STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP001448-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESMOND MYERS LAPEAN,

Defendant-Appellant.

Appeal of a Judgment Entered in the St. Croix County Circuit Court, the Honorable Eric J. Lundell, Presiding, and from the Order Entered in the St. Croix County Circuit Court, the Honorable Scott J. Nordstrand, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was Mr. LaPean denied the effective assistance of counsel when his attorney failed to object to the state's breach of the plea agreement and failed to advise him that he could seek specific performance at a new sentencing hearing as a result of the plea breach?

Circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The briefs should adequately set forth the arguments and publication will likely be unwarranted as the issue presented can be decided on the basis of well-established law.

STATEMENT OF THE CASE AND FACTS

On September 18, 2017, the state filed a criminal complaint charging Desmond Myers LaPean with first degree sexual assault of a child under 12 and repeated sexual assault of a child. (1:1). The complaint alleged that sometime between September 1, 2013 and September 1, 2014, Mr. LaPean had sexual contact or sexual intercourse with A.M.A.M. on at least three occasions. (1:1).

The case resolved with a plea agreement, pursuant to which Mr. LaPean pled no contest to Count 2 of the information, repeated sexual assault of a child. (21:1; 87:3-4, 13). In exchange, the state agreed to dismiss Count 1, as well as the charges in 17-CM-289 and 17-TR-2070, and to cap its sentencing recommendation at 10 years of initial confinement and 10 years of extended supervision. (30:2; 87:3-4).

After a plea colloquy, the circuit court[1] accepted Mr. LaPean's plea, found him guilty, ordered a presentence investigation report, and set the case over for sentencing. (87:13-14).

Sentencing was held on July 9, 2018. (88). The Court began by hearing from the state. (88:4-15; App. 118-128). During her argument, the prosecutor read a letter from the victim, discussed the gravity of the offense, and repeatedly called Mr. LaPean a "monster" before making her sentence recommendation. (88:5-14; App. 118-128). At that point, the following exchange occurred:

> [Prosecutor]: The gravity of the offense is high. The need to not unduly depreciate what happened here I think warrants a high prison time. *The state recommends to this court 24 years*

[1] The Honorable Eric J. Lundell presided over the plea and sentencing hearings in this case, while the Honorable Scott J. Nordstrand presided over the postconviction proceedings.

> *fashioned as 12 years initial confinement* --
>
> [Defense Counsel]: Objection, your Honor, this is a violation of the plea agreement which capped the State's recommendation at 10 years.
>
> [The Court]: I don't know either way, so.
>
> [Defense Counsel]: The record will be clear from the plea hearing.

(88:14; App. 127)(emphasis added). The state then continued its argument:

> *Ten years - - I am sorry. Ten years initial confinement, 14 years of extended supervision*. And I think that the court needs to sentence Desmond LaPean to that high amount because to do so[sic] anything less would unduly depreciate the seriousness of the crime, the gravity of the offense, and the need to protect the public.
>
> This is not a young man who I believe has learned from the errors of his ways. I think that he has a community that's going to insulate and continue to protect him and not have the degree of accountability to say what you did was wrong and you need help. He is going to get that with sex offender treatment, right. But he also needs a lengthy period of incarceration not only for himself, but to other victims and to A[].
>
> This girl needs to grow up and be older to feel confident in her security and her safety and not realize that Desmond is going to get out within six to twelve months. He's a danger to our society. He just is.

> He is a sex offender. He is going to be labeled as such. And this court is going to put provisions that keep him accountable on the extended supervision part of it. But with regards to the initial confinement I ask this court to sentence him to the ten years because it is needed. Desmond is a threat. He is a danger and he is a monster. Thank you.

(88:14-15; App. 127-128).

After the state concluded its remarks, defense counsel made his presentation to the court, eliciting testimony from his expert. (88:15-41; App. 128-154). Mr. LaPean then began his allocution, at which point the state requested a side-bar. (88:42; App. 155). Back on the record, the prosecutor stated the following:

> Judge, due to the plea agreement that we had entered into, the state does agree to cap its recommendation at 20 years fashioned as 10 years initial confinement and 10 years extended supervision. I apologize to the court that I misstated our agreement.

