STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2022AP001350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

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.
Trial Court Case No. 2020CF546

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES CITED

STATEMENT OF ISSUES

1) Did the trial court properly deny Hamilton's motion for resentencing on the basis that Attorney Lehman breached his plea agreement?

   Brief answer: Yes

2) Did the trial court properly deny Hamilton's request for *Machner* hearing in light of the fact that Attorney Lehman did not breach his plea agreement?

   Brief answer: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication are necessary. The issues raised on appeal will be fully developed in the briefs submitted to the Court. Furthermore, the issues involve no more than the application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

On July 17, 2020, officers were dispatched to a hotel on report of a disturbance. (R.4:2). On scene, officer spoke with "Victim 1" who said she and her boyfriend, Hamilton, had been in a fight. (R.4:2). Victim 1 said she had been living with Hamilton and was pregnant with his child. (R.4:2-3). When Victim 1 observed a text message

on Hamilton's phone, she took the phone. (R.4:3). The two struggled over the phone when the altercation escalated with Hamilton placing his hands around Victim 1's neck and choked her. (R.4:3). After Victim 1 got Hamilton off of her, Hamilton left the hotel. (R.4:3). When law enforcement located Hamilton, he admitted to an argument with Victim 1 over another woman but denied choking her. (R.4:3).

The next day, Victim 1 spoke with one of the officers who was on scene. (R.4:3). She said that her statement she gave was a lie and that Hamilton pushed her down by the neck, but he did not choke her. (R.4:3). Victim 1 denied speaking with Hamilton since she made her initial statement and that he did not pressure her to recant. (R.4:3).

Officers reviewed jail phone calls Hamilton made on July 17, 2020. (R.4:3). In one call, Hamilton told a female identified as Victim 1 that she needed to tell officers she exaggerated her statement, explaining that his concern was with the strangulation charge. (R.4:3). Hamilton placed a second phone call to Victim 1. (R.4:3). This time, Hamilton directs Victim 1 to talk to his parole agent and the District Attorney's Office, coaching her on what to say. (R.4:3).

Victim 1 later submitted a letter to the District Attorney's Office, in which she said Hamilton never put his hands on her but because she was hurt by and mad at

him, she said he choked her. (R.107:1). She went on to say that "literally nothing happened." (R.107:1).

The State charged Hamilton with felony intimidation of a victim, strangulation and suffocation (domestic abuse), and disorderly conduct (domestic abuse), all as a repeater. (R.4:1-2). Hamilton entered into a plea agreement with the State, whereby he would plead to an amended charge of battery (domestic violence) as a repeater and disorderly conduct (domestic violence) as a repeater. (R.88:1). The felony intimidation of a witness charge would be dismissed but read in for purposes of sentencing. (R.88:2). The State agreed to recommend two years of initial confinement and two years of extended supervision, stayed for three years of probation, consecutive to any other sentence. (R.88:2).

The trial court requested a *Conger* memorandum from the State to better understand the reasoning for the State's plea agreement. (R. 132:6). In complying with the trial court's order, the State's filed a memorandum outlining its *Conger* analysis. (R.95:1-3). Attorney Lehman pointed to many factors considered when reaching the plea agreement with Hamilton. (R.95:1-2). Most notably, he pointed to Victim 1's recantations and exaggerations, how the plea agreement would secure two convictions and render Hamilton a Domestic Violence Repeater, that he would be on supervision, with prison imposed and stayed Hamilton would go straight to prison should he be revoked from probation, how Hamilton's

aggravated conduct of calling Victim 1, and her subsequent recantations, compromised the State's case rendering it unable to prove the strangulation charge, how Hamilton admitted to acts of disorderly conduct in his jail phone calls to Victim 1, and that public safety would be preserved by way of placing Hamilton on supervision. (R.95:1-2).

A plea hearing was held on July 6, 2021. (R.140:1). During this hearing, the trial addressed the *Conger* memorandum, took Hamilton's plea and started the sentencing. (R.140:1). In addressing the *Conger* analysis, the Attorney Lehman was able to elaborate on the reasoning for the plea agreement. (R.140:6). He pointed to an inability to prove the strangulation charge because of Hamilton's successful intimidation and considerable credibility issues Victim 1 presented. (R.140:6). After considerable push back, the trial court still did not understand Attorney Lehman and did not "believe that the prosecutor has articulated a reason that makes sense in light of the statutory scheme," but ultimately deferred to prosecutorial discretion. (R.140:7-9).

