STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP1448-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESMOND MYERS LAPEAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, THE HONORABLE ERIC J. LUNDELL, PRESIDING, AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE SCOTT J. NORDSTRAND, PRESIDING, BOTH ENTERED IN ST. CROIX COUNTY CIRCUIT COURT

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was Desmond Myers LaPean's counsel ineffective for not objecting when the prosecutor misstated—beyond the cap she had agreed to in exchange for LaPean's plea—her recommendation for the length of LaPean's extended supervision, where the prosecutor soon after clarified the correct recommendation on the record?

The postconviction court said, "No."

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Assuming that this Court resolves this issue by holding that the State's breach was not material and substantial, neither is warranted. The issue presented can be resolved by applying well-settled law, and the parties' briefs should adequately set forth the relevant principles and facts.

If this Court reaches the question whether LaPean demonstrated the prejudice prong of *Strickland*, publication may be warranted to clarify that the United States Supreme Court in *Puckett v. United States*, 556 U.S. 129 (2009), in holding that defendants are not relieved from establishing prejudice resulting from unpreserved claims that the State breached a plea agreement, conflicts with and effectively overrules existing Wisconsin case law.

INTRODUCTION

Although the question presented is an ineffective-assistance claim, its resolution depends on the merits of the underlying breach-of-plea allegation. Here, LaPean's counsel did not object when the prosecutor, who was bound by the plea agreement to cap her sentence recommendation at 10 years' initial confinement and 10 years' extended supervision, initially asked the court to sentence LaPean to 24 years,

comprised of 10 years' initial confinement and 14 years' extended supervision. After making her argument, but before the court made its decision, the prosecutor clarified the correct recommendation to the court in a sidebar and then immediately on the record.

Because LaPean could have obtained relief only if the State's breach of the plea agreement was material and substantial, that question drives whether counsel's failure to object to the State's breach was ineffective. As discussed below, the breach was merely technical, not material and substantial, particularly given that the State promptly corrected the error, the court was unquestionably aware of the plea provision, and the State was not covertly arguing that it believed LaPean deserved a harsher sentence than what it had agreed to argue. Alternatively, even if the breach was material and substantial, LaPean cannot establish prejudice resulting from counsel's failure to object to it. This Court should affirm.

STATEMENT OF THE CASE

Multiple times between September 2013 and September 2014, when he was 16 or 17 years old, LaPean sexually assaulted then-five-year-old AMAM. (R. 1:1.) The State charged LaPean with counts of first-degree sexual assault of a child under age 12 and repeated sexual assault of a child. (R. 1:1.)

The parties entered a plea agreement where LaPean agreed to plead no contest to the repeated sexual assault count. (R. 87:3.) In exchange, the State agreed to dismiss the first-degree sexual assault count and cap its sentencing recommendation at 10 years of initial confinement and 10 years of extended supervision. (R. 87:3.) The maximum sentence for the crime was 60 years, up to 40 years of initial confinement and 20 years of extended supervision. (R. 1:1.)

During the five months between the plea and sentencing hearings, the court received PSIs. The writer of the court-ordered PSI recommended a term of imprisonment of 9 to 13 years of initial confinement and 7 to 10 years of extended supervision. (R. 40:22.) LaPean also arranged to have an independent PSI prepared. (R. 46.) While that report is under seal in the record, that writer appeared to recommend a term of six months in jail. (R. 88:13.)

At sentencing, the State offered a letter written by AMAM—then nine years old—who asked the court to sentence LaPean to 14 years. (R. 88:4–5.) AMAM's mother spoke as well, telling the court that AMAM suffered continued trauma from LaPean's assaults. (R. 88:10.) "She has had episodes of screaming for hours because she's angry and doesn't know what to do." (R. 88:10.) AMAM's mother revealed that AMAM was hospitalized due to suicidal thoughts and was treated for PTSD, anxiety, and depression. (R. 88:10.)

The State focused its remarks on the seriousness of the crimes and LaPean's failure to take responsibility for them. (R. 88:12–14.) It initially argued that the court should sentence LaPean to 24 years, including 12 years' initial confinement. (R. 88:14.) LaPean's counsel interrupted, objecting that the State's recommendation violated the plea agreement. (R. 88:14.) In response, the State corrected itself as to the 10-year cap for initial confinement, but it incorrectly reflected the agreement as to extended supervision, telling the court, "Ten years—I am sorry. Ten years initial confinement, 14 years of extended supervision." (R. 88:14.)

