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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2021AP21 - CR
(Vernon County Case No. 2018CF81)

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ROBERT K. NIETZOLD, SR.,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from a Judgment of conviction and an Order Denying Postconviction Relief, Both Entered in Vernon County Circuit Court, the Honorable Darcy J. Rood, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules, & Statutes

Other Authorities

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Material breach, cure, and judicial remedy are separate concepts. Without a breach, no need exists for a cure. If an attempt to cure the breach succeeds, no need exists for a judicial remedy. Yet, when analyzing breaches of plea agreements, Wisconsin courts often mix the concepts and consider cure when determining whether the breach is material. *See, e.g.,* ***State v. Bowers***, 2005 WI App 72, 280 Wis.2d 584, 696 N.W.2d 255.

Within this framework, objecting to a breach of a plea agreement only points out the need for an immediate cure, if possible, and judicial remedy if not. That some errors cannot be cured when made and in the presence of the original decision-makers is not new. For example,

sufficiently prejudicial errors may result in mistrials because no lesser remedy suffices. *See* ***State v. Bunch***, 191 Wis.2d 501, 506, 512, 529 N.W.2d 923 (Ct. App. 1995). The court then releases the jury and the case is tried before a new jury.

So too with some prosecutorial breaches of the sentence recommendation terms of a plea agreement. When the overall message from a prosecutor's conduct and statements, even after any attempted cure, is that the prosecutor covertly believes a more severe sentence than the recommendation is warranted, plea withdrawal or a new sentencing before a different judge is warranted, *see* ***Santobello v. New York,*** 404 U.S. 257, 262-263 (1971), despite the objection and attempt at cure, *see* ***State v. Williams,*** 2002 WI 1, ¶ 51, 249 Wis.2d 492, 637 N.W.2d 733.

This result does not render objections irrelevant. Although one purpose of objections is to give the court the opportunity to correct errors, *see* ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797 (1990); *see also* ***State v. Smith,*** 207 Wis.2d 258, 272-73, 558 N.W.2d 379 (1997), there are other purposes, *see* ***Vollmer***, 156 Wis.2d at 10-11 (listing four purposes). A timely objection makes an immediate cure more likely but does not guarantee it is possible. Thus, when this Court in ***Smith***, 207 Wis.2d at 268, suggested that the lack of a contemporaneous objection to a breach of the plea agreement caused the breach not to be remedied, this Court was not holding that all or even most such breaches could be cured at the sentencing hearing.

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") therefore asks this Court to clarify that courts

analyzing breaches of sentencing recommendation terms of a plea agreement should first determine whether a breach occurred, then decide if any attempted cure was effective, and, if not, grant the defendant either the right to withdraw his plea or be resentenced before a different judge. Ultimately, whether an attempted cure was effective turns on whether the prosecutor's statements, including those before and after the attempted cure, imply that the State would make a different sentencing recommendation but for the agreement. Objections matter to this analysis only to the extent that they allow an attempted contemporaneous cure.

ARGUMENT

After analyzing breach and attempted cure separately, courts should decide whether a remedy is needed because the prosecutor's statements, including those before and after any attempted cure, imply that the State would make a different recommendation but for the agreement.

"When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." ***Santobello***, 404 U.S. at 262. Courts therefore must determine if such promises have been fulfilled. Although courts borrow from contract law, the defendant's due process rights mandate some modification. *See* ***State v. Deilke***, 2004 WI 104, ¶ 12 & n.7, 274 Wis. 2d 595, 682 N.W.2d 945. Given these considerations, courts should first determine whether a breach exists and then determine whether any attempted cure succeeded.

"A plea agreement is analogous to a contract, though the

analogy is not precise." ***Id.***, ¶ 12. The due process concerns that underlie ***Santobello*** require courts to make sure that defendants are not treated unfairly, ***State v. Poole***, 131 Wis 2d 359, 361, 304 N.W.2d 909 (Ct. App. 1986), because "fundamental due process rights are implicated by the plea agreement." ***State v. Rivest***, 106 Wis.2d 406, 413, 316 N.W.2d 395 (1982). Those constitutional rights, *see* U.S. Const. amend. XIV; Wis. Const. art. I § 8, protect only defendants, not the state.