After taking Hamilton's plea, Attorney Lehman began his sentencing remarks. (R.140:34). Attorney Lehman, so as to not belabor the point, opted deferred to his *Conger* letter on the issue of Hamilton's criminal history, while noting that Hamilton had not been revoked for this conduct. (R.140:35-36). Attorney Lehman argued probation was appropriate because "this is a closed case,

but I don't think we're necessarily past the threshold consideration of probation…with what we have here." (R.140:36). It was Attorney Lehman's belief that probation would not unduly depreciate the seriousness of the offense at hand. (R.140:36). As for the seriousness of the offense, while acknowledging the allegations were serious, Victim 1's credibility issues "would be difficult to surmount at trial" to prove the charges beyond a reasonable doubt. (R.140:37). He also argued that no additional confinement was necessary because Hamilton had already spent nearly one year in custody for this case, again noting that Hamilton was not revoked for this case. (R.140:37). In his conclusion, Attorney Lehman stated the following:

> At this point, Your Honor, the State's in a position of how can we ensure that the public is best protected and that we – we do have enough to keep tabs on the defendant. And I think 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 crimes.

(R.140:38).

Before the trial court adjourned the sentencing hearing so that it could review Hamilton's jail calls, Attorney Lehman clarified another evidentiary concern in that Victim 1 fabricated the pregnancy she reported to the police. (R.140:46).

When the parties reconvened for an adjourned sentencing hearing, Attorney Lehman advised the trial court of new information. (R.122:8). Attorney Lehman stated,

> I – the State would first note that – or rather would *stand by its recommendation*, noting that it's ethically bound by the recommendation in the 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* –

(R.122:8).

Attorney Lehman continued,

> The defendant has been charged with additional felonies 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 the case is currently – is sitting in jail on serious felony charges as well. So I'm ethically bound by the recommendation and I would ask that the Court follow it, but beyond that – I have no further argument.

(R.122:8-9).

The Court responded by telling Attorney Lehman he was free to make the recommendation he wanted but that it was no secret that the Court had been very concerned about the State's recommendation. (R.122:9). The Court also explained that it must have a broad range of accurate information whether at initial sentencing or resentencing. (R.122:10-11). Attorney Lehman responded by reiterating his adherence to his sentencing recommendation pursuant to the plea agreement and how "the Court has everything before it, and *has analyzed everything the State would be referencing as argument*." (R.122:11). He then concluded by, once again, asking the Court to follow his recommendation. (R.122:11).

Attorney Jaeger interjected, objecting to considering Hamilton's pending case to which.

(R.122:11). A lengthy discussion took place between the trial court and Attorney Jaeger where they debated whether the trial court was permitted to consider Hamilton's other open case at sentencing as relevant to his character. (R.122:11-16). The trial court noted it did not know what the nature of the new charge(s) during this exchange. (R.122:16). Attorney Lehman tried to provide the Court with that information. (R.122:16). The Court then claimed that Attorney Lehman "cast a cloud in part over the sentencing, by saying there is something more I should know, but I can't tell you." (R.122:17). After additional remarks about the Court's ability to use the information of pending charges at sentencing and how the State is "not breeching its plea agreement," Attorney Lehman described the nature of the new charge. (R.122:19).

As the sentencing hearing continued, the trial court confirmed that Attorney Lehman was *not* recommending any jail time and was *not* asking the for prison. (R.122:20). Attorney Lehman stated, "Right…And Your Honor, the State's lack of a recommendation of condition time is in recognition of the fact that the defendant has already sat for a year on this." (R.122:20-21).

During Attorney Jaeger's sentencing remarks, he noted that Victim 1 did not have any visible marks on her neck and pointed out the concerns regarding her credibility. (R.122:22).

