recommendation. (R. 40:70.)

Regarding counsel's alleged failure to provide the court with mitigating sentencing factors, the court concluded that it was not deficient to not repeat information that was included within the presentence investigation when it was clear that the court had read it. (R. 40:69–70.)

After concluding there was no deficient performance, the court concluded there was no prejudice: "I have been presented with no facts here today that I was unaware of, and I can think of no reason why I would not have done either what I did or something lengthier in terms of a prison sentence." (R. 40:70–71.)

Vandenberg appeals.

STANDARD OF REVIEW

"Whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact." *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364. The circuit court's findings of fact are upheld unless clearly erroneous. *Id*. Whether counsel's performance constitutes

constitutionally ineffective assistance of counsel is a question of law reviewed de novo. *Id*.

ARGUMENT

Vandenberg failed to prove ineffective assistance of counsel, and thus, he is not entitled to resentencing.

The circuit court denied Vandenberg's claim of ineffective assistance of counsel after a *Machner* hearing. Therefore, the question is whether Vandenberg proved that trial counsel was constitutionally ineffective.

To prove that his trial counsel was constitutionally ineffective, Vandenberg had to show that counsel's performance was deficient and that the deficient performance actually prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Vandenberg had to prove both elements of the ineffective assistance of counsel standard to be entitled to relief. *Domke*, 337 Wis. 2d 268, ¶ 1. Failure to satisfy either element results in an insufficient showing to establish ineffective assistance of counsel. *State v. Carter*, 2010 WI 40, ¶ 21, 324 Wis. 2d 640, 782 N.W.2d 695.

In exceedingly rare cases where a defendant has been effectively denied the right to counsel altogether, prejudice may be presumed. *Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 658 (1984). Prejudice may not be presumed "simply because certain decisions or actions of counsel were made in error." *State v. Balliette*, 2011 WI 79, ¶ 24, 336 Wis. 2d 358, 805 N.W.2d 334.

A. Vandenberg failed to prove that counsel performed deficiently.

With respect to the deficient performance prong, there are no specific standards by which to judge an attorney's performance. *Strickland*, 466 U.S. at 688. Rather, "[t]he

proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* Reviewing courts are strongly cautioned to avoid gratuitous second-guessing after a defense ultimately proves to be unsuccessful: "Judicial scrutiny of counsel's performance must be highly deferential. . . . [T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). Moreover, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To establish deficient performance, a defendant must prove "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–61.

Even if it appears in hindsight that another defense strategy might have been more effective, counsel's decision will not be deemed deficient as long as it was rationally based on relevant facts and applicable law. *State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

1. Counsel made the strategic decision to advocate for a novel interpretation of the law.

Counsel made a reasonable strategic decision, and that decision is virtually unchallengeable. While counsel took a novel approach to the law, he did so after he researched the issue and concluded that there was room for argument. (R. 40:12–14, 24–25.)

Counsel read *State v. Williams*, 2014 WI 64, 355 Wis. 2d 581, 852 N.W.2d 467, in which the supreme court concluded that a sentencing court is required to impose a bifurcated sentence under Wis. Stat. § 346.65(2)(am)6. that includes at least three years of initial confinement. Williams argued that there was room in the statute for the court to impose and stay a sentence. *Id.* ¶ 37. The majority rejected that interpretation, but the concurrence disagreed: "The legislature may have intended to grant a circuit court discretion in imposing a sentence on a serial offender for whom incarceration has not effectively deterred repeat offenses." *Id.* ¶ 51 (Abrahamson, C.J., concurring). "The legislature may have had in mind the beneficial effects of granting a sentencing court discretion to enable it to choose the most effective sentencing strategy for each individual to reduce recidivism and protect public safety." *Id.*

Nonetheless, Vandenberg's counsel reasonably believed that there was still room to advocate that the court could impose and stay a bifurcated sentence. He went to the sentencing hearing knowing the judge was particularly amenable to arguments focused on rehabilitating defendants with addiction issues and decided to swing for the fences. (R. 40:12–13, 36.) Counsel knew it was not likely that he would be successful, but determined that a compelling argument for an imposed and stayed sentence—premised on the fact that treatment in a confined setting had not worked for Vandenberg—would further support his recommendation that the sentencing court should order the minimum period of confinement. (R. 40:12–14.)