Moreover, plea agreements differ from contracts because breach remedies are more limited. When contracts are breached, courts generally can award money damages. *See, e.g.*, ***Sporleder v. Gonis***, 68 Wis.2d 554, 559, 229 N.W.2d 602 (1975). Money damages are not available in criminal cases so the only remedies are rescission through plea withdrawal or specific performance at resentencing before at different judge (at which the prosecutor complies fully.) *See* ***Santobello***, 404 U.S. at 263.[1]

Courts have imported from contract law the idea that a breach of a plea agreement must be "material" before a remedy is available. *See* ***Deilke***, 2004 WI 104, ¶ 13 n.9.[2] Determining whether there is a material breach before deciding if cure occurred makes sense. *See* ***Williams***, 2002 WI 1 (using this analysis). Saying, for example, that no breach occurred when "the prosecution withdrew its first recommendation, which was contrary to the plea agreement, and told the court that it was recommending

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[1] Because ***Santobello, id.***, dictates the remedies, remedy will not be discussed further.

[2] The term "substantial" has been used with "material," but "substantial and material" is a single concept. ***Deilke***, 2004 WI 104, ¶ 12 n.8.

sentencing in accordance with the agreement" is clear error. ***United States v. Kurkculer,*** 918 F.2d 295, 298 & n.5 (1st Cir. 1990). Viewed this way, an objection provokes an attempted cure attempt which may not be sufficient to obviate the need for further remedy.

Courts therefore should first ask whether a material breach occurred, despite any attempt at cure. A material breach does not always require a failure to make the bargained-for recommendation. ***Williams***, 2002 WI 1, ¶ 38. If the prosecutor's conduct "defeats the benefit for which the accused bargained," ***id.***, or the prosecutor "'taints' the sentencing hearing by implying to the court that the defendant deserves more punishment than was bargained for," ***Bowers***, 2005 WI App 72, ¶ 9; *see also* ***Poole***, 131 Wis.2d at 364, a material breach occurred.

The correct focus is on prosecutorial statements and whether they ultimately convey reservations about the agreed-upon recommendation. Using rhetoric to say one thing but imply something very different is not new, William Shakespeare, *Julius Caesar*, Act III, Scene 2, lines 1610-1767 (Mark Antony's speech), and "'[e]nd runs around a plea agreement are prohibited," ***Williams***, 2002 WI 1, ¶ 42.

The focus is *not* on the prosecutor's motive or intent. The ***Santobello*** Court, 404 U.S. at 257, held that inadvertence lacked significance in determining whether the defendant was entitled to a remedy and inadvertence or lack of intent did not excuse breaches. The issue was whether defendants received less than they bargained for, regardless of prosecutorial intent. *Id.*

State v. Knox, 213 Wis.2d 318, 320, 570 N.W.2d 599 (1997) and ***Bowers***, 2005 WI App 72, ¶¶ 11-12, therefore

conflict with ***Santobello***. Despite ***Santobello's*** clear guidance that neither prosecutorial inadvertence nor prosecutorial intent matter, 404 U.S. at 262, the Court of Appeals held in ***Knox*** and ***Bowers*** that no material breach existed if the prosecutorial misstatements were "inadvertent" and "not intended to affect the substance of the agreement." The correct reasoning considers whether any misstatements violated the terms of the agreement and defeated a benefit for the defendant, ***Deilke***, 2004 WI 104, ¶ 14, not what the prosecutor intended or why the error occurred.

Whether the breach influenced or could have influenced the court also is irrelevant because of "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made." ***Santobello***, 404 U.S. at 262. The breach in ***Santobello*** was worthy of remedy even though the sentencing judge in that case said the prosecutor's breach did not influence him and the Court had "no reason to doubt that." ***Id.*** at 262-263. The damage is the breach itself, not its effect on the judge. *See* ***United States v. Clark***, 55 F.3d 9, 13-14 (1st Cir. 1995). Holding otherwise would "allow prosecutors to make sentencing recommendations with a wink and a nod." *Cf.* ***State v. Bearse***, 748 N.W.2d 211, 217-18 (Iowa 2008) (discussing an ineffectiveness claim for failure to object to a breach).