After Attorney Jaeger's remarks, the trial court opined on all of the sentencing factors. (R.122:28). After discussing the nature of the charge Hamilton faced in his other open case, the trial court gave him the benefit of the doubt and said, "I won't consider those." (R.122:33-34). After reviewing many aggravating factors, the trial court held that "this is a prison case, and the facts here and the phone calls bear that out. (R.122:38). "This is not a probation case, by any stretch of the imagination for the reasons I have set forth." (R.122:38). Furthermore, "this isn't a jail case and it's not a probation case. It's a very serious case for which this is the minimum amount of custody confinement consistent with the *Gallion* factors, as I've outlined." (R.122:39). The trial court sentenced Hamilton to two years of initial confinement followed by two years of extended supervision. (R.122:38).

On August 25, 2021, Hamilton filed Notice of Intent to Pursue Postconviction relief. (R.116:1). On May 20, 2022, he filed a Postconviction Motion for Resentencing. (R.146:1-12). In his motion, Hamilton alleged that when Attorney Lehman breached the plea agreement when he failed to mention any positive facts about Hamilton and noted that the "landscape has changed" in between the plea hearing and the sentencing. (R.146:6-11). Hamilton also raised an ineffective assistance of counsel claim as trial counsel failed to object to the State's breach, which precluded a direct appeal on breach issue. (R.146:11). Attorney Jaeger's failure to

object to the State's breach was presumptively ineffective. (R.146:12). As such, Hamilton requested a *Machner* hearing. (R.146:12).

On June 27, 2022, the State filed a Postconviction Reply. (R.150:1-6). In its motion, the State argued that Attorney Lehman's comments did not amount to a material substantial breach of the plea agreement. (R.150:2). Furthermore, case law does not support the contention that the State is under any obligation to make any argument at sentencing. (R.150:4). The State argued that Hamilton was not entitled to a *Machner* hearing because, by failing on the plea breach argument, he had not established a basis upon which trial counsel was ineffective. (R.150:5).

Hamilton filed a Postconviction Reply on June 27, 2022. (R.151:1-3). At the first hearing for a decision on the postconviction motion, the trial court properly noted that both Hamilton and the State failed to consider the entirety of the sentencing record. (R.168:5-7). The trial court pointed to Attorney Lehman's sentencing remarks during the first part of Hamilton's sentencing hearing. (R.168:8-9). It was only after the parties reconvened that Attorney Lehman made one the comment that Hamilton claims breached their plea agreement. (R.168:9). The trial court believed that Attorney Lehman's characterization of his remarks *must* be reviewed in the totality of the sentencing record. (R.168:9). The trial court also noted that Attorney Lehman's *Conger* letter served as another

portion of his sentencing recommendation. (R.168:12). The trial court adjourned so as to allow the parties to present an argument that took into consideration both of the sentencing transcripts. (R.168:14).

On July 18, 2022, Hamilton filed a Supplemental Postconviction Motion. (R.158:1-5). Hamilton ultimately concluded that Attorney Lehman's remarks from the hearing held on July 6, 2021, did not change how his remark from the August 19, 2021 hearing tainted the entirety of his sentencing recommendation. (R.158:2).

On July 19, 2022, the trial court held the adjourned hearing on Hamilton's motion for postconviction resentencing. (R163:1-33). The trial court began by noting that Attorney Lehman "quite aggressively" advocated for his plea recommendation during the first sentencing. (R163:3).

Later during the hearing, Hamilton argued that Attorney Lehman's nervousness that was part of the problem, in that it showed Attorney Lehman's discomfort with sharing the new information. (R163:16). Furthermore, the statement that the landscape had changed was "very evocative." (R163:16).

The trial court made note that it looked to the context of Attorney Lehman's statements in deciding Hamilton's motion. (R163:19). First, Attorney Lehman made numerous arguments in support of an imposed and stayed prison sentence for a period of lengthy probation. (R163:19-20). This was significant because upon

revocation, Hamilton would go directly to prison without further argument. (R163:20). In support of that recommendation, the trial court pointed to the "unfavorable things" Attorney Lehman made the court aware of about Hamilton. (R163:20). Furthermore, the trial court pointed to Attorney Lehman's comments that he, in part, made this recommendation because he did not believe Victim 1's credibility would hold up. (R163:20). The trial court quoted Attorney Lehman, "However, at least from the State's perspective, the victim presents with credibility issues that would be difficult to surmount at trial, at least for purposes of beyond a reasonable doubt. The defendant certainly played a role in that to some extent, but I simply don't think there's escaping the inconsistencies in her recantations." (R163:20-21).

