STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY JOSEPH HAMILTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Motion, Entered in the Sheboygan County Circuit Court, the Honorable Daniel J. Borowski, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

A defendant has a constitutional right to enforcement of a plea agreement. If a plea agreement includes a sentencing recommendation, the State must make the recommendation, and may not implicitly undercut the recommendation. In Mr. Hamilton's case, the State agreed to recommend probation at sentencing. The issues presented are:

1. Whether, by stating that the "landscape had changed" between the plea and sentencing, and implying that it was only making the recommendation because it was "ethically bound," the State breached the plea agreement.

The circuit court answered: No. The court found that although it was "dangerously close," that any potential breach was "technical." (R.163:25; App.145)

This Court is asked to answer: Yes. The State breached the plea agreement by undercutting its agreed-upon recommendation.

2. Whether, by not objecting to the breach, Mr. Hamilton's counsel provided ineffective assistance of counsel.

The circuit court answered: No. Given that the court found that there was no breach, it found that counsel was not ineffective for not objecting. (R.163:28; App. 148).

This Court is asked to answer: Yes. Without Mr. Hamilton's consent not to object, counsel's performance was per se ineffective. Mr. Hamilton asserts that his attorney did not obtain his consent to forego an objection. If the State does not concede Mr. Hamilton's assertion, this Court should remand for an evidentiary hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are required. The issues should be sufficiently set forth by the briefs, and the appeal involves the application of well-established law to the facts of the case.

STATEMENT OF THE CASE AND FACTS

On July 17, 2020, police were dispatched to a hotel for a disturbance. (R.4:2). Officers met with "Victim 1." She reported an altercation with her boyfriend, Mr. Hamilton. She stated that an argument began after she saw text messages on his phone from another woman. (R.4:3). She confronted him and grabbed his phone. (*Id.*). She alleged that Mr. Hamilton then took the phone and pushed her to the bed, and choked her. (*Id.*). Mr. Hamilton then left the hotel. Police contacted Mr. Hamilton. (*Id.*). He acknowledged that they wrestled over the phone, but denied choking her or holding her down. (*Id.*).

The next day, "Victim 1" told police that she had been untruthful. (R.4:3). Although Mr. Hamilton pushed her down, she admitted that he did not choke her. She told police that Mr. Hamilton did not pressure her to recant. (R.4:3).[1] The complaint referenced jail calls between Mr. Hamilton and "Victim 1" about her telling police that the choking did not occur. (R.4:3). The complaint also indicated that "Victim 1" was pregnant at the time, but that turned out to be a fabrication. (R.140:46).

The State charged Mr. Hamilton with count one, victim intimidation, domestic abuse, as a repeater; count two, strangulation/suffocation, domestic abuse, as a repeater; and count three, disorderly conduct, domestic abuse, as a repeater. (R.1:1-2). Count one, felony intimidation of a victim, would be dismissed and read in. (*Id*.).

Mr. Hamilton accepted a plea agreement. Under the plea agreement, he would plead to an amended count two, battery, domestic abuse, as a repeater; and

[1] She wrote, "I found out he was cheating. I approached him about the situation and got mad. We were arguing. He wanted to leave. I followed him. He asked the lady, can she call the police so he could have so the situation wouldn't get worse for me to get my stuff out of the car. And he ended up just letting me get my stuff and he left. I was hurt and mad, so I told the police he choked me. He never put his hands on me. I was there when they arrested him, and they let us kiss and everything -- kiss and everything, literally nothing happened." (R.140:39-40; App.41-42).

count three, disorderly conduct, domestic abuse, as a repeater. (R.91:1). As part of the plea agreement, the State would recommend three years of probation, consecutive to any other sentence, with an imposed and stayed prison sentence of two years of initial confinement and two years of extended supervision. (R.91:2).

On July 6, 2021, the Sheboygan County Circuit Court held a hearing. (R.140; App.3-50). It was scheduled as a plea and sentencing hearing. (R.140:3; App.5). The Honorable Daniel J. Borowski presided. The court began the hearing by asking the State to justify its request to amend the charges. (*Id*). The State had previously filed a "*Conger*" letter.[2] (*see* R.95:1-3). The court found the letter confusing and concerning. (R.140:5-6; App.7-8). The court was not persuaded that the *Conger* factors supported the plea agreement. However, because of court crowding and other factors, the court would accept the plea. (R.140:8-9; App.10-11). The court proceeded to engage Mr. Hamilton in a plea colloquy, and accepted his plea. (R.140:16-33; App.18-35). The court then asked the State if it was going to play audio of the jail calls referenced in the criminal complaint. (R.140:34; App.36). The State said no, but offered to supply the court with the calls. (R.140:35; App.37).