(88:42; App. 155). Mr. LaPean then completed his allocution and the court proceeded to sentence him, imposing a sentence of 22 years' imprisonment, divided as 12 years of initial confinement and 10 years of extended supervision. (52; 88:42-49; App. 101-103).

Mr. LaPean filed a postconviction motion seeking resentencing. (60). In it, he alleged that he was denied the effective assistance of counsel due to defense counsel's failure to object to the state's second

plea breach and failure to advise him that he could seek specific performance at a new sentencing hearing as a remedy for the breaches.[2] (60:1-10). The state filed a response opposing Mr. LaPean's motion. (67). The state asserted that its breach of the plea agreement was not material and substantial and, consequently, trial counsel did not perform deficiently in failing to object. (67:3-7).

The circuit court held a hearing on the motion at which both defense counsel and Mr. LaPean testified. (91). Defense counsel testified that the plea agreement required the state to cap its sentencing recommendation at 10 years of initial confinement and 10 years of extended supervision, while the defense was free to argue. (91:7-8, 15-16; App. 157-158, 165-166). He also testified that, at sentencing, he objected to the state's request for a 24 year prison sentence consisting of 12 years of initial confinement because it was a material and substantial breach of the plea agreement. (91:8, 21-24; App. 158, 171-174). Defense counsel explained that he did not notice the state's subsequent request for 10 years' initial confinement and 14 years' extended supervision, did not have a reason for not objecting to that request, and did not discuss his decision not to object with Mr. LaPean. (91:9-12; App. 159-162).

[2] Mr. LaPean also alleged that he was denied his due process right to be sentenced by an impartial judge. (60). He is not renewing that claim on appeal.

Further, defense counsel testified that at some point during the hearing the state corrected its mistake and he spoke to Mr. LaPean about how he wished to move forward. (91:9; App. 159). He explained that when he spoke to Mr. LaPean about the state's error, Mr. LaPean "immediately and eagerly asked [him] whether that breach of the plea agreement would be grounds for a resentence hearing in front of a new Judge." (91:10; App. 160). Defense counsel testified that based on his understanding of the law, he informed Mr. LaPean that the only remedy he could seek was plea withdrawal. (91:10-11, 24; App. 160-161, 174). He stated that he was unaware of the fact that Mr. LaPean could have requested resentencing before a different judge. (91:11, 23; App. 161, 173).

Mr. LaPean also testified at the hearing. (91:25-28; App. 175-178). He explained that he was not aware that he could have sought a new sentencing hearing before a different judge as a remedy for the state's plea breach and, had he been aware of that remedy, he would have requested it "because the plea was broken." (91:27-28; App. 177-178).

After hearing testimony and arguments, the circuit court requested supplemental briefs. (91:64-65). Later, the court issued a written decision and order denying Mr. LaPean's motion for resentencing. (72; App. 104-117). The court concluded that the prosecutor's misstatement of the terms of the plea agreement was not a material and substantial breach

because it was ultimately corrected. (72:8-11; App. 111-114).

This appeal follows.

ARGUMENT

The state materially and substantially breached the plea agreement and defense counsel waived the error, as a result, Mr. LaPean was denied the effective assistance of counsel and is entitled to resentencing.

The state materially and substantially breached the plea agreement in this case when it twice requested that the court impose a sentence of 24 years' imprisonment and argued that anything less would unduly depreciate the seriousness of the offense and would not protect the public. This breach was not remedied by the state's later concession, made after defense counsel's presentation, that the plea agreement was for a 20 year sentence. The state's message had already been sent and Mr. LaPean had been deprived of the benefit of his bargain. As a result, defense counsel performed deficiently when, for no strategic reason, he failed to object to the state's breach of the plea agreement and failed to accurately inform Mr. LaPean of his options as a result of the breach. Because Mr. LaPean was prejudiced by this deficient performance, his motion for resentencing before a different judge must be granted.

A. Legal standard and standard of review.

As the state's breach of the plea agreement in this case was material and substantial, Mr. LaPean was denied the effective assistance of counsel guaranteed to him when defense counsel failed to object to that breach and failed to advise him of both remedies available.