The trial court pointed out that Attorney Lehman did not believe further confinement would be necessary because Hamilton had already sat in custody for nearly one year on this case and how he was not revoked for this conduct. (R163:21). Additionally, Attorney Lehaman believed the best way to protect the public from Hamilton would be to have him on continued supervision. (R163:21). The trial court also pointed out how Attorney Lehman discussed Hamilton "meddling in the criminal justice system," yet still stood behind his probation recommendation. (R163:21).

In addressing Attorney Lehman's comments that were at issue, the trial court held "I don't think his choice

of words in and of themselves create a breach." (R163:22). While the trial court acknowledged he could have used better words, it was clear Attorney Lehman was nervous as "it's a tough spot to be in for a prosecutor, particularly when we've already made sentencing argument." (R163:22). While the trial court believed Attorney Lehman's statements about being ethically bound by the recommendation were problematic, the trial court concluded that Attorney Lehman took the "landscape has changed" language and "flipped it." (R163:23).

The trial court then pointed out how Attorney Lehman stated, "my argument in that regard is for purposes of recognizing the State's recommendation is what it is, and the State stands by it, recognizing that the landscape has changed." (R163:23). The trial court went on to say that Attorney Lehman said, "I would ask that you follow it, and would suggest that the Court has everything before." (R163:23). The trial court interpreted these statements as meaning "he wasn't going to use the new thing to – to do it, or to – change his argument." (R163:23-24). Furthermore, the trial court noted that on two separate occasions, Attorney Lehman affirmed the State's recommendation of no additional confinement. (R163:24).

The trial court ultimately held, "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." (R163: 24-25). Furthermore, "the manner in which was originally said were, if anything, a technical breach which would have been cured by the later explanation." (R163:25). Even if Attorney Lehman was close to undoing what he had done, the trial court held that "the plain fact is he had already argued the sentence, and had advocated very much for this probation, and had given a reason why confinement wasn't needed." (R163:25-26). "I don't think in the big picture it taints the process." (R163:26).

In reaching this decision, the trial court factually distinguishes Hamilton's case from *Liukonen, Poole*, and *Williams*. (R163:25-27).

The trial court's final ruling was "Attorney Lehman's comments taken as a whole do not breach the plea agreement…his later commentary combined….with his earlier support of the plea and the rationale from it." (R163:28). The trial court explained that a material and substantial breach must "defeat the benefits for which the defendant – or for which the accused bargained." (R163:29). While Attorney Lehman "wasn't artful," the trial court did not find his language was a material and substantial breach. (R163:29-30). Furthermore, the trial court held, "if there's no breach of the plea agreement, then I believe we are – we don't go to part two of this hearing." (R163:28).

ARGUMENT

I. The trial court correctly held that the State did not breach the plea agreement

Constitutional and fundamental fairness considerations are implicated when a defendant gives up his rights to enter into a plea bargain with the State. *Santobello v. New York*, 404 U.S. 257, 262, (1971). A prosecutor who agrees to a negotiated sentencing recommendation breaches that agreement when what was negotiated is not presented. *State v. Williams*, 249 Wis. 2d 492, 517, 637 N.W.2d 733 (2002). "An actionable breach must not be merely a technical breech: it must be a material and substantial breach." *Id*. This occurs when the breach defeats the benefit of the defendant's bargain. *Id*. When the state's breach is material and substantial, a defendant may be entitled to plea withdrawal or resentencing. *Id*. The court is to examine the entire sentencing proceeding when evaluating a prosecutor's remarks. *Id*. at 520.

A prosecutor "may not render less than a neutral recitation of the terms of the plea agreement." *State v. Poole*, 131 Wis. 2d 359,364,394 N.W.2d 909 (Ct. App. 1986). Furthermore, "end runs" around a plea agreement are prohibited. *State v. Hanson*, 232 Wis. 2d 291, 606 N.W.2d 278.

