STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2022AP000876 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONAVEN C. SPRAGUE,

Defendant-Appellant.

On appeal from a judgment of conviction
and decision denying postconviction relief,
both entered in the Barron County Circuit Court,
the Honorable J. Michael Bitney, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Introduction.

The issue presented is whether trial counsel was ineffective in his response to a plea breach: the State recommended 16 years of confinement rather than five. Counsel discussed Mr. Sprague's options with him during a court-ordered recess right after the breach, but it's undisputed that counsel did not mention the most obvious option: specific performance of the plea deal at a new sentencing with a different judge. Because that is the remedy courts almost always grant for uncured plea breaches—the presumptive remedy—this omission was objectively unreasonable.

Worse yet, counsel told Mr. Sprague that the State's excessive confinement request wasn't really a problem—the State's after-the-fact change in position and his own forthcoming argument would be enough to get Mr. Sprague's sentencing back on track. Although counsel failed to grasp either the severity of the breach or the persistence of its impact on the fairness of Mr. Sprague's sentencing, Mr. Sprague followed his lawyer's advice: he continued with the hearing. Had counsel properly advised Mr. Sprague that he could seek specific performance of his plea deal at a new sentencing with a different judge, he would have followed that advice instead.

On this record, Mr. Sprague was deprived of effective assistance of sentencing counsel.

The State's counterarguments are muddled but focus on two points.

First, the State claims that it adequately cured its breach. It says Mr. Sprague got the benefit of his bargain thanks to the prosecutor's belated statement that he "would stand with" the five-year confinement recommendation he had promised, then flouted. (*See* 44:12). And, since a cured breach does not warrant a remedy, the State concludes that counsel's failure to advise his client of the presumptive remedy was not deficient.

Second, the State contends that Mr. Sprague was not prejudiced, even if counsel's incomplete advice was deficient. The State notes that Mr. Sprague chose not to seek substitution, and it infers from this choice (made early in the case) that Mr. Sprague would have declined to seek a different judge following the State's plea breach (at the end of the case, under changed circumstances). The State even deems the circuit court's findings on substitution dispositive of the plea breach-based prejudice issue, claiming Mr. Sprague's abandoned substitution claim is "unified" with the issue presented. Resp't's Br. 9 n.2.

The State's first argument fails because it takes a technical approach to plea breach cures when due process requires this Court to employ common sense. The State's second argument is largely nonsensical.

Mr. Sprague respectfully requests that the Court reject the State's misguided arguments and affirm what the record demonstrates: trial counsel's response to the State's plea breach was ineffective, and the presumptive plea-breach remedy is due.

II. The State's breach was either incurable or went uncured. Trial counsel performed deficiently by failing to advise Mr. Sprague that, as a result, he could seek specific performance of his plea agreement before an untainted judge.

The State contends that a lawyer isn't deficient for failing to advise a client about an unavailable remedy, and the remedy at issue here was unavailable because the State cured its breach. The State is right about one thing: the ultimate issue is whether it cured its breach.

Recall the basic problem: the State offered full-throated advocacy for a term of initial confinement *over three times as long* as the one it had promised to recommend. It then corrected its breach in passing, saying sorry but never explaining why its new, vastly reduced recommendation was appropriate. The gap between the State's recommendations was too stark, and its advocacy for the greater recommendation too vehement, for a cursory apology to solve the problem.

The State insists that it wasn't required to correct its breach "forcefully or enthusiastically." Resp't's Br. 18 (citing *State v. Bowers*, 2005 WI App 72, ¶12, 280 Wis. 2d 534, 696 N.W.2d 255). But to support that proposition, it cites *Bowers*, where the State's breach was a request for 2.5 years in, 2.5 years out, rather than 2 years in, 3 years out. 280 Wis. 2d 534, ¶¶2-3. What was necessary to meaningfully correct the minor divergence from the plea deal in *Bowers* does not dictate the steps necessary to correct the egregious breach at issue here.

In every plea-breach case, the adequacy of an attempted cure—and whether a cure is available at all—turns both on the nature and severity of the breach and on the steps the State takes to deal with it. Breaches come in countless forms, so there is no one-size-fits-all cure and no single rule dictating whether a breach is curable. The upshot is that an enthusiastic, forceful rejection of an erroneous recommendation is not a universal prerequisite to curing a breach. But in some cases, including this one, more than a cursory retraction of the erroneous recommendation will be necessary—assuming a cure is possible at all.