[2] *State v. Conger*, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341 (holding that the court may reject a plea agreement that is not in the public interest, and setting for factors the court may consider).

The court initially determined it would move forward to sentencing. (R.140:35; App.37). The State began its remarks. It asserted that probation was "a closed [sic] case, but I don't think we're necessarily past the threshold consideration of probation, at least with what we have here." (R.140:36; App.38). Defense counsel then made initial sentencing remarks.

At that point, the court determined it would not sentence Mr. Hamilton until it reviewed the jail calls. (R.140:41-43; App.43-45). The court stated that it would hear further argument and allocution at the subsequent sentencing hearing. (R.140:43; App.45).

On August 19, 2021, the court held a sentencing hearing. (R.122; App.51-95). At the outset of the hearing, the court summarized the plea agreement. (R.122:4-5; App.54-55). A lengthy and obscure conversation about pending charges then followed. The State indicated that there was a new charge, but refused to say what it was.

> MR. LEHMAN: Judge, I -- the State would first note that -- or rather would stand by its recommendation, noting that it's ethically bound by the recommendation in this case. That be -- but I would suggest that the landscape has changed between our previous hearing and this one. Such that, I'm ethically bound to the recommendation, and I would strongly --

> THE COURT: Well, what landscape is that?
>
> MR. LEHMAN: Your Honor, the defendant has been charged with additional felonies[3] from -- dating before this case, for an incident that happened before this case was charged. It was not brought to my attention until after our previous hearing. He was charged for those incidents, and the Victim in this case is currently -- is sitting in jail on serious felony charges as well. So I'm ethically bound by the recommendation and would ask that the Court follow it, but beyond that–
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> THE COURT: Well, but I –
>
> MR. LEHMAN: -- I have no further argument.
>
> THE COURT: There's nothing that prevents you -- I -- first of all, you make your -- whatever recommendation you want. And obviously, for the record, the Court was very concerned, and has been very concerned about the State's recommendations in this case, and the plea deal that was struck, that's no secret.

(R.122:8-9; App.58-59).

The court noted that it needed justification in order to accept plea agreement to begin with and stated that its role as the sentencing court was to have "accurate, complete, and current information." (R.122:10; App.60).

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3 The State used the plural "felonies" and "charges," but it was later clarified that there was a single charge. (R.122:19; App.59).

> MR. LEHMAN: And Your Honor, my argument in that regard is for purposes of recognizing that the State's recommendation is what it is, and the State stands by it, recognizing that the landscape has changed. I would ask that you follow it, and I would note -- or would suggest that the Court has everything before it, and has analyzed everything that the State would be referencing as argument. So the State would ask that you follow the recommendation with no further arguments.
>
> THE COURT: Except I don't -- what – you're very cryptically telling me he's been charged with something else and I –
>
> MR. LEHMAN: And Judge, I don't want to tread over my plea agreement, so I would just ask that you follow the recommendation.

(R.122:11; App.61).

Defense counsel argued that the court should not consider the pending charges, and the State said "that's not what I'm saying. I just do not want to breach my plea agreement, and I would ask that the State - - that the Court follow the recommendation with no further argument." (R.122:11; App.61). The court continued to press for more information, or alternatively, for an adjournment so that the parties could submit authority. (R.122:13; App.63).

> THE COURT: Well, I mean, I'm – I'm just mystified, again. I've been mystified a lot lately. 'Cause you're saddling on to the trial court, I've got a State that won't -- that claims he's going to breach a plea agreement if you tell me he picked

> up additional charges. I don't know where that comes from, you honor your plea agreement by making your recommendation.

(R.122:14; App.64).

The court noted its impression that a "cloud" had been cast over the hearing.

> The State has raised a specter and it's cast a cloud in part over the sentencing, by saying there is something more I should know, but I can't tell you because it could jeopardize the recommendation they're making. And I think that's a worse situation than finding out what it is and determining if it should be any weight at all.

(R.122:17; App.67).

Finally, the court gave a directive to the State to state what the charges were.