Criminal defendants in Wisconsin are guaranteed the right to counsel by both the United States Constitution and the Wisconsin Constitution. *State v. Carter*, 2010 WI 40, ¶20, 324 Wis. 2d 640, 782 N.W.2d 695 (citing U.S. Const. amend. VI). The right to counsel includes effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). To establish ineffectiveness, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Id.*, at 687.

Review of a claim of ineffective assistance of counsel involves a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236–37, 548 N.W.2d 69 (Wis. 1996). This court grants deference to the circuit court's findings of fact regarding the circumstances of the case, counsel's conduct, and counsel's strategy; overturning them only if such findings of fact are clearly erroneous. *Id.*; *State v. Ortiz-Mondragon*, 2015 WI 73, ¶30, 364 Wis. 2d 1, 21, 866 N.W.2d 717. "However, whether counsel's performance was deficient and whether the deficient

performance prejudiced the defense are questions of law" which this court reviews de novo. *Sanchez*, 201 Wis. 2d at 236–37.

Similarly, when reviewing a plea breach claim, this court reviews "the circuit court's determination of historical facts, such as the terms of the plea agreement and the State's conduct that allegedly constitutes a breach, under the clearly erroneous standard of review," while the question of whether the state's conduct constitutes a material and substantial breach of the plea agreement is a question of law reviewed de novo. *State v. Williams*, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733.

B. The state's breach of the plea agreement was material and substantial.

In spite of the promise it made to induce Mr. LaPean's no contest plea, at sentencing, the state twice asked the circuit court to impose a sentence totaling 24 years of imprisonment. Those requests, along with the prosecutor's passionate argument that anything less than 24 years would unduly depreciate the seriousness of the offense and need to protect the public, were a material and substantial breach of the plea agreement in this case.

Criminal defendants have "a constitutional right to the enforcement of a negotiated plea agreement." *State v. Smith*, 207 Wis. 2d 258, ¶18, 558 N.W.2d 379 (1997). "[W]hen a plea rests in any significant degree on a promise or agreement of the

prosecutor…such promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262 (1971). In other words, once the defendant has entered his plea pursuant to a plea agreement, "due process requires that the defendant's expectations be fulfilled." *Smith*, 207 Wis. 2d 258, ¶18 (quoting *State v. Wills,* 187 Wis. 2d 529, 537, 523 N.W.2d 569 (Ct. App. 1994)).

While a "prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement," not every plea breach violates due process and warrants a remedy. *Williams*, 2002 WI 1, ¶38. There must be a "material and substantial breach" of the agreement, rather than a merely technical breach, before the defendant is entitled to either plea withdrawal or resentencing. *Id.*

Determining "whether a breach occurred and whether the breach was substantial and material requires a careful examination of the facts." *Id.*, ¶53. A material and substantial breach of the plea agreement is a "violation of the terms of the agreement that defeats the benefit for which the accused bargained." *Id.*, ¶38. Wisconsin courts have made clear that "even an oblique variance will entitle the defendant to a remedy if it 'taints' the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for." *State v. Bowers*, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. A prosecutor may not: "render less than a neutral recitation of the terms of the plea

agreement," "cast doubt or distance itself from its own sentence recommendation," or use "qualified or negative language in making the sentence recommendation." *Williams*, 2002 WI 1, ¶¶42, 50; *State v. Poole*, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct App 1986)("A comment which implies reservations about the recommendation 'taint[s] the sentencing process' and breaches the agreement.").

The plea agreement in this case was clear and unambiguous. As the circuit court found, Mr. LaPean entered his no contest plea in exchange for the state's commitment to dismiss additional charges and not to recommend a sentence higher than 20 years' prison, consisting of 10 years' initial confinement and 10 years' extended supervision. (72:7-8; 87:3-4; App. 110-111). The state's agreement to cap its sentencing recommendation was a material and substantial term of the plea agreement. *See Smith*, 207 Wis. 2d 258, ¶21; *See also State v. Howard,* 2001 WI App 137, ¶18, 246 Wis. 2d 475, 630 N.W.2d 244 ("Undoubtedly, one of the most crucial issues in a plea agreement is the recommendation concerning the length of time to be served....").