LaPean's counsel did not correct the State's misstatement regarding its recommendation for extended supervision. (R. 88:15.) His counsel agreed that the gravity of the crime was serious but urged the court to consider assessments that LaPean was unlikely to reoffend, evidence that LaPean was taking responsibility for the assaults, and

the punishment LaPean would receive by having to register as a sex offender for the rest of his life. (R. 88:39–41.) Counsel did not ask for a specific sentence but instead asked the court "to hand down a sentence that will protect rather than please the public." (R. 88:41.)

Just after LaPean began his allocution, the State requested a sidebar, after which it corrected its sentencing recommendation:

> 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.

(R. 88:42.) LaPean then completed his allocution, and the court began its sentencing remarks. (R. 88:43.)

The court told the parties that it had read all of the written materials submitted for sentencing and had "considered this case now for I guess ten months. Thought about it a lot." (R. 88:43.) The court explained that in this case, LaPean's relative risk of reoffense was less important than other factors. (R. 88:44.) "[W]hat's important is what happened at the time" and its effect on the young victim. (R. 88:44.) The court stated that AMAM needed "security, knowing how long the defendant will be incarcerated. She deserves to feel safe in her own home and not have to worry about" LaPean coming for her. (R. 88:44.) The court also explained that the seriousness of the crime diminished the importance of any low risk of reoffense. (R. 88:45.) "Some crimes you don't get a second chance. This is one of them." (R. 88:45.) The court told LaPean that "what is significant is the need to protect [AMAM] from you for a certain period of time. And that's likely the primary factor here that's going to go into your sentence." (R. 88:45.)

The court continued to address the sentencing factors, finding that punishment, deterrence, and protection of the public and AMAM were important. (R. 88:46–47.) It considered LaPean's character and noted that it was favorable, given that "[l]ots of people love you and appreciate you. And I have no hate whatsoever. I find you a likeable young man except for what you did." (R. 88:46.) It disagreed with the sentence recommendation from the independent PSI writer, stating that it would have no deterrent effect. (R. 88:47.)

Finally, the court explained that the seriousness of the offense was significant, particularly given the continued effects on AMAM. (R. 88:47.) It explained that it was not giving LaPean the maximum given his otherwise good character and his lack of record. (R. 88:47–48.) It told LaPean that it had been thinking through his potential sentence for a long time and was "fine-tuning today what I had been thinking of over the last few months here." (R. 88:49.)

The court then explained that its rationale was focused on the need to protect AMAM, and that the sentence was designed so LaPean would remain confined until nine-year-old AMAM reached age 21. (R. 88:49.) Beyond that, the court explained, LaPean would be on a period of extended supervision "for a period of time until hopefully" the victim was married and felt more secure as an adult. (R. 88:49.) Accordingly, the court sentenced him to 12 years' initial confinement and 10 years' extended supervision. (R. 88:49.)

LaPean filed a postconviction motion for resentencing, arguing that his counsel was ineffective for not objecting to the State's second misstatement of its sentence recommendation. (R. 60:4–10.) After holding a hearing on the motion, (R. 91), the postconviction court denied it in a written decision and order, (R. 72). It held that the State's breach of the plea agreement was not material or substantial, and as a

result, counsel was not ineffective for not objecting when the State initially miscorrected itself. (R. 72:7–11.)

LaPean appeals.

STANDARD OF REVIEW

The question presented involves two layers. LaPean claims that his trial counsel was ineffective. Whether counsel rendered ineffective assistance is a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This Court will uphold the postconviction court's factual findings unless they are clearly erroneous. *Id*. Whether the defendant satisfies *Strickland*'s deficiency or prejudice prongs is a question of law that this Court reviews without deference to the lower court's conclusions. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364.

Whether LaPean satisfied his burden of pleading a claim of ineffective assistance depends on whether an objection to an alleged breach of the plea agreement would have been fruitful. In reviewing plea-breach claims, this Court reviews the factual findings under the clearly erroneous standard, but it reviews de novo whether the State's conduct is a substantial and material breach of the plea agreement. *State v. Williams*, 2002 WI 1, ¶ 20, 249 Wis. 2d 492, 637 N.W.2d 733.