If a material breach occurs, then the courts should consider any attempted cure's sufficiency. Given the due process concerns and the narrow choices of remedy, *see* page 8 *supra*, the state should have the burden of establishing that any cure succeeded. This burden is fair because the prosecutor's actions caused the breach. The prosecutor's improper use of a plea agreement threatens

"'the honor of the government' and 'public confidence in the fair administration of justice,'" ***Bearse***, 748 N.W.2d at 215 (citation omitted), so the prosecutor should be required to restore them. Moreover, this allocation incentivizes prosecutors to prepare diligently for sentencing, *cf.* ***Vollmer***, 156 Wis.2d at 11 (discussing reasons for requiring objections), and helps keep them acting in good faith, thereby preventing breaches.

In any event, the attempted cure's sufficiency depends on whether, even after it, the prosecutor's statements still imply that the prosecutor would make a different recommendation but for the agreement, ***State v. Fannon***, 799 N.W.2d 515, 522 (Iowa 2011), or whether the cure is "too little, too late," ***Williams***, 2002 WI 1, ¶ 52. In other words, if the cure is adequate, the prosecutor's statements, taken as a whole, will not "defeat[] the benefit for which the accused bargained." *See* ***id.***, ¶ 38.

How these concepts play out may depend on the type of breach. There are two major categories of breach of sentencing recommendation terms.[3] First, there are breaches in which the prosecutor is bound to give one recommendation but gives another. Second, there are the breaches in which prosecutors make the bargained-for recommendation but undercut it in remarks. *See, e.g.,* ***Poole***, 131 Wis 2d at 364. Both categories may includes potential breaches of agreements in which the prosecutor agrees to "remain silent."

Agreeing to give one recommendation but giving another is the first category of breach. Giving an affirmative

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[3] Other alleged violations are possible. *See, e.g.,* ***State v. Bangert***, 131 Wis.2d 246, 287-292, 389 N.W.2d 12 (1986) (dispute over a banned word).

recommendation when the prosecutor agreed to "remain silent" is one example. *See, e.g.*, ***State v. Birge***, 638 N.W.2d 529 (Neb. 2002).

At a minimum, an agreement to do something specific at sentencing creates an affirmative obligation to do exactly that and a prohibition against recommending any other sentence *See* ***State v. Waldner***, 692 N.W.2d 187, 190 (S.D. 2005). Although prosecutors need not use "magic words," they must clearly convey that they are making and support the bargained-for recommendation. *See* ***State v. Hanson***, 2002 WI App 10, ¶ 22, 232 Wis.2d 291, 608 N.W.2d 278.

All of these breaches are material.[4] Defendants enter pleas "in the hopes of obtaining a lesser sentence," Mark W. Bennett, Going, Going, Gone: The Missing American Jury, 69 Ala. L. Rev. 247, 256 (2017). "Undoubtedly, one of the most crucial issues in a plea agreement" is sentence length. ***State v. Howard***, 246 Wis.2d 475, 489, 630 N.W.2d 244 (Ct. App. 2001). The defendant waives his constitutional trial rights "not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statements in court." ***Clark***, 55 F.3d at 14.

Once the prosecutor materially breaches and an attempt at cure occurs, the question is whether the attempt succeeded. Stating the correct recommendation is

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[4] Courts sometimes cite ***Bangert***, 131 Wis.2d at 286, for the idea that some breaches can be merely technical. But ***Bangert*** concerns a linguistic breach, not a change in recommendation. The agreement allowed a recommendation of "a very long period of prison" and barred mentioning "maximum." The prosecutor said, "the State is not going to ask the Court to impose the maximum sentence." ***Id.*** at 286-87.

Note too that, if the prosecutor omits an agreement term, but later endorses that term, there is a breach, but it is easily cured, *see* ***State v. Campbell***, 2011 WI App 18, 331 Wis.2d 91, 794 N.W.2d 276, because no implication that another sentence was appropriate arises.

insufficient if the statements as a whole imply that the prosecutor supports a different recommendation. *See, e.g.,* ***Fannon***, 799 N.W.2d 515. A "perfunctory gesture alone" will not suffice. *See id.* at 521.

The second category of breach occurs when the prosecutor uses "qualified or negative language in making the sentence recommendation." *See* ***Poole***, 131 Wis.2d at 364. Prosecutors giving the impression that a certain sentence is appropriate despite an agreement to "remain silent," *see, e.g.,* ***Birge***, 638 N.W.2d 529, fits in this category. A breach occurs because the state "may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***Williams***, 2002 WI 1, ¶ 42. Courts must carefully examine whether prosecutors "undercut the essence of the plea agreement." ***Id.***, ¶ 46.