Despite this commitment, at sentencing, the state requested a sentence above the agreed upon amount on two separate occasions: it first asked for a sentence of 12 years' initial confinement and 12 years' extended supervision and, after defense counsel objected, it then requested a sentence of 10 years' initial confinement and 14 years' extended supervision.(88:14; App. 127). Both recommendations

were above the 20 year sentence Mr. LaPean bargained for and, therefore, breached the plea agreement. The question in this case is whether the prosecutor's later acknowledgement of the error, made just prior to the court imposing sentence, was sufficient to render those breaches merely technical.

The state's breaches of the plea agreement were not merely technical, they were material and substantial – they defeated a benefit for which Mr. LaPean had bargained: his expectation that the state would not argue for more than a 20 year sentence. *See Smith*, 207 Wis. 2d 258, ¶21. Further, in light of the prosecutor's argument that Mr. LaPean was a monster and anything less than 24 years would be inadequate, her later acknowledgement of the error in this case was "too little, too late." *See Williams*, 2002 WI 1, ¶52.

In *Williams*, the Wisconsin Supreme Court rejected the state's argument that the prosecutor's affirmation of the plea agreement, after objection from defense counsel, cured an earlier breach. *Williams*, 2002 WI 1. Under the plea agreement in that case, the state agreed to recommend three years' probation with 60 days' jail. *Id.*, ¶24. At sentencing, the prosecutor made a number of comments related to the PSI and conversations with the defendant's ex-wife that prompted an objection from the defense. *Id.*, ¶¶26-27. Defense counsel argued that the state was "undercutting its sentencing recommendation," after which the prosecutor "explicitly stated that she

was not changing her recommendation," and again recommended three years' probation. *Id.*, ¶¶27-29.

Despite the prosecutor's assertion that she was recommending the agreed upon sentence, the court held that the state "substantially and materially breached the plea agreement because it undercut the essence of the plea agreement." *Id.*, ¶46. In so holding, the court noted that "[t]he prosecutor's declaration of her personal opinion created the impression that the prosecutor was arguing against the negotiated terms of the plea agreement." *Id.*, ¶¶47-48. It also noted 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. After the defendant objected to the State's discussion of the presentence investigation report and the ex-wife's statements, the State affirmed its decision to proceed with the plea agreement. Despite stating its intention to stand by the plea agreement, the State had adopted as its own opinion the negative information regarding the defendant that was otherwise available to the court. …
>
> The overall impression from reading the entire record of the sentencing hearing is, however, that the State's comments affirming the plea agreement were too little, too late. We agree with the court of appeals that "just because the prosecutor says there was no breach does not make it so." That the prosecutor did not intend to breach the agreement or that a breach was inadvertent "does not lessen its impact."

Id., ¶¶51-52(internal citations omitted). In sum, the court found that despite the state's confirmation that it was abiding by the plea agreement, the "effect of the State's conduct … was to undercut the plea agreement, thereby depriving the defendant of the benefit of his bargain and rendering the sentencing proceeding fundamentally unfair." *Id.*, ¶58.

The prosecutor's comments in this case – that in her opinion, a prison sentence of no less than 24 years was necessary due to the gravity of the offense and the need to protect the public – similarly had the effect of undercutting the plea agreement. The state's later acknowledgement of the plea agreement could not undo the message that was already sent – that a more severe sentence than that which had been bargained for was warranted. It is that message which distinguishes this case from both *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct App. 1997) and *State v. Bowers*, 2005 WI App 72, 280 Wis. 2d 534, 696 N.W.2d 255, in which this court found the state's breach of the plea agreement, promptly corrected after the defense's objection, was a technical rather than material and substantial breach.

In *Knox*, after the prosecutor erroneously requested a consecutive, rather than concurrent sentence, defense counsel ""immediately requested a recess" and, "when the hearing reconvened, the prosecutor advised the court that there had apparently been a miscommunication regarding the agreement, and that she wished to make a new

record regarding the State's recommendation." *Knox*, 213 Wis. 2d 318, 320-321. The prosecutor then requested the agreed upon sentence. *Id*. Finding that the breach was not substantial, this court noted:

> the deviation from the original terms *drew a prompt objection* and was shown to be the result of a mistake that was *quickly acknowledged and rectified*. Indeed, the prosecutor's earnest manner in advocating the corrected proposed disposition, commented upon by the trial court, further circumstantially belies an implication of improper motives. For these reasons, the *momentary* and inadvertent misstatement of the parties' agreement did not constitute an actionable breach.