That said, a prosecutor is not required to enthusiastically recommend a plea agreement. *Id*. "A prosecutor must not be the proverbial potted plant at a sentencing hearing." *Williams*, 249 Wis. 2d at 518. The

State walks a "fine line" as it must balance its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement." *Id.* As plea agreements are the result of compromises, often the product of dissatisfied negotiators, prosecutors are not obligated to "forcefully and enthusiastically" make a sentencing recommendation. *Poole*, 131 Wis. 2d at 362.

On appeal, the terms of the plea agreement and the historical facts are questions of fact subject to a clearly erroneous standard. *Williams*. 249 Wis. 2d at 501-502. Whether the State's conduct constitute a breach of the plea agreement is a question of law, reviewed de novo. *Id*. The appropriate remedy for the State's breach of a plea agreement is resentencing. *Poole*, 131 Wis. 2d at 365.

a. The State is permitted to present aggravating facts at sentencing.

There are two aspects of Attorney Lehman's sentencing remarks that Hamilton addresses and with which he takes issue. The first issue is that Attorney Lehman only presented negative facts during his sentencing argument.

In *Naydihor*, the defendant argued that the state breached the plea agreement by failing to mention anything positive and highlighting many negative aspects of his background and the crime at issue. *State v. Naydihor*, 270 Wis. 2d 585, 599, 678 N.W.2d 220 (2004). The state argued that these comments were necessary to justify the sentencing recommendation. *Id*. The court

ultimately "found no case that holds that the State is obligated to say something nice or positive about the defendant in order to avoid breaching the plea agreement." *Id*. at 607. The Supreme Court of Wisconsin concluded that in justifying its recommendation, the state did not covertly suggest it was no longer appropriate, but rather strongly affirmed it. *Id*. at 608.

A plea agreement cannot prohibit a prosecutor from informing the court of aggravating sentencing factors. *Id*. at 602. The state is also not barred from characterizing a defendant's conduct in harsh terms. *State v. Liukonen*, 276 Wis. 2d 64, 74, 686 N.w.2d 689. Even such terms that, when viewed in isolation, might appear inconsistent with the plea agreement. *Id*.

The case law is very clear as it relates to Hamilton's first point. The state must balance dual obligations when it enters into a plea agreement with an accused. On the one hand, the state is obligated to provide the sentencing court with information relevant to the sentencing factors. On the other hand, the state must present that information in a manner that suggests the appropriate disposition is that to which the parties have agreed.

In this case, Attorney Lehman had an obligation to the trial court to present facts, whether positive or negative, that were relevant to the sentencing factors. That the facts relating to Hamilton's conduct and background were primarily negative is not the fault of the prosecutor. As Attorney Lehman is under no obligation to advocate for Hamilton, all can and must do is present accurate

information while arguing that his sentencing recommendation is appropriate in light of that information. This is exactly what Attorney Lehman did here. He even went so far as to point out detrimental aspects of the State's case, which is a fact in favor of Hamilton, and gave Hamilton credit for having already sat in custody for one year. Just as in *Naydihor*, Hamilton only bargained for Attorney Lehman to recommend probation, not for him to "extol his virtues at sentencing." *Naydihor*, 270 Wis. 2d at 607.

In *Ferguson*, the prosecutor agreed to recommend probation but went on to characterize the offenses as "the most perverted of all perverted sex acts" and that "this is the sickest case that I have seen or read about." *State v. Ferguson*, 166 Wis. 2d 317, 319-20, 479 N.W.2d 241(1991). The prosecutor also said, "If I refer to this defendant as 'sleaze,' I think that would be giving him a compliment." *Id*. The Court of Appeals pointed out that the plea agreement did not prohibit the state from informing the court of aggravating factors, nor could it. *Id*. at 324. It was perfectly appropriate for the state to articulate aggravating factors when recommending the maximum sentence, albeit stayed for probation. *Id*. Furthermore, the prosecutors remarks about the defendant's character, while denigrating, were relevant. *Id*. at 325. The court held that the State did not breach the plea agreement. *Id*. Even when a prosecutor uses very strong language to describe a defendant's character or conduct, that does not mean there is an attempt to undercut

the plea agreement. Attorney Lehman's remarks weren't even close to being considered denigrating. They were perfectly appropriate so as to advise the trial court of relevant sentencing information.