> The State raised it. The State's not breeching its plea agreement. So the worst thing is I can assume the worst, and that would be the wrong thing to do too. If I have the information, I can appropriately address it and give it weight: some weight, or no weight at all. So what are the charges?

(R.122:19; App.69).

The State disclosed that the charge was manufacture or delivery of cocaine between five and fifteen grams, as a repeater. The incident occurred two months before the incident in the current case. (*Id*). The court asked the State to clarify the terms of

the plea agreement. The State made no further argument. (R.122:21; App.71). The defense made arguments, and Mr. Hamilton gave allocution.

The court then gave its sentencing remarks. As to the new charge, the court agreed not to consider it. (R.122:33-34; App.83-85). It noted that its obligation was to first consider probation: "the Court's initial directive in sentencing is to consider probation as the disposition, which the State has recommended here. Without -- I mean, with and without, I guess, some explanation." (R.122:36; App.86).

The court rejected probation and imposed a total of two years of initial confinement and two years of extended supervision between the two counts. (R.122:37-38; App.87-88).

Mr. Hamilton filed a notice of intent to pursue postconviction relief and a postconviction motion. (R.166, R.146). The motion requested resentencing based on a breach of the plea agreement. He argued that the State violated the principles in *State v. Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733, when it "disowned and backed away from the agreement, thus undermining the recommendation to an extent that amounted to a plea breach." (R.146:8). He clarified that he was not arguing that the State breached the agreement by disclosing the charge. The totality of the State's remarks and argument constituted the breach. (R.146:10).

Mr. Hamilton further argued that his attorney provided ineffective assistance of counsel when he did not object to the breach. (R.146:11-12). Mr. Hamilton requested a *Machner*[4] hearing on his motion. On June 24, 2022, the State filed a response and asked the court to deny the motion without a hearing. (R.150:1-6). On June 27, 2022, Mr. Hamilton filed a reply. (R.151:1-2).

On July 13, 2022, the court held a hearing on Mr. Hamilton's postconviction motion. (R.168; App.96-120). The hearing was set for an oral ruling. (R.168:3; App. 98). However, the court stated it believed the parties had not adequately addressed the State's remarks at the July 9, 2020, "plea/sentencing" hearing. (R.168:7-11; App.102-106). Therefore, the court adjourned the hearing and invited the parties to review the transcript and incorporate it into their arguments. (R.168:19; App.114). Mr. Hamilton filed a supplemental motion on July 18, 2022. (R.158:1-5). He argued that, assuming the State sufficiently argued for probation at the plea hearing, it negated that argument by stating at the sentencing hearing that the "landscape had changed" since then. (R.158:2).

On July 19, 2022, the court held the adjourned postconviction hearing. (R.163; App. 121-153). The State argued that it sufficiently supported the probation recommendation at the plea hearing, and

[4] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (an evidentiary hearing is required to complete a claim of ineffective assistance of counsel).

that even though it said the "landscape" had changed, it still told the court it was ethically bound by the agreement and asked the court to follow it. (R.163:11; App. 131).

The court stated it was "dangerously close" and that it had gone "back and forth on this." (R.163:9, 15, 25; App.129, 135, 155). The court stated, "every time I go through the authorities, I somewhat flip flop, because I do think this case is that close." (R.163:18; App.138). The court found that the State's comment about the landscape having changed was not the "best words," but did not "in and of themselves create a breach." (R.163:22; App.144). The court found that the State's repeated comments about being "ethically bound" to the agreement were "problematic." (*Id.*). The court agreed that the State appeared "nervous." (*Id.*). However, the court concluded that the State said enough to "save it" when it still asked the court to follow the recommendation. (R.163:23; App.143). The court ruled:

> And when I look at this in the totality, I don't think you can get much closer than this is in many respects, but my decision is that Attorney Lehman's statements on page 11, to the extent there is an argument that there was a breach clarified that he was not breaching or otherwise implying that the -- undermining his recommendation.
>
> And when you look at the total transcript and total set of facts, I mean, at best -- at best -- and -- and it's close, by the way -- so when I say at best -- but I – if there's the choice of words, the manner

> in which was originally said were, if anything, a technical breach which would have been cured by the later explanation.

(R.163:24-25; App.144-145).

On July 19, 2022, the court entered a written order denying Mr. Hamilton's postconviction motion. (R.160; App. 154). Mr. Hamilton appeals. (R.164).

