**STATE OF WISCONSIN**
**SUPREME COURT**
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**CASE NO. 2021AP21-CR**

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**STATE OF WISCONSIN,**
**Plaintiff-Respondent-Petitioner,**

**-vs-** **Case No. 2018 CF 81**
**(Vernon County)**

**ROBERT K. NIETZOLD, SR.,**
**Defendant-Appellant.**

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**ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ONEIDA COUNTY, THE HONORABLE PATRICK F. O'MELIA PRESIDING.**

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# RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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**BY:**

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## ARGUMENT

Defendant Nietzold hereby opposes the State's Petition for Review. The court of appeals reached the just and appropriate result. The State's assertion that the result is inconsistent with existing precedent is not borne out by a review of the cases cited by the State. The State's suggestion that this case, as unpublished, could create future confusion is not persuasive.

### The decision of the court of appeals is just

As an initial matter, the decision of the court of appeals is the right decision. Any suggestion that defendant Nietzold received the benefit of his plea agreement in this case borders on absurd. It is easier said than done for a trial court to ignore a prosecutor's advocacy for a specific term of incarceration. Any argument there was anything other than a material and substantial breach is not borne out by the record.

Defendant bargained for an outcome whereby the State agreed not to argue for a specific length of prison. The State presented it full sentencing argument in uninterrupted fashion. The State made specific recommendations as to an appropriate length of prison, the very thing it had promised not to do at sentencing!

Citing *State v. Smith,* 207 Wis.2d 258, ¶38, 558 N.W.2d 379 (1997), the court of appeal, *State v. Robert Nietzold,* District IV Case 2021AP21-CR, decided 12/9/21, at ¶10, "when a prosecutor agrees to make no sentence recommendation but instead recommends a significant prison term, such conduct is a material and substantial breach of the plea agreement." The decision of the court of appeals implicitly recognizes the inherent difficulty in remedying this type of error.

It is not hyperbole to assert that a reasonable person watching this sentencing hearing would have found the proceeding to be unfair to defendant.

### The decision of the court of appeals is consistent with existing precedent

The State argues the decision of the court of appeals in this case is inconsistent with other precedent. The State asserts the decision of the court of appeals is not consistent with two other cases, *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. Neither case would suggest the decision by the court of appeals is incorrect.

In *Knox,* defendant worked out an agreement whereby defendant would plead to felony offenses in exchange for an agreement by the State whereby the parties would jointly recommend a six-year prison sentence, to run concurrently with other sentences. *Id.* at 320. At sentencing a few weeks later, a prosecutor not involved in the negotiations appeared for the State. She argued for a five-year prison term consecutive to any other sentence. *Id.* Defense counsel immediately objected, a recess was called and the prosecutor corrected her recommendation to reflect the plea agreement when the case was recalled. *Id.* The court of appeals found there was no substantial breach of the plea agreement:

> The perceived breach in this case 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. Rather, the deviation from the original terms drew a prompt objection and was shown to be the result of a misstate 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 motive. For these reasons, the momentary and inadvertent misstatement of the parties' agreement did not constitute an actionable breach. *Id.* at 322-23.

In *Bowers,* on 5/19/03, defendant entered into a plea agreement with the State whereby the parties would jointly recommend a prison sentence of four years prison, two years initial confinement and three years of extended supervision. *Id.* at ¶2. The agreement was silent on whether the recommendation as to whether the recommendation was to be concurrent or consecutive. *Id.* At sentencing on 7/30/03, the State recommended two and one-half years initial confinement and two and one-half years of extended supervision, to run consecutively to any other sentence. *Id.* at ¶3. Immediately after the State completed its sentencing argument, the defense pointed out that the State had misstated the plea agreement. *Id.* Upon hearing this, the State immediately amended its recommendation to "two years in, three years out." *Id.* Defendant was ultimately sentenced to three years initial confinement and two years of extended supervision. *Id.*

The *Bowers* court, citing *State v. Dielke,* 2004 WI 104, ¶14, 274 Wis.2d 595, 682 N.W.2d 945, recognized a material and substantial breach of a plea agreement is one that violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he bargained. *Bowers* at ¶9. Ultimately, because the State's misstatement was "inadvertent and insubstantial," the *Bowers* court found no breach had occurred. *Id.* at ¶2.

This case is not like *Knox* at all. In *Knox,* the misstatement was corrected instanteously. Consequently, there could be no impact on the sentencing proceedings and there was not a substantial or material breach. In this case, the State presented its full argument in uninterrupted fashion. Not only did the State recommend a specific length of prison in violation of the plea agreement, it offered a reasoned explanation why it was making its recommendation.

While this case is somewhat similar procedurally to *Bowers*, in reality the misstatement by the State was fairly *de minimus* in *Bowers.* The State was bound to recommend two years of initial confinement but instead argued for two years and six months of initial confinement, an additional six months. The error was corrected before sentencing was pronounced. On appeal in *Bowers,* the State conceded the misstatement was material but not substantial. *Id.* at ¶11. The court found the state's inadvertent misstatement was neither material or substantial because the error was corrected promptly and did not impair the integrity of the sentencing process. *Id.* at ¶12.

Unlike in *Bowers,* in this case, the State's recommendation was not a mere misstatement of the plea agreement, it was the advocacy for a specific length of prison, the one argument the State had agreed not to make. The reality is there is no easy way to fix this type of error. The trial court cannot unhear this type of argument. When one looks at the entire sentencing transcript, it is apparent the trial court was still aware of the State's erroneous recommendation when it imposed sentence, regardless of the State efforts to correct it. The court of appeals correctly concluded the State was unable to cite a case where a prosecutor's disavowal of a specific prison sentence recommendation in the face of an agreement not to recommend a specific recommendation was sufficient to cure any breach of the plea agreement. *State v. Robert Nietzold,* District IV Case 2021AP21-CR, decided 12/9/21 at ¶15.

The decision of the court of appeals will not create confusion

The State argues that because this case can be cited in Wisconsin courts, it will create confusion because its holding is inconsistent with other precedent. As argued above, the holding in this case is completely consistent with *Knox* and *Bowers.* The court of appeals has the duty to apply the legal concepts to the facts of any given case. This case is no different. While there often is binding precedent that mandate a given result related a set of facts, there are substantial occasions where the court of appeals has to apply the closest precedent to reach a just and fair result. That is exactly what the court of appeals did in this case. The Wisconsin Supreme Court does not have to review every case where the court of appeals reaches a decision where there is no unequivocal, binding precedent.

## CONCLUSION

For the reasons set forth above, the Wisconsin Supreme Court should not grant the State's petition for review.

Dated: September 13, 2021

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Attorney for Defendant
Electronically signed by Philip J. Brehm
Bar No. 1001823
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## CERTIFICATE OF EFILE/SERVICE

I certify that this response to the State's petition for review conforms with the rules contained in Wis. Stat. §809.62(4) for a response produced with proportional serif font. The length of this response is 1,320 words.

Dated: January 20, 2022

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Attorney for Defendant
Electronically signed by Philip J. Brehm

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §809.62(4)(B).

I further certify that: (1) I have submitted an electronic copy of this response, excluding any appendix, which complies with the requirements of Wis. Stat. §§809.62(4)(b) and 809.19(12); (2) This electronic response is identical in content and format to the printed form of the petition for review filed as of this date; and (3) A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated: January 20, 2022,

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Attorney for Defendant
Electronically signed by Philip J. Brehm