As for Attorney Lehman's use of the plural "felonies," this was not a nefarious attempt to make the new information seem worse than what it actually was and covertly suggest to the trial court that a harsher sentence was more appropriate than that which is was overtly recommending. Hamilton forgets that Attorney Lehman is a fallible human. Humans failings will occur so long as humans practice law. *Hanson*, 232 Wis. 2d at 282. The law only requires a defendant be entitled to a fair trial, not a perfect one. *Id*. Same as with trial counsel, a defendant is constitutionally guaranteed adequate representation, not the best representation. *Id*. While most people could stand to be more articulate at times, as long as law is practiced by humans, there will be a range of errors. It cannot be overlooked that all parties acknowledged that Attorney Lehman appeared nervous when presenting the information about Hamilton's open case to the trial court. All humans can easily get tongue tied when they get nervous. Which is a reasonable reaction after receiving significant pushback for the plea agreement. Even the trial court slipped and said it would not consider those new charges.

The statements Attorney Lehman made are all perfectly permissible under the law. Attorney Lehman had mostly negative information to work with and merely

made a mistake with one word. According to case law, that does not amount to an attempt to subvert his sentencing recommendation.

b. The "landscape has changed" language does not amount to a breach of the plea agreement.

Hamilton's second contention is that Attorney Lehman's remarks that the "landscape has changed" since the first sentencing hearing was an attempt to subvert the plea agreement. As such, Attorney Lehman breached the plea agreement. The case law repeatedly notes the "fine line" between what constitutes a breach of a plea agreement. To give context to Attorney Lehman's remarks, we must look to the entirety of his sentencing argument.

In *Poole*, the prosecutor recommended a fine upon the defendant's plea to a burglary charge. *State v. Poole*, 131 Wis. 2d 359, 360, 394 N.W.2d 909 (1986). At sentencing, the prosecutor noted this recommendation was agreed to "before we knew of the other instances. But that is our agreement." *Id*. The other instances was a different case where the defendant had been revoked from supervision. *Id*. The Court of Appeals held that the state breached the plea agreement as these comments "implied that circumstances had changed since the plea bargain, and that had the state known of the other instances of the defendant's misconduct, they would not have made the agreement they did." *Id*. at 364. The qualified language

implied reservations about the recommendation, thus tainting the sentencing. *Id*. at 364.

Hamilton's case is distinguishable for a number of reasons. While Attorney Lehman nervously stated that the landscape had changed and how he was ethically bound by his agreement, the trial court pointed to the multiple times Attorney Lehman stated he stood by his recommendation. Furthermore, Attorney Lehman "aggressively argued" for probation during his initial sentencing remarks. In presenting all positive and negative facts, he strongly argued for probation. Attorney Lehman then explained that he believed the trial court had all relevant information before it and he would not recommend additional confinement time. These facts are vastly different than the language from *Poole*. The general tenor of all of Attorney Lehman's remarks indicate strong adherence to the appropriateness of the sentencing recommendation pursuant to the plea agreement. Not an attempt to inconspicuously undercut it.

In *Liukonen*, the Court of Appeals held that comments regarding the seriousness of the conduct, criminal history and character, even utilizing strong language, were perfectly appropriate sentencing remarks. *State v. Liukonon*, 276 Wis. 2d 64, 76, 686 N.W.2d 680 (2004). What subverted the plea agreement was when the prosecutor belabored the point that the defendant got "an extreme break" or a "tremendous break" after learning of new information after entering into the plea agreement. *Id*. While the court held that the state breached its plea

agreement, it noted that a prosecutor is not in an unresolvable quandary if remarks suggest the court should impose a harsher sentence than what the state is recommending. *Id*. at 78. The state can repair any damage done by making such remarks.