ARGUMENT

Counsel was not ineffective for the lack of objection to the State's second misstatement because the State's breach was not material and substantial.

A. Whether counsel was deficient in his nonobjection depends on whether the State's perceived breach was material and substantial.

LaPean's overarching claim is one of ineffective assistance of counsel. Specifically, he claims that counsel should have objected when the prosecutor misstated her agreed-upon maximum sentence recommendation of 10 years' initial confinement and 10 years' extended supervision by asking the court to sentence LaPean to 10 years' initial confinement and 14 years' extended supervision.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.* To show prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id.* at 693.

Whether counsel performed deficiently or prejudicially for not objecting to the State's perceived breach of the plea agreement depends on whether the objection would have been fruitful. *See State v. Campbell*, 2011 WI App 18, ¶ 8, 331

Wis. 2d 91, 794 N.W.2d 276 (stating that to show ineffective assistance of counsel for failing to object to an alleged breach, the defendant must prove that the breach was material and substantial).

A defendant has a due process right to the enforcement of a negotiated plea agreement. *Williams*, 249 Wis. 2d 492, ¶ 37. Because "[a]n agreement by the State to recommend a particular sentence may induce an accused to give up the constitutional right to a jury trial, . . . once an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of the bargain." *Id*. (footnotes omitted). To that end, a prosecutor who fails to present a negotiated recommendation to the sentencing court breaches the plea agreement. *Id*. ¶ 38.

But "not all conduct that deviates from the precise terms of a plea agreement constitutes a breach entitling the defendant to relief." *Campbell*, 331 Wis. 2d 91, ¶ 7. "An actionable breach must not be merely a technical breach; it must be a material and substantial breach." *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*. The remedies for a material and substantial breach of a plea agreement are vacation of the plea agreement or resentencing. *Id.*

B. A misstatement of plea agreement terms is not a material and substantial breach when it is promptly corrected and it does not imply that the defendant deserves more punishment than he bargained for.

This Court's holdings and reasoning, in *State v. Bowers*, 2005 WI App 72, ¶ 3, 280 Wis. 2d 534, 696 N.W.2d 255, and *State v. Knox*, 213 Wis. 2d 318, 321, 570 N.W.2d 599 (Ct. App.

1997), demonstrate that the type of error the prosecutor committed here was not a material and substantial error.

For example, in *Knox*, the prosecutor argued for consecutive sentences when the plea agreement required her to recommend concurrent ones. *Knox*, 213 Wis. 2d at 320. The parties conferred, and the prosecutor informed the court of the correct term, then proposed a concurrent prison sentence consistent with the agreement. *Id.* at 320–21.

On appeal, this Court held that a prosecutor's misstatement of a plea agreement term is not material and substantial when it is promptly corrected and does not taint "the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for." *Id.* at 321 (citing *State v. Poole*, 131 Wis. 2d 359, 394 N.W.2d 909 (Ct. App. 1986)). Applying that rule, the *Knox* Court held the prosecutor's "perceived breach . . . was not substantial. It was not intended to affect the substance of the agreement by sending a veiled message to the sentencing court that greater punishment than provided for in the plea agreement was warranted." *Id.* at 322. Rather, the breach was a mistake that the prosecutor "quickly acknowledged and rectified" by "advocating the corrected proposed disposition." *Id.* at 323.

Likewise, in *Bowers*, the State mistakenly recommended a longer sentence than what the plea agreement called for. *Bowers*, 280 Wis. 2d 534, ¶ 3. The mistake was pointed out after the State concluded its remarks, and the State responded by reciting the correct recommendation. *Id.* Bowers claimed that the State's recitation of the correct recommendation was "too little, too late," but this Court disagreed. *Id.* ¶ 10. It noted that the law did not require "that the state correct a misstated sentence recommendation forcefully or enthusiastically." *Id.* ¶ 12. Rather, it was 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.* Given the State's correction of its misstatement and evidence that the court was aware of the terms of the plea agreement, "[t]he perceived breach was not an attempt to qualify or undercut the substance of the plea agreement; rather, it was simply an inadvertent misstatement that was acknowledged and rectified shortly thereafter." *Id.* ¶ 13.