ARGUMENT

I. The State breached the plea agreement by undercutting its agreed-upon sentencing recommendation.

A. Legal principles and standard of review.

A defendant has a constitutional right to fulfillment of a plea agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971). When a negotiated sentencing recommendation is part of the plea agreement, a plea breach occurs if the State fails to convey that recommendation. If a defendant shows a "material and substantial" breach, this provides grounds to seek resentencing before a different judge. *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*. A defendant is not required to prove that a breach was intentional. That a breach "may have been inadvertent does not lessen its impact." *State v. Howard*, 2001 WI App 137, ¶20, 246 Wis. 2d 475, 630 N.W.2d 244.

While a prosecutor need not enthusiastically recommend a plea agreement, he or she "may not render less than a neutral recitation of the terms of the plea agreement." *State v. Poole*, 131 Wis. 2d at 364, 394 N.W.2d 909. In addition, "[e]nd runs" around a plea agreement are prohibited. *State v. Hanson*, 2000 WI App 10, ¶ 24, 232 Wis. 2d 291, 606 N.W.2d 278. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." *Id.*

On appeal, the terms of the plea agreement and the historical facts are questions of fact, upheld unless clearly erroneous, *Williams*, 249 Wis. 2d 492, ¶5. However, whether the State's conduct constitutes a breach of a plea agreement, and whether the breach is material and substantial, are questions of law, reviewed de novo. *Id.*

Here, there is no dispute as to the terms of the plea agreement. The circuit court's only factual finding was that the prosecutor was "nervous" during the sentencing hearing while discussing the new charge, which Mr. Hamilton does not challenge. (R.163:22; App.142). Therefore, the issue is whether, as a matter of law, the State's conduct amounted to a material and substantial breach of the plea agreement.

B. The State breached the plea agreement by stating that the "landscape had changed" since it entered into the plea agreement, and implying that it was only giving the recommendation because it was "ethically bound" to do so.

The State's comments at Mr. Hamilton's sentencing hearing breached the plea agreement. Although the State accurately stated the literal recommendation, it subverted its recommendation by improper argument. The taint of improper comments was not removed by the State's bare endorsement of the agreed-upon recommendation. *See Williams*, 249 Wis. 2d, ¶¶42-44.

Although Mr. Hamilton does not argue that the breach occurred at the plea hearing, he agrees with the circuit court that sentencing hearing should not be considered in isolation. The State filed a "*Conger*" letter, and in addition, made comments about the plea agreement at the plea hearing. The *Conger* letter centered on persuading the court to accept the amended charges instead of rejecting the plea agreement. (R.95). It did not focus on the sentencing portion of the agreement. The State's main point was that it was concerned about its ability to prove its case beyond a reasonable doubt.

The State highlighted several negative factors including that: "the defendant's criminal history in Wisconsin is extensive"; "the offense in this case is a serious incident of domestic violence"; it was "further

aggravated where the defendant then engaged in numerous phone calls to Victim 1 telling her to recant her statement that she was strangled"; and, "the defendant poses a threat to Victim 1 in this case… further exacerbated by the defendant's willful engagement in acts that subvert the operation of the criminal justice system." (R.95:2). Yet, the State entered into the agreement because "[t]he numerous, inconsistent recantations of Victim 1 caused by the defendant has undermined the State's case to the extent that it is dubious that the strangulation could be proven beyond a reasonable doubt." (R.95:2).

The State's comments at the plea hearing were not much better. The court was struggling with the dismissal of the intimidation charge, "you're dumping the felony intimidation of victim repeater. That doesn't make sense to me." (R.140:5-6; App.7-8). The State argued why it did not think it could prove the charge at trial. (*Id.*). The court continued with statements about the State's position not making sense, but ultimately stated it would accept the plea agreement. (R.140:8-9; App.10-11). It reiterated, however, that "I don't, for the record, make any findings that this protects third parties, is in the Public's interest, or that the other Conger Factors have been satisfied." (R.140:9; App.11). After the plea was taken, the court invited sentencing arguments before it ultimately adjourned so that it could listen to the jail calls.