Hamilton's cases is clearly distinguishable from *Liukonen* where the prosecutor emphatically argued that the defendant received a big break. This is an "end run" around a plea agreement and very clearly suggested that the prosecutor would not have entered into this agreement had he known of this information. Attorney Lehman on the other hand, while acknowledging his obligation to the plea agreement, explained that he had presented all relevant information to the trial court and that he stood behind his sentencing recommendation. Attorney Lehman also never suggested that the sentencing recommendation was anything short of appropriate. Never once stating Hamilton got a break or received a deal.

Hamilton strongly relies on *Williams* as a parallel case. In *Williams*, the prosecutor appeared to adopt the opinions and recommendations for a harsher sentence from the presentence investigation writer and the defendant's ex-wife. *State v. Williams*, 249 Wis. 2d 492, 511-12, 637 N.W.2d 733 (2002). The state's affirmations of the plea agreement were insufficient to overcome the covert message that a harsher penalty was warranted. *Id*. at 521. The prosecutor's comments began by stating the presentence investigation report and comments from the defendant's ex-wife were "quite a contrast, speaking with

her and reading and learning about [the defendant]." *Id*. at 511. The prosecutor went on to describe conversations with the presentence writer and the defendant's ex-wife. *Id*. at 512. Each description of these conversations appeared to conclude as the opinion of the prosecutor. Despite affirming its adherence to the plea agreement, these affirmations were "too little, too late." *Id*. at 522-23. These remarks undercut the defendant's bargain and therefore constituted a material and substantial breach.

Hamilton's case is drastically different than the facts in *Williams*. As previously discussed, Attorney Lehman was reluctant to provide detailed information about the new information he received in between the two sentencing hearings. Reluctance or apprehension is not the same as intentionally trying to mislead, especially when Attorney Lehman tried to tell the trial court the nature of the specific charge. When he ultimately described the charge, Attorney Lehman did not make any further argument identifying it as an aggravating fact. He simply advised the trial court that this open case existed, while acknowledging his reluctance to do so because of his responsibility to uphold his plea agreement *and* his belief that the sentencing recommendation remained appropriate. *Williams* stands for the proposition that the prosecutor may not appear as to suggest that new information was quite a contrast to what the prosecutor knew before entering into a plea agreement; then go on to appear to agree with or adopt the new information, which came from people who advocated a harsher sentence. In no way did Attorney

Lehman use the new case as an opportunity to suggest that his sentencing recommendation pursuant to the plea agreement was anything less than appropriate. Furthermore, he didn't use the new case as a way to paint Hamilton's record as increasingly aggravated. Attorney Lehman wouldn't even repeat Hamilton's criminal history so as to not belabor the point already made in his *Conger* letter.

In *Hanson*, the Court of Appeals looked to the entire proceeding, as a motion hearing preceded the sentencing hearing, to address whether the state's failure to expressly recite the "ten-year" cap provision of the plea agreement constituted a breach. *State v. Hanson*, 232 Wis. 2d 291, 299, 606 N.W.2d 278 (1999). Before the sentencing hearing, the defendant brought a motion claiming the state breached the plea agreement by filing a victim impact statement. *Id*. While addressing that motion, the parties focused entirely on the "ten-year cap" provision of the state's plea agreement in addressing the defendant's motion. *Id* at 299-300. The state later failed to expressly reference the "ten-year cap" during the formal sentencing. *Id*. at 300. The Court of Appeals held that in light of the entire proceeding, there was no misunderstanding the State's recommendation and therefore failing to state those specific words did not constitute a breach the plea agreement. *Id*. In so holding, the court stated "In the legal laboratory and in the perfect world, that would have occurred." *Id*. at 299.

The defendant in *Hanson* also argued that the state's sentencing remarks were less than neutral so as to undercut it. *Id*. at 282-83. In looking "to the entire sentencing proceeding to get the true flavor of the prosecutor's remarks," it was important that the state acknowledged the need to be cautious in presenting certain information because there was a plea agreement and expressly stood behind. *Id*. at 301-02. The prosecutor specifically stated she would be "very…circumspect" in making her sentencing remarks, was "aware what the plea agreement is," stated "I certainly stand by the plea agreement," and noted the recommendation was "fair to the Defendant and fair to the victim." *Id* at 301-02. These remarks meant the state was not merely paying lip service to the plea agreement, but rather stood behind it. *Id*. at 302. These remarks were held to be not less than a neutral recitation of the state's recommendation. *Id*. at 303.