Here, the State's breach was not material and substantial. The perceived breach was its misstatement recommending a sentence of 10 years' confinement and 14 years' extended supervision, (R. 88:14), which meant that the State requested four more years of extended supervision than the plea agreement permitted. The State realized its error at the start of LaPean's allocution and promptly informed the court of the correct recommendation during a sidebar and then immediately after on the record: "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." (R. 88:42.)

Like in *Bowers* and in *Knox*, the State promptly, neutrally, and matter-of-factly corrected its misstatement when it realized its mistake. And like in those cases, the court was aware of the correct terms of the plea agreement. The State told the court the correct recommendation during the sidebar and on the record. (R. 88:42.) Moreover, when the court announced its sentence, nothing in its remarks reflected a misunderstanding of the sentence the State was arguing. Rather, the court explained that it fashioned LaPean's initial confinement to ensure that LaPean would not be released until then-nine-year-old AMAM turned 21 years old. (R. 88:48–49.) It also imposed 10 years' extended supervision with the hope that by the time that supervision ended, AMAM would be in a relationship or family situation in which she felt

secure and protected. (R. 88:49.) The length of supervision was consistent with the State's correctly capped recommendation (and within the range recommended by the writer of the court-ordered PSI). (R. 88:47–48.) Given all of that, the State's misstated recommendation for extended supervision was soundly cured by its on-the-record correction and was no more than a technical breach.

C. LaPean's attempts to align his case with *Williams* are not persuasive.

LaPean argues that the State's correction was too little and too late given its "passionate argument that anything less than 24 years would unduly depreciate the seriousness" of LaPean's assaults and undercut the need to protect the public. (LaPean's Br. 9–10.) He argues that this situation is more akin to the situation in *Williams*, 249 Wis. 2d 492, where the court identified a material and substantial breach of the plea agreement. (LaPean's Br. 12–14.)

In *Williams*, the prosecutor recited the plea agreement that she would be recommending, three years' probation, but then made numerous comments during her remarks reflecting that her opinion of that recommendation had changed. *Williams*, 249 Wis. 2d 492, ¶ 26. The prosecutor told the court that after the parties entered the agreement, the prosecutor received additional information from the PSI and Williams's ex-wife regarding Williams's manipulation and unwillingness to take responsibility. *Id.* ¶ 26. The prosecutor went on to emphasize the PSI and that writer's opinion that Williams "need[ed] to go to prison." *Id*.

Williams's counsel objected that the State was covertly modifying its recommendation by advancing the PSI writer's position, which was inconsistent with the position the State agreed to take as part of the plea agreement. *Id.* ¶ 27. The prosecutor responded that she was merely relaying relevant

information from the PSI and that she stood by the agreed-upon recommendation of three years' probation. *Id.* ¶ 29.

The supreme court held that the "case present[ed] a close question," but based on the overall impression from the entire sentencing transcript, the State breached the plea agreement and the breach was material and substantial. *Id.* ¶¶ 46, 52. That was so because the State gave a less-than-neutral recitation of the plea agreement when it implied, at the start of its remarks, that it lacked information about the defendant at the time of the plea agreement, then went on to emphasize additional information that "raised doubts regarding the wisdom of the terms of the plea agreement." *Id.* ¶ 50.

LaPean's case is unlike *Williams*. There, the sentencing transcript reflected a consistent implication that after the parties reached the plea agreement, the prosecutor received additional information through the PSI and the defendant's ex-wife that caused her to doubt the wisdom of the agreed-upon sentence recommendation. Her remarks emphasizing the PSI writer's recommendation for prison further implied that the prosecutor personally believed that a harsher sentence than what she had agreed to ask for was warranted.

Here, in contrast, there was nothing from the prosecutor reflecting a change of heart regarding the agreed-upon sentencing cap. Rather, the transcript reflects that the prosecutor simply had the wrong number in her head—24 years, not 20—when she began her sentencing remarks and initially appeared to request a 24-year sentence with 12 years' confinement. (R. 88:14.) She continued to believe that 24 was the relevant cap because she responded to LaPean's objection by correcting her recommendation to 10 and 14 years. (R. 88:14.) But nothing in her remarks reflected a changed view since the time of the plea. She did not "relay" the department of corrections' presentence writer's opinion or recommendation. She apologized when she made her initial

correction to reflect the accurate recommendation for initial confinement, and then again when she informed the court of the correct recommendation for extended supervision. (R. 88:14, 42.)