Before the court adjourned the hearing, the State made some remarks, and in those remarks, the State said nothing positive about Mr. Hamilton

whatsoever. The State began by stating the terms of the recommendation. (R.140:36; App.38). The State proceeded to recount Mr. Hamilton's prior criminal history. Then, the State indicated that, "this is a closed [sic] case, but I don't think we're necessarily past the threshold consideration of probation, at least with what we have here." (*Id.*). The State argued that the crime was "a cowardly act. And not only that, the defendant's meddling in the criminal justice process through his jail phone calls are incredibly concerning, but I don't think, at least at this point, Your Honor, that probation would duly depreciate the seriousness of the offense." (R.140:37; App.39).

The State next argued that "the defendant certainly has gone to great lengths to avoid responsibility for this case." (R.140:37; App.39). However, the State again noted that "the victim presents with credibility issues that would be difficult to surmount at trial, at least for purposes of beyond a reasonable doubt." (*Id.*). The State did note that Mr. Hamilton had already sat for roughly a year on the case. (*Id.*). Finally, the State argued that "the State's recommendation provides the supervision, or rather, an extended period of supervision over the defendant with a hefty imposed and stayed prison sentence should he decide to engage in other acts or other crimes." (R.140:38; App.40).

Then there was an adjournment, and when the full sentencing hearing took place, the State breached the agreement. The State opened its remarks by commenting that, although it was "ethically bound" to

its recommendation—and would ask the court to follow it—it "would suggest that the landscape has changed between our previous hearing and this one. Such that, I'm ethically bound to the recommendation, and I would strongly—" (R.122:8; App.58). The court interjected to ask "what landscape," and a tortured exchange unfolded where the State incorrectly told the court that there were additional felonies (there was only one) that "was not brought to my attention until after our previous hearing." The State again said, "So I'm ethically bound by the recommendation and would ask the court to follow it, but beyond that—I have no further argument." (R.122:9; App.59).

After casting doubt on the agreement given the "changed landscape," the State then stopped speaking and made no actual argument in support of the recommendation. When the court (legitimately) sought more information about the new charge, the State remained steadfast and said it did not want to "tread" over its agreement by saying more. (R.122: 11; App.61). The court told the State, "you honor your plea agreement by making your recommendation." Yet the State continued to persist in withholding the information. (R.122:14; App.64). The court confirmed during postconviction proceedings that the State was "nervous" during this awkward exchange. (R.163:22; App.142).

The court itself acknowledged that the "State has *raised a specter [sic] and it's cast a cloud in part over the sentencing*, by saying there is something more I should know, but I can't tell you because it could

jeopardize the recommendation they're making. And I think that's a worse situation than finding out what it is and determining if it should be any weight at all." (R.122:17; App.67) (emphasis added). Finally, the State disclosed the charge. The court asked the State to clarify the terms of the plea agreement. The State made no further argument. (R.122:21; App.71).

The court seemed to recognize the paucity of the recommendation. The court noted that "the Court's initial directive in sentencing is to consider probation as the disposition, which the State has recommended here. Without -- I mean, *with and without, I guess*, *some explanation*." (R.122:36; App.86) (emphasis added).

Wisconsin courts have reviewed several cases involving covert plea breaches, and comparison to the facts of those cases demonstrates that a breach occurred in Mr. Hamilton's case. In *Williams*, 249 Wis. 2d 492, the Wisconsin Supreme Court considered whether a sentencing argument, following the recitation of the agreement, rose to the level of a plea breach. The State recited the proper negotiated plea, but during argument on the sentence, undercut its position by discussing the victim's opinion and findings of the pre-sentence investigation report in a less-than-neutral manner. *Id*., ¶45. Defense counsel objected, and in response, the State told the court that the argument being made was simply a restatement of positions the victim and pre-sentence writer had already asserted, and that the State was not adopting the less favorable recommendations of the other

parties. *Id*., ¶29. The Supreme Court rejected the State's claim, concluding its argument indirectly and implicitly advocated for a more severe sentence than it had bargained during its sentencing remarks. *Id*., ¶¶48- 49.

The *Williams* Court held that, the State "undercut the essence of the plea agreement" which was to recommend probation. *Id*., ¶46. The impression that the State was backing away from the plea agreement was furthered by the fact that the prosecutor began her comments to the sentencing court by stating, "'When Mr. Williams entered his plea. . .we had told the Court that we would be recommending. . .that he be placed on probation, that he pay arrearages and pay current child support.' *Id*., ¶49 (emphasis added). The Court found that the words "'would be' intimate that a change of the State's plans would be revealed." *Id*. Indeed, "the prosecutor implied that had the State known more about the defendant, it would not have entered into the plea agreement." *Id*., ¶47. The facts of Mr. Hamilton's case are akin to *Williams*, if not more egregious. Although the State recited its recommendation at the start of the sentencing hearing, like the State in *Williams*, it did so while using language that undercut its position.