Id., at 322-323(emphasis added). The breach did not violate the defendant's "due process right to have the full benefit of the plea bargain on which he relied." *Id*., at 323.

Similarly, in *Bowers*, after defense counsel indicated that the state may have misstated the plea agreement, the prosecutor "immediately amended its recommendation" to the agreed upon sentence. *Bowers*, 2005 WI App 72, ¶3. In determining whether this was a material and substantial breach of the plea agreement, this court looked to *Knox*, stating that it "teaches us that it is sufficient for the State to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process." *Id*., ¶12. Ultimately, this court held that "because the misstatement was insubstantial, inadvertent and promptly recognized and rectified, it [did] not constitute an actionable

breach of the plea agreement." *Id.*, ¶1. It noted that the state "promptly and matter-of-factly corrected its recommendation" shortly after the mistake was made." *Id.*, ¶13.

Unlike those cases, the prosecutor's misstatement in this case was not objected to, was not promptly rectified, and did impair the integrity of the sentencing hearing. The prosecutor's breach was material and substantial; it violated Mr. LaPean's due process right to have the full benefit of the plea bargain by indicating that a sentence four years longer than the maximum it agreed to recommend was necessary to meet the court's sentencing goals.

Although defense counsel objected to the state's initial request for a sentence of 12 years' initial confinement and 12 years' extended supervision, there was no objection to its second request for a 24 year prison sentence consisting of 10 years' initial confinement and 10 years' extended supervision. (88:14; App. 127). The lack of objection to the prosecutor's misstatement in this case is important, as it prevented the error from being promptly rectified, impairing the sentencing process.

The state's error was not simply "momentary." Despite one objection, the state continued to breach the plea agreement by arguing for a sentence of 24 years of imprisonment. Not only did the prosecutor request a longer sentence than was agreed upon, she made a strong argument explaining why that sentence was necessary – telling the court that it

"need[ed] to sentence" Mr. LaPean to 24 years, that "anything less would unduly depreciate the seriousness of the crime, the gravity of the offense, and the need to protect the public," and that that amount of time was necessary for the victim's well-being and security. (88:14-15; App. 127-128). The state not only implied, but directly argued to the court that Mr. LaPean deserved more than the 20 year sentence for which he bargained. Further, it was with this argument in mind that the circuit court heard and considered defense counsel's argument and recommendation, as it was not until much later in the sentencing hearing that the state attempted to rectify its error. (88:15-42; App. 128-155).

Further, the state's later acknowledgment of the plea agreement was not sufficient to cure its material and substantial breach. The prosecutor's remarks after realizing her error did not rectify the breach, and in fact, only further undercut the agreement by implying that the state was only changing its recommendation because it was required to do so. Unlike the prosecutors in *Knox* and *Bowers*, the prosecutor did not ask to make a new record, nor was her correction made either "earnestly" or "matter-of-factly." *See Knox*, 213 Wis. 2d 318, 320-323*; Bowers*, 2005 WI App 72, ¶13. Rather, after realizing that she had misstated the recommendation again, the prosecutor requested a side bar and then, back on the record, stated:

> Judge, *due to the plea agreement that we had entered into*, *the state does agree* to cap its recommendation at 20 years fashioned as

> 10 years initial confinement and 10 years extended supervision. I apologize to the court that I misstated our agreement.

(88:42; App. 155)(emphasis added). The prosecutor did not engage in any other discussion about the recommendation, ask the court to disregard its earlier argument, or otherwise explain why the court should ignore its earlier recommendation.

In fact, the state did not even assert that it no longer believed a sentence of 24 years was necessary. Instead, the state qualified its correction by noting that "due to the plea agreement" it agreed to cap its recommendation at 20 years. (88:42; App. 155). This language suggested that the state was simply saying what it was required to say without actually believing that a 20 year sentence was appropriate. *See Id*., ¶¶15-16 (finding a material and substantial breach where "the prosecutor all but told the court he was only making the seventeen-year recommendation because of his plea agreement obligation.").