This is not the case in which counsel failed to research and understand a law to the client's detriment, like in *State v. Thiel*, 2003 WI 111, ¶ 51, 264 Wis. 2d 571, 665 N.W.2d 305. (*See* Vandenberg's Br. at 9). Rather, counsel researched the issues, concluded that there was room for argument, and concluded that making the argument would only further

support counsel's sentencing recommendation of three years' confinement. Counsel did not perform deficiently.

Vandenberg argues that it was unreasonable for counsel to argue for a sentence the court had no authority to impose, and that such an argument risked the court concluding that a lengthy sentence was appropriate. (Vandenberg's Br. 10–11.)

But that argument ignores the context and tone of the argument, which was a recommendation of the three-year minimum or, alternatively, that Vandenberg presented a strong case for probation if the court believed it had any discretion in the matter. And that approach was not lost on the circuit court: "his argument about the probation was very transparent." (R. 40:66.) The court understood counsel to be "arguing for three years [of confinement], and . . . the only way he could take a position that was more lenient than that was to somehow argue . . . probation. There was nothing else he could argue, but . . . ultimately that's where he wanted me to end up." (R. 40:67.) "When you go to what his strategy was I thought it was fairly transparent that he wanted me to impose three years, which was a minimum." (R. 40:67.)

There is full support for that decision in the record: counsel testified that "the position or the strategy was that everyone knows it was a three-year mandatory minimum, State was asking for four, I was making the argument, the swing-for-the-fence argument, on probation. And oftentimes judges come in between [the parties' recommendations]. [The] . . . term we use is they split the baby. And that would . . . do that." (R. 40:36.)

Counsel's strategy was reasonable. Counsel did not perform deficiently, and Vandenberg is not entitled to resentencing.

2. Counsel meaningfully advocated for Vandenberg at the sentencing hearing.

Counsel made the strategic decision to not minimize the severity of Vandenberg's conduct, and that is not deficient performance.

Counsel testified at the *Machner* hearing that he does not sugarcoat the severity of a seventh offense OWI conviction because otherwise he risks losing credibility with the court. (R. 40:25–26.) As the circuit court noted, trial counsel had to deal with extremely bad facts. (R. 40:61–62.) Vandenberg had six prior OWI convictions, and he was arrested for his seventh because he was driving erratically with a blood alcohol content of .265. (R. 40:61–62.) As the court reasoned, "[t]here are many times when being an advocate means to accept certain premises, to agree with the State on certain things in order to gain credibility." (R. 40:6.) One of the primary functions of an attorney is to gain credibility with the court, without it they have nothing. (R. 40:61.)

While it is true that counsel acknowledged Vandenberg's history with alcohol abuse and his inability to obtain or maintain sobriety, counsel did not make negative comments about Vandenberg. Rather, counsel "strategically . . . acknowledge[d] the weak points of the case or the facts of the case" and focused his argument on rehabilitation because counsel's experience in OWI cases was that "judges are much more concerned about rehabilitative components of the sentencing." (R. 40:26.) That strategic decision was objectively reasonable.

Vandenberg faults counsel for not emphasizing the presentence writer's recommendation of three years' confinement and two years' extended supervision. (Vandenberg's Br. 13.) Yet, the court began the sentencing hearing by informing the parties that it had read the presentence report "in detail," and counsel did advocate for a

sentence of three years' confinement. (R. 34:2, 11.) Contrary to Vandenberg's unsupported suggestion, counsel is not incompetent simply because counsel's chosen strategy did not rely heavily on the presentence recommendation. (*See* Vandenberg's Br. 13.)