Nietzold is an example of such case-by-case analysis. *State v. Nietzold*, 2023 WI 22, 986 N.W.2d 795. In determining that the prosecutor cured his breach (a recommendation for a specific prison sentence rather than an undefined term of imprisonment), the court recited the prosecutor's post-breach comments at length. *Id.*, ¶14. "The prosecutor immediately acknowledged the blunder and modified" his recommendation to conform to the plea deal, the court observed. *Id.* "But that's not all. The prosecutor doubled down when the circuit court made comments that initially suggested it may have forgotten or misunderstood the prosecutor's earlier correction." *Id.* Taking the record as a whole, the court concluded that Nietzold got the benefit of his bargain "[a]fter an initial error." *Id.*

Thus, where a prosecutor made a specific prison recommendation instead of the undefined prison recommendation he'd promised, then withdrew it and repeatedly insisted that he took no position on the

sentence's length, he cured his breach. Beyond that fact-intensive holding, *Nietzold* offers little. While it recognizes that some breaches cannot be cured at all, it doesn't give any examples, and while it acknowledges that a prosecutor alerted to a curable breach may fall short of curing it, it says nothing about what such failure might look like. *See id.*, ¶¶9-11.

In the end, this Court must review the breach *here*, the (scant) comments the prosecutor made *here*, and determine—as a matter of law—whether Mr. Sprague truly got the benefit of his bargain. In making that assessment, the Court must resolve, first, whether a cure was possible for a breach as egregious as the prosecutor's in this case, and second, whether the minimal effort the prosecutor put forth in correcting his breach was the cure due process requires. For the reasons set forth at length in Mr. Sprague's opening brief, the Court should answer the first question "no," and if it reaches the second, it should hold that the prosecutor's breach went uncured.

The State's remaining arguments on the cure question are quickly dispensed with:

- The State protests that a prosecutor must present relevant, aggravating facts, no matter its recommendation. True enough. But the issue here isn't the facts the State cited; it's the recommendation to which the State tied those facts. The overarching impression the State gave was supportive of a term of confinement far greater than that which the plea deal allowed.

- The State notes that the prosecutor discussed favorable facts, as well, saying he made "an evenhanded sentencing argument directed at the sentencing factors and based on the record." Resp't's Br. 16. Indeed he did, but he made that evenhanded sentencing argument *in seeking 16 years' initial confinement*. The overall credibility of the prosecutor's comments don't lessen the blow of his excessive recommendation. Quite the opposite.

- The State says the circuit court's sentencing remarks show that the State's cure was effective. *See* Resp't's Br. 14. But elsewhere in its brief, it correctly acknowledges that the relevant inquiry is into the prosecutor's conduct—not the circuit court's sentencing decision or decisionmaking process. *See* Resp't's Br. 17; *see Nietzold*, 2023 WI 22, ¶15.

- Finally, the State says the prosecutor did nothing that "undermined the plea agreement." Resp't's Br. 17. Query whether asking for 16 years' confinement when 5 was the deal "undermined the plea agreement." *See id.* Regardless, this isn't a case (like some in the plea-breach canon) of subtle circumvention. There's no need for indirect undermining when you commit a blatant breach.

Even in *Bowers,* the Court acknowledged that "an oblique variance" from the terms of a plea agreement "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." *Bowers*, 280 Wis. 2d 534, ¶9. The variance here was not oblique—it was overt and extreme—and the correction the State offered was "too little, too late." *See State v. Williams*, 2002 WI 1, ¶52, 249 Wis. 2d 492, 637 N.W.2d 733. Mr. Sprague was entitled to a remedy, and trial counsel performed deficiently by failing to advise him of that fact.

III. Whether a person opts to substitute the judge at the outset of his criminal case says nothing about whether that person will want a remedy—including a new judge—should the State breach the plea deal at sentencing. It is reasonably probable Mr. Sprague would have sought a remedy here. Thus, he was prejudiced.

Setting aside the deficient-performance question, the State contends that Mr. Sprague was not prejudiced. More specifically, the State claims there is no reasonable probability that Mr. Sprague would have wanted the presumptive remedy following the State's plea breach had he known he could seek it. After all, the presumptive remedy would entail switching judges, and Mr. Sprague had opted not to switch judges early in his case. Thus, according to the State, foregoing substitution negates any reasonable probability that a defendant would seek a remedy for a plea breach.

This analysis is fundamentally flawed. Trial counsel's advice to Mr. Sprague regarding substitution and his advice in the aftermath of the State's plea breach have almost nothing to do with one another.