To be clear, Mr. Hamilton does not now argue that the State was barred from informing the court of the new charges. *Williams*, 249 Wis. 2d 492, ¶50 ("[a]lthough the State is not barred from using negative information about the defendant that has come to light after the plea agreement and before the

sentencing, the State may not imply that if the State had known more about the defendant, the State would not have entered into the plea agreement."). In fact, had the State noted the charge in a matter of fact manner, this would have avoided the awkward and prolonged exchange with the court amplifying the charges and leading the State to distance itself from the plea agreement. *See State v. Liukonen*, 2004 WI App 157, ¶16, 276 Wis. 2d 64, 686 N.W.2d 689 (the prosecutor might have disclosed new information without breaching the agreement by arguing that the agreement was still appropriate). In Mr. Hamilton's case, the court correctly informed the State that it could give the court information and also, "honor your plea agreement by making your recommendation." (R.122:14; App.64).

Here, it was essential that the State actually justify to the court why probation with a two-year imposed and stayed sentence was appropriate. The court had been "very concerned about" the plea agreement. (R.122:9; App.59). Notably, the plea agreement in this case was not for the State to remain silent. It was for the State to affirmatively make a recommendation.

The State's *Conger* analysis and statements at the plea hearing were hardly enthusiastic support for probation in the first place. The State's main point was that, although the State believed Mr. Hamilton was dangerous to the public and had committed these crimes, it was unsure that it could meet its burden of

proof because the alleged victim had recanted the most serious charges.

As the circuit court itself noted, "Attorney Lehman mentions a lot of unfavorable things about the defendant. He talks about how violent this crime was. He talks about domestic violence and the need to protect victims. . .he says basically: 'I'm making this recommendation in part because I don't think the victim's going to hold up, and we got a plea, we got a plea deal, we got a conviction. We don't think the victim's going to hold up.'" (R.163:20; App.140). True, the State also argued that Mr. Hamilton had already been in jail for approximately a year and would have a significant sentence hanging over his head. Yet it bears repeated that the State never said a single positive thing about Mr. Hamilton at any point during these proceedings.

Subsequently, whatever positive things might be gleaned from the *Conger* letter or plea hearing were entirely undermined by the State's assertion at the sentencing hearing that the "landscape had changed" since the plea hearing.

Again, as *Williams* and other cases show, the State may lawfully inform the court of previously-unknown, negative information, but cannot imply that, had it known about the information, it would not have entered into the plea agreement. In *Poole*, 131 Wis. 2d at 364, the defendant pleaded guilty to burglary. The State agreed to recommend a fine. At sentencing, the prosecutor asked to impose the fine

"but noted that this recommendation was agreed to 'before we knew of the other instances. But that is our agreement.'" *Id*. at 360.

The *Poole* court held that this was a breach because, "the prosecutor's comments implied that circumstances had changed since the plea bargain, and that had the state known of the other instances of defendant's misconduct, they would not have made the agreement they did." *Id*. at 364. The court found that, "[a] comment which implies reservations about the recommendation 'taint[s] the sentencing process' and breaches the agreement." *Id*. (quoted source omitted).

In Mr. Hamilton's case, as in *Poole*, the change in circumstances involved previously unknown criminal conduct. Here, the prosecutor said the "landscape has changed," not just implying that circumstances had changed since the plea bargain, but explicitly saying so. As in *Poole*, the State reluctantly conceded that it was "ethically bound" to give the recommendation, but also implied that it would not have made the agreement had it known about the drug charge. In fact, the State twice said the "landscape had changed," and three times said it was "ethically bound." (R.122:11; App.61).

Mr. Hamilton's case is also similar to *Liukonen*, 276 Wis. 2d 64. There, this Court found that the State crossed the line between presenting information and suggesting the court impose a longer sentence than bargained for when it said that the defendant got a "tremendous break" with the plea deal. *Id*., ¶4. The

court concluded that the prosecutor "all but told the court he was only making the seventeen-year recommendation because of his plea agreement obligation." *Id*., ¶16. This is similar to Mr. Hamilton's case, where the State repeatedly emphasized that the reason for the plea deal was its inability to prove its case beyond a reasonable doubt despite its belief that Mr. Hamilton was guilty of all charges.