Vandenberg also faults counsel for not *emphasizing* his positive attributes. (Vandenberg's Br. 13–14.) That choice phrase is telling. This is not the case in which counsel wholly failed to present the court with mitigating factors. As established at the *Machner* hearing, the presentence investigation contained the information postconviction counsel believed should have been highlighted for the court. (R. 40:55–56.) And the sentencing court told the parties it had reviewed that report carefully. (R. 18; 34:2.) Accordingly, the postconviction court appropriately reasoned that counsel's not repeating that information was not deficient under the circumstances. (R. 40:69–70.) In short, Vandenberg did not present any facts proving that counsel was deficient. (R. 40:70.)

Furthermore, contrary to Vandenberg's suggestion, counsel was not functioning as a member of the prosecution. (Vandenberg's Br. 15.) Counsel advocated for a sentence less than what the State recommended, and attempted to persuade the court that prison would not aid in Vandenberg's recovery. Counsel chose to highlight Vandenberg's history of failures to build credibility with the court and to highlight that the court should focus on rehabilitation. Vandenberg was, in no way, in a worse position than he would have been without counsel. (*See* Vandenberg's Br. 15.) Counsel chose a strategy that he believed would minimize Vandenberg's prison sentence. That strategy was clear to the court and, apparently clear to Vandenberg, who also highlighted that he had been an alcoholic for his entire life and that it was "pretty apparent that prison . . . [was] making it worse." (R. 34:13,

16.) Counsel's performance was not deficient and Vandenberg is not entitled to resentencing.

B. Counsel advocated for Vandenberg and presuming prejudice is inappropriate under the circumstances of this case.

Vandenberg asserts that this Court should presume prejudice under *Cronic* because counsel failed to function as counsel at all. His claim is factually and legally untenable.

Even assuming for the sake of argument that counsel's performance was deficient, as a general rule, a defendant must affirmatively prove prejudice, *State v. Burton*, 2013 WI 61, ¶ 49, 349 Wis. 2d 1, 832 N.W.2d 611, which Vandenberg cannot do. So, he asks this Court to presume prejudice instead. The Wisconsin Supreme Court has identified three "rare" instances in which courts presume prejudice: (1) "when the effective assistance of counsel has been eviscerated by forces unrelated to the actual performance of the defendant's attorney"; (2) "when, although the defendant is actually given counsel, 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate'"; or (3) when "[i]n other, more limited, circumstances the actual assistance rendered by a particular attorney has been deemed so outside the bounds necessary for effective counsel." *State v. Erickson*, 227 Wis. 2d 758, 770–71, 596 N.W.2d 749 (1999) (citations omitted). Within that third exception, the supreme court identified situations where counsel represented a defendant while "harboring a conflict of interest" or "when an attorney fails to present known evidence to the court calling into question the defendant's competency to stand trial." *Id*. at 771 (citations omitted).

Here, none of those exceptions apply. Vandenberg's arguments do not fit either of the first two exceptions identified in *Erickson*, i.e., the denial of effective assistance

by "forces unrelated" to counsel's actual performance, or a situation where competent counsel cannot perform effectively. As for the third exception, this case does not involve a conflict of interest or counsel's failure to present evidence that his client lacked competency. Nor was counsel's performance here otherwise "so outside the bounds necessary for effective counsel" as to constitute a rare instance where prejudice must be presumed.

Vandenberg does not address *Burton* or *Erickson*, and instead seeks persuasive support from *Patrasso v. Nelson*, 121 F.3d 297, 304 (7th Cir. 1997); *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997); and *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988). (Vandenberg's Br. 16.) None of those cases are binding on Wisconsin courts; moreover, each case is factually distinguishable.

In *Patrasso*, counsel's performance at sentencing was "practically non-existent." *Patrasso*, 121 F.3d at 303. Indeed, defense counsel's sentencing argument was, "I have nothing." *Id.* "Lacking the assistance of counsel, Patrasso was left without a defense at sentencing, without an opportunity to argue for a sentence less than the statutory maximum he received." *Id.* at 304. In that extreme circumstance, "counsel "*entirely* fail[ed] to subject the prosecutor's case to meaningful adversarial testing," and the Seventh Circuit presumed prejudice. *Id.* at 304 (emphasis added). That wholesale failure did not occur here.