As the state requested a sentence four years longer than it had agreed to recommend, and impaired the integrity of the sentencing by arguing in support of the recommendation, the magnitude of the breach required more than the less than neutral acknowledgement that it made. Having repeatedly stated that Mr. LaPean was a monster and that any sentence less than 24 years of imprisonment "would unduly depreciate the seriousness of the crime, the gravity of the offense, and need to protect the public," the state's acknowledgement that it was required to

request a sentence of 20 years could not undo the harm already caused. (88:14-15; App. 127-128).

The state's initial recommendations for 24 years, and its comments in support thereof, "undercut the essence of the plea agreement," impairing the integrity of the sentencing process. *See Williams*, 2002 WI 1, ¶46. The prosecutor argued against the terms of the plea agreement and her position that at least 24 years was necessary, "cast doubt on" and distanced her from the negotiated recommendation. *See Id.*, ¶50. The erroneous recommendations affected the substance of the plea agreement – they sent a message to the court that Mr. LaPean deserved a greater punishment than that which the state had agreed to recommend and implied that the bargained for sentence – 20 years – was insufficient. *See Knox*, 213 Wis. 2d 318, 322-323; *See also State v. Liukonen*, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 686 N.W.2d 689 ("prosecutors may not make comments that suggest the prosecutor now believes the disposition he or she is recommending pursuant to the agreement is insufficient.").

Overall, the state's language during the sentencing hearing in this case – while committing the breach and acknowledging its error – expressed or implied reservations about the agreed upon recommendation, undercutting the plea agreement and tainting the sentencing process. The prosecutor did more than simply state the wrong number and then promptly correct herself. As the misstatement was not immediately realized, the state was able to

argue that the sentence it erroneously recommended – 24 years – was the least amount of time necessary to meet the court's sentencing goals. The state sent a message to the court "that greater punishment than provided for in the plea agreement was warranted." *Knox*, 213 Wis. 2d 318, 322. The state directly told, and implied, to the court that Mr. LaPean deserved to be sentenced to prison for 24 years, four more years than what was bargained for.

Consequently, Mr. LaPean was deprived of a material and substantial benefit of the plea agreement – his expectation that the state would not make a recommendation above 20 years' imprisonment was not fulfilled. The state materially and substantially breached the plea agreement.

C. Trial counsel performed deficiently and Mr. LaPean was prejudiced by that deficient performance.

Mr. LaPean was denied the effective assistance of counsel when defense counsel failed to object to the state's breach of the plea agreement during sentencing and failed to advise him of both remedies available as a result of the state's material and substantial breach. Accordingly, he is entitled to a new sentencing hearing, before a different judge, at which the state recommends a sentence of no more than 20 years' imprisonment, consisting of 10 years' initial confinement and 10 years' extended supervision.

As the state's breach of the plea agreement was material and substantial, defense counsel performed deficiently when, for no strategic reason, he failed to object to the state's second misstatement of the plea agreement. *See State v. Sprang*, 2004 WI App 121, ¶13, 274 Wis. 2d 784, 683 N.W.2d 522. Defense counsel's performance also fell below objective standards of reasonableness when he informed Mr. LaPean that the only remedy for the state's breach of the plea agreement was plea withdrawal.

An attorney's failure to object to a material and substantial plea breach constitutes deficient performance unless the attorney discussed the breach with the defendant and the defendant, knowing his options, chose to move forward with sentencing despite the breach. *Smith*, 207 Wis. 2d 258, ¶26; *Sprang*, 2004 WI App 121, ¶¶27-29. This is because there is no further information or investigation required for the attorney to determine whether to object, and a failure to object "[flies] in the face of the 'informed strategic choice' made" by the defendant when he entered into the plea agreement. *Smith*, 207 Wis. 2d 258, ¶25. Moreover, failure to object to the breach of the plea agreement, without consulting the defendant, results in a renegotiated plea agreement and "constitute[s] a breakdown in the adversarial system." *Id.*, ¶25; *Sprang*, 2004 WI App 121, ¶29.