LaPean disagrees that the State's correction was "prompt." (LaPean's Br. 16.) But by all appearances, the prosecutor corrected the errors as soon as she realized they were errors: first, immediately after LaPean's counsel objected to her recommendation of 12 years' initial confinement, and later interrupting LaPean's allocution to apologize and to inform the court of the correct recommendation. (R. 88:14, 42.)

LaPean insists that the State's error in recommending a longer overall sentence carried over into her sentencing remarks. (LaPean's Br. 16–17.) He focuses on the prosecutor's remarks when she told the court that "a high prison time" and that "high amount" of 10 years' confinement with 14 years' extended supervision was necessary "because to do . . . anything less would unduly depreciate the seriousness of the crime, the gravity of the offense, and [the] need to protect the public." (R. 88:14.) LaPean further suggests that in making its correction, the State should have asserted "that it no longer believed a sentence of 24 years was necessary." (LaPean's Br. 18.) He faults the prosecutor for qualifying its correction as being "due to the plea agreement." (*Id.*)

To start, LaPean's counsel repeatedly emphasizes that the State was recommending "24 years of imprisonment," (LaPean's Br. 16–20), when the error was reflected only in its recommendation for extended supervision. To that end, the focus of the State's remarks regarding "high prison time" was the 10 years of confinement, which was consistent with the plea agreement. In making the recommendation, the prosecutor noted that the "lengthy period of incarceration" was necessary for both LaPean and the victim, who "needs to grow up and be older to feel confident in her security and her

safety and not realize that [LaPean] is going to get out within six to twelve months. He's a danger to our society." (R. 88:15.) In other words, the prosecutor was arguing for the maximum initial confinement consistent with the plea agreement. By so arguing, she was not suggesting that LaPean deserved more time than what she was required to argue under the agreement.

And to be clear, the State does not mean to suggest that the extended supervision portion of the recommendation didn't matter. It did matter, and the prosecutor had a duty under the plea agreement to recommend 10 years of extended supervision. But the point remains that the prosecutor directed her argument to advocate for the 10-year period of initial confinement, given the gravity of the offense, the need to protect the public, and the need for the victim to develop a sense of security. The focus of her argument was not the length of extended supervision.

Furthermore, the law permits a prosecutor to argue zealously for his or her recommended sentence, even when subject to a cap under a plea agreement. *See State v. Naydihor*, 2004 WI 43, ¶ 30, 270 Wis. 2d 585, 678 N.W.2d 220 ("[W]e have found no case that holds that the State is obligated to say something nice or positive about the defendant in order to avoid breaching a plea agreement."). The tenor of the prosecutor's argument was that the cap she had agreed to argue was justified based on the facts of the case and the relevant sentencing factors. It was not a veiled effort to persuade the court that LaPean deserved more punishment than he had bargained for her to argue.

Similarly, as for LaPean's claims that the prosecutor should have done more to advocate for a 20-year sentence after correcting her mistake, the law does not require that. Rather, it merely requires a prompt correction that does not impair the integrity of the sentencing process, not a particularly zealous or enthusiastic one. For example, while

in *Bowers*, "the State did not correct itself with tremendous enthusiasm and zeal and while the trial court did not reflect upon the State's 'earnest' advocacy of the proper sentence," neither of those things were required for the court "to find a perceived breach immaterial and insubstantial. There is no requirement that the state correct a misstated sentence recommendation forcefully or enthusiastically." *Bowers*, 280 Wis. 2d 534, ¶ 12. Instead, "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.*

Here, the prosecutor's saying that the cap on her sentence recommendation was 20 years, with up to 10 years' initial confinement and 10 years' extended supervision due to the plea agreement, is a neutral, matter-of-fact clarification of the plea agreement terms. Both times that the prosecutor made the correction, she apologized for the error. Neither time—nor at any point during her sentencing remarks—did the prosecutor step over the line as the State did in *Williams* to imply a change of heart since the plea agreement or a new opinion that LaPean deserved more punishment than what he had bargained for the State to argue.