State v. Naydihor, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220, helpfully clarifies the difference between presenting negative information and using that information to backtrack on the plea agreement. There, the prosecutor discussed information from the pre-sentence investigation report in addition to other aggravating factors. *Id*., ¶13. However, he did not imply that he would not have made the deal had he known about the information. *See id*., ¶¶28-29.

Interestingly, the appeal in *Naydihor* was from the resentencing hearing. The resentencing occurred because, at the original sentencing, the "prosecutor breached the plea agreement by repeatedly stating to the court that he had made the plea agreement before reading the presentence report, which indicated that Naydihor had previous convictions for alcohol-related offenses." *Id*., ¶4. The State did not oppose resentencing, and the Supreme Court agreed that it was a breach. *Id*., ¶24, ("the prosecutor's conduct at the original sentence hearing clearly constituted a breach of the plea agreement under *Poole*"). What happened in Mr. Hamilton's case is like the original sentencing in *Naydihor*.

In all, although the State spoke the literal terms of the plea agreement, it made no argument in support of its recommendation and instead stated that the "landscape" had changed between the time of the agreement and the time of sentencing and implied it was making the recommendation because it was "ethically bound," and not because it stood by it. This undercut the agreement, and amounted to a breach.

Finally, the breach was material and substantial because it tainted the proceedings with an implication that Mr. Hamilton should receive a harsher sentence than what the prosecutor had agreed to recommend. "[E]ven 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.

The remedy that Mr. Hamilton seeks is resentencing before a new judge.

II. Trial counsel rendered ineffective assistance of counsel by not objecting to the plea breach.

A. Legal principles and standard of review.

Mr. Hamilton's right to directly challenge the breach was forfeited because there was no contemporaneous objection. *See Liukonen*, 276 Wis. 2d 64, ¶18. He therefore raises this claim in the context of an ineffective assistance of counsel claim.

A defendant's constitutional right to effective assistance of counsel is violated when defense counsel performs deficiently and the deficient performance prejudices the defendant. *Howard*, 246 Wis. 2d 475, ¶22. The standard of review is mixed. The trial court's factual findings will not be reversed unless they are clearly erroneous; however, whether trial counsel's conduct was deficient and prejudicial are questions of law that this court reviews de novo. *Id.*, ¶23.

Whether trial counsel's failure to object to the State's plea breach was deficient turns on whether counsel told the defendant he could object, and whether the defendant personally decided against it. *State v. Sprang*, 2004 WI App 121, ¶28, 274 Wis. 2d 784, 683 N.W.2d 522. This is because "a guilty plea is a personal right of the defendant," and therefore, trial counsel may not forego an objection on the defendant's behalf—even if he thought remaining silent would be strategically wise. *Id.*

If counsel failed to object absent the defendant's knowing waiver of such an objection, prejudice is presumed. *Howard*, 246 Wis. 2d 475, ¶25 A breach "precludes any need to consider what the sentencing judge would have done if the defense counsel had objected to the breach by the district attorney." *Id.* (quoting *State v. Smith*, 207 Wis. 2d 258, 278, 558 N.W.2d 379 (1997)).

B. Mr. Hamilton asserted, and the record confirms, that trial counsel did not consult him about whether or not to object to the breach. Prejudice is presumed.

At the sentencing hearing, trial counsel objected to the discussion of the new charge generally, and asked the court not to consider it. (R.122:11; App.61). However, the court correctly concluded that it was required to consider all relevant information and the parties could not shield the court from relevant information. Counsel did not object on grounds of a plea breach, and did not seek a remedy for the breach.

In his postconviction motion, Mr. Hamilton asserted that his attorney did not advise him of his right to object to the plea breach. (R.146:11-12). The transcript of the hearing confirms that there was no break taken during which a conversation could have occurred. However, the circuit court did not grant Mr. Hamilton's request for a *Machner* hearing. Therefore, if the State does not concede this assertion, the court should remand for a *Machner* hearing so that

Mr. Hamilton can complete his claim of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, Mr. Hamilton asks the court to reverse the circuit court's denial of his postconviction motion. If the State does not concede ineffective assistance of counsel, Mr. Hamilton requests that the Court remand the case for a *Machner* hearing.

Dated this 3rd day of October, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,726 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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.

Dated this 3rd day of October, 2022.

Signed:
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