Determining when the state has materially breached can be tricky. Prosecutors who bring up unfavorable information are not necessarily undercutting the agreement. They have obligations beyone keeping the plea agreement, and may not agree to keep relevant information from the sentencing judge. ***Id.,*** ¶ 43. Despite any agreement, they still have a duty to inform the court of the defendant's character and behaviors. ***Id***, ¶ 43. Prosecutors therefore walk a "fine line" between conveying relevant information to the court and abiding by the plea agreement, ***id.***, ¶44, and courts seeking to discriminate between the two will scrutinize the prosecutor's language to see if it "cast[s] doubt on" or "distance[s] itself" from the bargained-for recommendation. ***Id.***, ¶50.

Determining when a material breach of an agreement to "remain silent" occurs may be thorny. "Remain silent"

agreements can be confusing because they usually result almost as a default when the specific sentencing recommendation the state is willing to make is harsher than the defendant will accept. Defendants often do not understand "remain silent" and what benefits they have bargained for. They may believe that the agreement precludes the state "from making any statements whatsoever."[5] *See* ***State v. Jorgenson***, 137 Wis.2d 163, 169, 404 N.W.2d 156 (1987). But that preclusion would contravene public policy because it "runs contrary to the truth seeking purpose of all judicial proceedings." ***Id.*** at 169.

Prosecutors understand that "remain silent" agreements do not require them to refrain from saying anything hurtful about the defendant. They have an affirmative duty to "convey information to the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement." ***Williams,*** 2002 WI 1, ¶ 44. Thus, for example, although prosecutors cannot endorse the presentence investigation report's recommendation, they can discuss the unfavorable facts in it. ***State v. Duckett***, 2010 WI App 44, ¶ 15, 324 Wis.2d 244, 781 N.W.2d 522.

Given the broad terms, material breaches of "remain silent" agreements will be rare. The prosecutor who steers clear of implying that a particular sentence would be appropriate and sticks to the facts, even unfavorable facts,

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[5] Arguable, no agreement may exists because, the parties had no meeting of the mind. *See* ***Novelly Oil Co. v. Mathy Contruction Co.***, 147 Wis.2d 613, 433 N.W.2d 628 (Ct. App. 1988) (discussing contract law). If so, courts should allow the defendant to withdraw his plea as unknowing. But this issue is not before this Court.

will not have breached the agreement. But if the prosecutor does imply that a particular sentence, such as a maximum sentence, would be appropriate, then there will be a material breach. *See* ***Birge***, 638 N.W.2d 529.

Once this category of breach occurs, curing it contemporaneously is extremely difficult, despite immediate objections. Once prosecutors have conveyed their doubts about any bargained-for recommendation, merely reaffirming it does not alleviate the problem and there is little that they can say that will change the implication they do not support it.

If, after all is said and done, a reasonable prosecutor's total statements still imply reservations about the bargained-for recommendation, the defendant has not received the benefit of the bargain.

Thus, many prosecutorial plea agreement breaches will not be curable at the original sentencing hearing before the original judge, despite contemporaneous objection. Applying contract law to the situation requires that courts decide whether a material breach exists and only then consider whether the attempted cure works. Due process requires that the focus remain on whether the defendant, in exchange for waiving his constitutional rights at trial, received the benefit of his bargain–whatever the terms. Neither the prosecutor's motives nor the court's desire for efficiency trump those due process rights.

What matters is that, at the end of the hearing, the prosecutor did not create the implication that they desired something other than the bargained-for recommendation. If a defense objection cannot or does not result in a cure that gives the defendant the full benefit of his bargain, then the courts must either allow the defendant to withdraw his plea

or grant resentencing before a different judge. ***Santobello***, 404 U.S. at 263.

If prosecutors and judges want efficiency, the place to apply pressure is on prosecutors, not defendants or defense counsel.

CONCLUSION

WACDL therefore asks that this Court reaffirm that a court must grant a defendant the right to either withdraw his plea or have a resentencing before a different judge, despite a contemporaneous objection, if a prosecutor materially breaches the terms of the plea agreement and the prosecutor's statements, including those before and after the attempted cure, imply that the State would make a different recommendation but for the agreement.

Dated at Milwaukee, Wisconsin, July 7, 2022.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,963 words.

Signed electronically by Ellen Henak
Attorney Ellen Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Attorney Ellen Henak