In *Rickman*, counsel's performance displayed such hostility toward Rickman that counsel "aligned himself with the prosecution against his own client." *Rickman*, 131 F.3d at 1159. There, a capital murder case, defense counsel "assumed that there was no defense to the charge of first-degree murder and failed to conduct any investigation." *Id.* at 1157. Counsel "did not interview any witnesses, conduct any legal research, or obtain and review any records" and "spent a total of sixteen hours preparing for Rickman's trial." *Id.* At trial, counsel

"convey[ed] to the jurors an unmistakable personal antagonism toward Rickman" that "took the form of portraying him as crazed and dangerous." *Id.* at 1158.

The Sixth Circuit applied *Cronic*, 466 U.S. 648, concluding that counsel's performance was constitutionally deficient and "so egregious as to amount to the virtual or constructive denial of the assistance of counsel, and thus implicate [a] *presumption* of prejudice . . . ." *Rickman*, 131 F.3d at 1156. More importantly, the prejudice to Rickman was "patently inherent" and thus it could "dispense[ ] with the necessity of a separate showing of prejudice." *Id.* at 1159. *Rickman* is not persuasive here because counsel advocated on Vandenberg's behalf. He did not, by any stretch, align himself with the prosecution.

In *Osborn*, also a capital murder case, the Tenth Circuit explained that when "a defendant . . . shows that a conflict of interest actually affected the adequacy of his representation[, he] need not demonstrate prejudice in order to obtain relief." *Osborn*, 861 F.2d at 626 (citation omitted). Nevertheless, the court ultimately concluded that Osborn satisfied both of the *Strickland* components, given counsel's failure to investigate any defenses, counsel's public comments denigrating Osborn, and counsel's statements that Osborn deserved the death penalty. *Id.* at 628–29. "Osborn's attorney did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case." *Id.* The court then concluded "[p]rejudice, whether necessary or not, is established under any applicable standard." *Id.*

Osborn is not helpful to Vandenberg. Vandenberg's counsel did not abandon him and there was no conflict of interest. In fact, counsel researched and advocated for a novel position in hopes that it would persuade the court that the minimum sentence would give Vandenberg a fighting chance

to beat his addiction. Given that, there is no basis to presume prejudice.

Vandenberg also relies on *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997), but that case is also distinguishable. (Vandenberg's Br. 17.) Under *Smith*, prejudice is presumed when the State substantially and materially breaches a plea agreement. *Smith*, 207 Wis. 2d at 282. But since *Smith*, courts have declined invitations to extend the rule of per se prejudice to situations beyond a substantial and material breach of a plea agreement. *See, e.g., State v. Pinno*, 2014 WI 74, ¶ 84, 356 Wis. 2d 106, 850 N.W.2d 207 (failure to object to denial of public trial right during voir dire); *State v. Franklin*, 2001 WI 104, ¶¶ 23–25, 245 Wis. 2d 582, 629 N.W.2d 289 (failure to object a to six-person jury in a misdemeanor case). There was no breach of the plea agreement in this case, let alone a failure by defense counsel to object to one. *Smith* is not on point.

Nor do the circumstances here support Vandenberg's invitation to extend *Smith*'s holding. A prosecutor's breach of an agreement not to make a sentence recommendation "is a 'manifest injustice' and always results in prejudice to the defendant" regardless of the facts of the case. *Smith*, 207 Wis. 2d at 281 (footnote omitted) (citation omitted). Application of the per se prejudice rule in those circumstances is appropriate: courts may presume prejudice where it is likely that a case-by-case inquiry is not worth the cost. *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658–60.

But alleged "attorney errors particular to the facts of an individual case are qualitatively different." *Scarpa v. Dubois*, 38 F.3d 1, 12 (1st Cir. 1994). By definition, such errors "cannot be classified according to likelihood of causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." *Strickland*, 466 U.S. at 693. Vandenberg's complaints that counsel should have said or focused on different arguments or facts while advocating

for him is a standard *Strickland* claim. Accordingly, this Court should decline to presume prejudice.