In this case, defense counsel immediately objected to the state's first misstatement of the plea agreement but failed to object to its second breach

just moments later. (88:14; App. 127). At the postconviction motion hearing defense counsel testified that he had no strategic reason for failing to object; rather, he simply did not notice the second breach. (91:11-12; App. 161-162). Further, defense counsel testified that he did not discuss whether to object to this second misstatement of the plea agreement with Mr. LaPean. (91:9-10; App. 159-160). As defense counsel did not consult with Mr. LaPean, and failed to notice and object to the state's second breach, his performance fell below objective standards of reasonableness.

Defense counsel also performed deficiently when he failed to properly advise Mr. LaPean of the remedies available as a result of the state's material and substantial breach. Defense counsel testified that at some point after the state's initial breach, he had a discussion with Mr. LaPean about the state's error and his options moving forward. (91:9-11; App. 159-161). Specifically, based on his understanding of the law, he told Mr. LaPean that he could seek plea withdrawal as a remedy for the breach. (91:10; App. 160). Defense counsel "neither advised [Mr. LaPean] that he could request a new sentencing hearing, nor that he could request a new sentencing hearing in front of a new judge." (91:13; App. 163).

When the state commits a material and substantial breach of a plea agreement the defendant may seek either plea withdrawal or specific performance of the plea agreement through

resentencing before a different judge. *Williams*, 2002 WI 1, ¶38; *See also Howard*, 2001 WI App 137, ¶¶36-37. Defense counsel informed Mr. LaPean of the former, but not the latter, not for any strategic reason, but because he did not know that the law provided that remedy. This misunderstanding of the law constitutes deficient performance. *See State v. Maloney*, 2005 WI 74, ¶23, 281 Wis. 2d 595, 698 N.W.2d 583 ("Ignorance of well-defined legal principles, of course, is nearly inexcusable"). Defense counsel's failure to properly inform Mr. LaPean of his options resulting from the plea breach fell below objective standards of reasonableness.

Finally as Mr. LaPean was prejudiced by defense counsel's deficient performance, he was denied the effective assistance of counsel and is entitled to resentencing. Mr. LaPean was denied the benefit of the plea agreement and, as a result, a "sentencing proceeding whose result [was] fair and reliable." *Smith*, 207 Wis. 2d 258, ¶38. Further, had Mr. LaPean known that he could have requested a new sentencing hearing before a different judge, he would have done so.

Ordinarily, to establish prejudice a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. 668**,** 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. However, "[w]here the attorney is guilty of deficient performance in failing to object to a

substantial and material breach of the plea agreement, the defense is automatically prejudiced." *Howard*, 2001 WI App 137, ¶¶25-26("In *Smith*, our supreme court concluded that when a prosecutor materially and substantially breaches a plea agreement, the breach of the State's agreement always results in prejudice to the defendant."); *Smith*, 207 Wis. 2d at 281, ¶38. Accordingly, as defense counsel failed to object to the state's material and substantial breach, prejudice may be presumed in this case.

Additionally, Mr. LaPean asserts that he was prejudiced by defense counsel's failure to inform him that he could have requested specific performance through resentencing before a new judge as a remedy for the state's breach. At the postconviction motion hearing, Mr. LaPean testified that had he been aware that he could have sought resentencing before a different judge, he would have "[b]ecause the plea was broken." (91:27-28; App. 177-178). This assertion was supported by defense counsel's testimony that when he discussed the breach with Mr. LaPean, Mr. LaPean "immediately and eagerly asked [him] whether that breach of the plea agreement would be grounds for a resentence hearing in front of a new Judge," and that, in his opinion, Mr. LaPean was interested in having a different judge sentence him. (91:10, 12; App. 160, 162). Thus, there is a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different – Mr. LaPean would not have chosen to proceed with the sentencing hearing and would have obtained a

new sentencing hearing before a different judge at which the state made the correct recommendation.

Mr. LaPean was deprived of his rights to the bargained for plea agreement and the effective assistance of counsel in this case and, therefore, is entitled to resentencing before a different judge.

CONCLUSION

For the reasons stated above, Mr. LaPean respectfully requests that this court reverse the circuit court's denial of his postconviction motion and remand the case for resentencing before a different judge.

Dated this 7th day of October, 2019.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,552 words.

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.

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 § 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 one or more initials or other appropriate pseudonym or designation 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.

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 7th day of October, 2019.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender

APPENDIX

Record has been so reproduced
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