Substitution is a statutory right a defendant may exercise for any reason or no reason, but generally only once, and generally only for a brief time after the judge has been assigned. *See* Wis. Stat. § 971.20(2)-(4); *State v. Harrison*, 2015 WI 5, ¶¶39-42, 360 Wis. 2d 246, 858 N.W.2d 372. It is unclear why the State believes a person's decision not to exercise this time-limited statutory right translates into a permanent preference for a particular judge. People change their minds over the course of a case, change their strategies, and gain new information. It isn't hard to imagine why a defendant might trust a judge early on (at least compared to the likely alternatives) but grow to harbor misgivings.

In any case, the Court need not use its imagination here. The record shows why a change in judge became a compelling option late in the game: the State breached the plea agreement—flagrantly—and part of the presumptive remedy for such breaches is a different judge. The fact that Mr. Sprague and his lawyer decided against substitution at the outset of the case, before any meaningful litigation or plea negotiations, is irrelevant in determining how Mr. Sprague would have assessed the pros and cons of a change in judge following a plea breach.

More importantly, while substitution is nothing more than dismissing one judge and getting another, the change in judge effected by the presumptive plea-breach

remedy is part of a package. The key piece of that package is specific performance of the plea deal. But for over 50 years, the federal and state supreme courts have recognized that specific performance of a plea deal *before the same judge who witnessed its breach* would not fulfill due process. *Santobello v. New York*, 404 U.S. 257, 263 (1971). That is not because the judge did anything wrong; it's because fairness dictates a clean slate.

Thus, had trial counsel properly advised Mr. Sprague of the presumptive plea-breach remedy, the choice before Mr. Sprague would have included more than a judge swap. It would have included a meaningful opportunity to get the benefit of his bargain. That, much more than the change in circumstances pertinent to Mr. Sprague's position on his judge, renders it reasonably probable that he would have pursued the presumptive plea-breach remedy had counsel suggested he do so. Especially because Mr. Sprague lacked experience in the criminal legal system and was inclined to do whatever his lawyer advised. As he testified at the *Machner* hearing: "I was going off [my lawyer's] advice. I don't know much about the system …. So if he steered me one way, he's been through this many times." (114:40; App. 52).

There is one last detail from the State's confused substitution discussion that bears mention. The State emphasizes the circuit court's finding that Mr. Sprague discussed substitution with his lawyer and made an affirmative choice not to pursue it. This fact matters, the State's reasoning goes, because it shows Mr. Sprague preferred the judge he had and had good reasons for sticking with him.

But what are those good reasons? Trial counsel in his *Machner* hearing testimony, and the State in its brief, cite just two factors that weighed into Mr. Sprague's decision: he'd heard through the grapevine that his judge wasn't bad, and counsel was aware that he might end up with "a female judge" if he pursued substitution. (*See* 114:9; App. 21).

Trial counsel described his advice on substitution as follows:

> So when I went back to talk to Mr. Sprague about [substitution], the only thing that I remember saying to him was I believe one of the three judges was a female judge, and seeing's how he was charged with repeated sexual conduct, violation a minor less than a certain age, I just said to him, I don't know if that would be—I don't know if it would be the best case scenario to have the case in front of a female judge, I think was my comment.

(114:9; App. 21).

In its response brief, the State twice references this advice. In underscoring the supposed legitimacy of Mr. Sprague's decision to forego substitution, the State notes that trial counsel told Mr. Sprague "it would likely not serve [his] interests to be sentenced by a woman (in a case where he had sexually abused his own daughter)." Resp't's Br. 19. The State then clarifies that "a woman" was "one of the two substitution options." *Id.*

Trial counsel's position that a woman would be less likely to fairly sentence Mr. Sprague was sexism, not reasonable legal advice. Mr. Sprague's reaction to unreasonable advice regarding an *untainted* judge

doesn't show what he'd have done given reasonable regarding a *tainted* judge. The State's failure to grasp the distinction here is puzzling. So is its failure to discredit—or even recognize—the baseless prejudice underlying trial counsel's substitution advice.

To establish prejudice, Mr. Sprague must show a reasonable probability of a different outcome. Here, the outcome at issue is Mr. Sprague's decision about what to do following the State's plea breach. Because it is reasonably probable that Mr. Sprague would have pursued the presumptive plea-breach remedy had counsel advised him to do so—or even told him the option existed—Mr. Sprague was prejudiced.

CONCLUSION

Mr. Sprague respectfully requests that this Court reverse the circuit court's decision and order denying postconviction relief and remand the matter with instructions to vacate the judgment of conviction and order resentencing before a different judge.

Dated this 3rd day of July, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,589 words.

Dated and filed this 3rd day of July, 2023.

Signed:

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