In sum, the prosecutor here zealously advocated for the longest sentence she could, consistent with the plea agreement. Her mistake in misstating her recommended period of extended supervision, which she promptly corrected, was not a material and substantial breach.

D. Because the breach was not material and substantial, counsel was not ineffective; alternatively, LaPean cannot demonstrate prejudice.

The postconviction court correctly concluded that counsel was not ineffective because the breach was not material and substantial. Before the postconviction court, the

parties agreed that the question of ineffective assistance turned on whether the State's perceived breach was material and substantial. (R. 72:11.) As a result, the postconviction court did not otherwise address the *Strickland* factors. (R. 72:11.) That said, if this Court disagrees with the postconviction court's holding and the State's position that the breach was technical and not material and substantial, LaPean must still establish that he is entitled to relief under *Strickland*, which in the State's view he cannot do, because LaPean retains his burden to establish prejudice, and he cannot do so.[1]

1. Prejudice is not presumed.

LaPean asserts, (LaPean's Br. 23–24), that under Wisconsin case law, prejudice is presumed. *See State v. Smith*, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997) (holding that prosecutor's material and substantial breach of plea agreement deprives the defendant of fair and reliable sentencing proceedings, and thus prejudice is presumed); *State v. Howard*, 2001 WI App 137, ¶ 25, 246 Wis. 2d 475, 630 N.W.2d 244 (acknowledging holding in *Smith*).

The State disagrees that the presumption of prejudice in *Smith* and its progeny remains viable in light of subsequent United States Supreme Court law. In *Puckett v. United States*, 556 U.S. at 132–33, the government breached its plea agreement with Puckett during sentencing, but Puckett did not contemporaneously object. Because Puckett forfeited the claim of error, the Court reviewed Puckett's challenge under

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[1] As for the first *Strickland* prong, the State agrees with LaPean's position that he established that if the breach was material and substantial, counsel performed deficiently by not objecting. (LaPean's Br. 20–23.) At the *Machner* hearing, counsel testified that his failure to object to the State's misstatement of its recommended term of extended supervision was an oversight and not the product of a reasonable strategic decision. (R. 91:9–12.)

the plain-error doctrine. *Id.* at 135. Under that doctrine, the defendant must satisfy four elements, including that the error affected the outcome of the proceedings, i.e., that the error prejudiced him. *Id.*

Puckett opposed plain-error review, in part because "the prejudice prong, has no application, since plea-breach claims fall within 'a special category of forfeited errors that can be corrected regardless of their effect on the outcome.'" *Id.* at 140 (citation omitted).

The Court disagreed. It first noted that a breach of a plea deal "is not a 'structural' error as we have used that term" and is not necessarily precluded from harmless error review. *Id.* at 140–41.

The Court also distinguished and limited its previous holding in *Santobello v. New York*, 404 U.S. 257 (1971), where it held "that automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved." *Id.* at 141. But that holding, the court explained, was based not on the premise that a plea-breach constitutes the equivalent of a structural error to which harmless error review was not amenable, "but rather upon a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining." *Id.* So, the Court explained, while the rule in *Santobello*—as applied to cases where the objection was preserved—was sound, it did not extend to cases where the defense failed to preserve the error by a contemporaneous objection. As the Court wrote, "the rule of contemporaneous objection is equally essential and desirable [to the policy interest in establishing trust between the parties to plea agreements], and when the two collide we see no need to relieve the defendant of his usual burden of showing prejudice." *Id.*

Puckett controls over *Smith* and its progeny. *See State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142 ("The court of appeals must not follow a decision of [the Wisconsin Supreme Court] on a matter of federal law if it conflicts with a subsequent controlling decision of the United States Supreme Court."). The court in *Smith* concluded that prejudice is presumed when counsel deficiently fails to object to a material and substantial breach of a plea, and that it need not consider what the sentencing judge would have done had counsel objected, based on the idea that such a breach renders the sentencing unfair and unreliable. *Smith*, 207 Wis. 2d at 281. But that holding was based on *Santobello*, without limiting that case to situations where the objection was preserved: "Rather, our conclusion is premised on the rule of *Santobello*, that when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled." *Id.* Given the *Puckett* Court's later-stated limits on the holding in *Santobello*, *Smith*'s holding does not appear to remain viable.