And while "[p]art of the rationale behind presuming prejudice is the difficulty in measuring the harm caused by the error or the ineffective assistance" *Smith*, 207 Wis. 2d at 280, courts nevertheless have continued to analyze the prejudice prong where defendants have alleged fact-bound ineffective-assistance-at-sentencing claims.[2] Applying the *Cronic* presumption to this case would unfairly relieve Vandenberg of his burden to prove prejudice. Given that the harm in his case is not particularly difficult to measure, as discussed below, this Court should decline Vandenberg's request, which would allow the *Cronic* exception to swallow the *Strickland* standard.

C. Vandenberg failed to prove prejudice.

To prove prejudice, Vandenberg "must show that [counsel's deficient performance] actually had an adverse effect." *Strickland*, 466 U.S. at 693. "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *Domke*, 337 Wis. 2d 268, ¶ 54 (citation omitted). Rather, Vandenberg "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

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[2] *See e.g.*, *State v. Harbor*, 2011 WI 28, ¶¶ 1, 72–76, 333 Wis. 2d 53, 797 N.W.2d 828 (failure to investigate and present certain mitigating facts not prejudicial); *State v. Alexander*, 2015 WI 6, ¶ 40, 360 Wis. 2d 292, 858 N.W.2d 662 (failure to object to statements appended to the PSI not prejudicial); *State v. Benson*, 2012 WI App 101, ¶¶ 16–26, 344 Wis. 2d 126, 822 N.W.2d 484 (failure to correct misinformation in a report submitted at sentencing not prejudicial).

Here, the record demonstrates a lack of prejudice. The sentencing court had reviewed the PSI, it addressed the parties' arguments and the *Gallion* sentencing factors, and it considered Vandenberg's positive and negative traits in crafting its sentence. As the court made clear, it understood and took seriously counsel's arguments at sentencing that Vandenberg may have a better chance to kick his addiction outside of prison walls. Nonetheless, the court concluded that four years' prison time was necessary to protect the public.

Here, the facts were the facts, and there is no indication that the court's view of those facts would have possibly shifted in Vandenberg's favor had his attorney ignored the seriousness of the offense and Vandenberg's prior conduct. If anything, counsel made his rehabilitation argument all the more credible by establishing that Vandenberg was not going to minimize his actions. That the court rejected counsel's sentence recommendation does not make counsel's performance prejudicial. *Balliette*, 336 Wis. 2d 358, ¶ 25 (reviewing court "may not second-guess counsel's performance solely because the defense proved unsuccessful").

Vandenberg argues that the court employed an outcome-determinative test because the court explained why it had sentenced Vandenberg to four years' confinement and concluded that Vandenberg had not proven a reasonable probability of a different result. (Vandenberg's Br. 18–19.) The State does not follow. The court was explaining that it had struggled with its sentencing decision, not because it was concerned that four years was excessive, but because it believed that four years may be insufficient. (R. 40:71.) Nothing that Vandenberg presented made the court question that. (R. 40:71.) Stated another way, there was nothing presented to the court that undermined its confidence in the sentence, at least not in a way that was favorable to Vandenberg. Accordingly, the postconviction court correctly

found that there was no reasonable probability of a different outcome even if counsel had performed as Vandenberg argues he should have. That is the "benchmark for judging any claim of ineffectiveness." *Strickland*, 466 U.S. at 686, 694.

In sum, trial counsel reasonably executed a reasonable strategy to acknowledge the seriousness of Vandenberg's conduct and crimes and to characterize Vandenberg as an individual who would be best rehabilitated in the community. Vandenberg failed to prove deficient performance and prejudice. He is not entitled to resentencing.

CONCLUSION

This Court should affirm.

Dated this 26th day of February, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,932 words.

Dated this 26th day of February, 2019.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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Dated this 26th day of February, 2019.

_____
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