And that *Puckett* involved an application of the plain-error doctrine does not limit its applicability to *Strickland* claims. Plain-error and ineffective assistance of counsel claims are appropriate for appellate review of unobjected-to matters. *See State v. Beauchamp*, 2011 WI 27, ¶ 37, 333 Wis. 2d 1, 796 N.W.2d 780. Both tests require either a demonstration of prejudice (ineffective assistance) or lack thereof (plain error). *Id.* ¶¶ 38–39. Moreover, the Seventh Circuit Court of Appeals has held that defendants alleging ineffective assistance of counsel for failing to object to a breach of the plea agreement at sentencing were required to show prejudice, and relied in part on *Puckett* in doing so. *See, e.g.*, *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

Given the reasoning and rationale in *Puckett*, *Smith* is no longer good law to the extent that it holds that the presumption of prejudice applies to claims that counsel was

ineffective for failing to object to a material and substantial breach. This Court may recognize that *Puckett* conflicts with *Smith* and therefore controls. *Jennings*, 252 Wis. 2d 228, ¶ 19.

2. LaPean cannot demonstrate prejudice.

For a defendant to show prejudice based on an unobjected-to breach related to sentencing, "the 'outcome' he must show to have been affected is his sentence." *Puckett*, 556 U.S. at 142 n.4. To that end, a defendant "will not always be able to show prejudice, either because he obtained the benefits contemplated by the deal anyway (*e.g.,* the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event (as is seemingly the case here)." *Id.* at 141–42.

Here, the record demonstrates both roadblocks to LaPean's ability to show prejudice. The State's breach was recommending 14 years of extended supervision when it promised to recommend 10. LaPean received a 10-year period of extended supervision. Moreover, to the extent that the State breached by recommending a total term of 24 years, the record demonstrates that the court would have imposed the sentence it did regardless of the State's breach. As discussed, the court explained that its rationale for sentencing LaPean to 12 years' initial confinement was tied expressly to the victim's age (nine) at the time and the court's view that confining LaPean until the victim turned 21 was appropriate given the seriousness of the crime, the trauma it caused her, and the need to protect her and the public. (R. 88:49.) In addition, the sentence imposed was consistent with the recommendation provided in the court-ordered PSI. And nothing in the court's sentencing remarks reflected that it was influenced by the State's erroneous request for 14 years' extended supervision. LaPean cannot show that the State's breach affected the outcome, i.e., his sentence.

LaPean argues that he was prejudiced because counsel failed to inform him that he could receive resentencing before a new judge as a result of the State's breach. (LaPean's Br. 24.) At the postconviction hearing, LaPean's counsel testified that after the State made its initial mistake in requesting 12 years' initial confinement and counsel objected, counsel conferred with LaPean. (R. 91:9.) Counsel said that LaPean asked whether that breach would be grounds for a resentencing hearing before a new judge, and counsel told him, incorrectly, that it would not. (R. 91:10–11.) Counsel made clear that the discussion with LaPean related to the State's first breach in recommending 12 years' initial confinement, not the later breach of recommending 14 years' extended supervision. (R. 91:11–12.)

But the State immediately cured the first breach, at least to the extent that it advocated for a 12-year initial confinement sentence by correcting itself to ask for 10 years. So, even if counsel would have correctly advised LaPean after the State's first breach that he could seek specific performance through resentencing before a new judge, that first breach in and of itself was not material and substantial. And because counsel objected to that first breach, but not the second, the second breach is the focus of the ineffective assistance claim. To that end, the question of prejudice depends on whether the defendant can show a reasonable likelihood that the sentence would have been different but for the prosecutor's breach. *Puckett*, 556 U.S. at 142 n.4. As discussed, LaPean cannot satisfy that burden.

* * * * *

In summary, this Court may affirm on either of two grounds. As discussed in Part B., above, because the breach by the State was merely technical and not material and substantial, LaPean would have garnered no relief from an objection by counsel. *See Campbell*, 331 Wis. 2d 91, ¶ 8.

Alternatively, if the State's breach was material and substantial, under *Puckett*, LaPean is not relieved of his burden to demonstrate prejudice, and he cannot demonstrate it on this record. Thus, his ineffective assistance of counsel claim fails.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 30th day of December 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 5,801 words.

Dated this 30th day of December 2019.

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SARAH L. BURGUNDY
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 30th day of December 2019.

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