This case demonstrates the balance the State must strike between presenting facts in support of a sentencing recommendation, while being cautious to present them in a way that supports the agreed to recommendation.

As previously discussed, Attorney Lehman presented negative information about Hamilton as well as negative information about the state's case during both sentencing hearings. At the same time, Attorney Lehman told the trial court that he believed the sentencing recommendation was appropriate.

During the first sentencing hearing, Attorney Lehman opted not to belabor Hamilton's criminal history,

but rather belabored the reasons why probation was appropriate with no additional confinement. (R.140:34-38). In fulfilling his obligation to present the trial court with factual information, Attorney Lehman advised the trial court of Hamilton's open case during the second part of the sentencing hearing. In so doing, Attorney Lehman started his remarks by stating he would "stand by its recommendation." (R.122:8). He went on to say, "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*." (R.122:8). Though nervously articulated, Attorney Lehman found himself in quite a predicament. He now had to present *yet another* negative fact to the same trial court that strongly disagreed with the appropriateness of the plea agreement. In navigating this quandary, he made sure to note that the State stood by the recommendation and later stated, "the Court has everything before it, and has analyzed everything the State would be referencing as argument" and asked the trial court to follow his recommendation. (R.122:11). Attorney Lehman also reiterated the credit he gave to Hamilton by recommendation probation without any confinement time for having already sat in custody for a year. (R.122:20-21).

In presenting the fact about Hamilton's open case, Attorney Lehman stated he only "suggest[ed]" that the landscape had changed, but continued to strongly recommend the plea agreement. While it is true he was

ethically obligated to stand behind his recommendation at that point, he had already presented all of the relevant information in support of his recommendation. Just as in *Hanson*, Attorney Lehman properly balanced his obligation to present the trial court with facts relevant to the sentencing factors all while adhering to his plea agreement.

A prosecutor may rehabilitate comments that could be construed as to have breached a plea agreement. Here the trial court held that Attorney Lehman's comments did not breach the plea agreement. That said, the trial court believed that his comments came close. The trial court did not believe that Attorney Lehman's comments that the landscape had changed, in and of themselves, created a breach. (R.163:22). It was mostly Attorney Lehman's comments about being ethically bound by the recommendation that were problematic. (R.163:22). That said, the trial court pointed to the number of times Attorney Lehman noted that the trial court had before it all relevant information from the State's perspective, stated he stood behind his recommendation, and asked the trial court to follow it. (R.163:22-24). The trial court also pointed to Attorney Lehman affirming the State's recommendation of no additional confinement on two separate occasions. (R.163:24). It was with all of this that the trial court held, even if Attorney Lehman was close to undoing what he had done with his sentencing remarks, "a technical breach which would have been cured by the later explanation."

(R163:25). Furthermore, "I don't think in the big picture it taints the process." (R163:26).

Attorney Lehman "aggressively argued" for the agreed to sentencing recommendation. Any linguistic slip-ups do not amount to covert attempts to argue for a harsher sentence, therefore breaching the plea agreement. Based on the foregoing, the trial court correctly applied the controlling law to the facts of this case. The State would therefore, respectfully, ask that this Court deny Hamilton's appeal.

II. The State did not breach the plea agreement, therefore, Hamilton is not entitled to a *Machner* hearing.

Hamilton forfeited the right to directly challenge the alleged breach because there was no objection. *State v. Liukonen*, 276 Wis. 2d 64, 68, 686 N.W.2d 689 (2004). If, however, a plea agreement is breached without objection, a defendant may raise an ineffective assistance of counsel claim. *Id*.

In *Naydihor*, the Supreme Court of Wisconsin affirmed the decision of the Court of Appeals holding that the circuit court did not abuse its discretion in denying a *Machner* hearing because the prosecutor had not violated the terms of the plea agreement at resentencing, therefore counsel was not ineffective for failing to object. *State v. Naydihor*, 270 Wis. 2d 585, 593, 678 N.W.2d 220 (2004).

A trial court's ineffective assistance of counsel analysis involves a mixed question of law and fact. *State*

v. Howard, 246 Wis. 2d 475, 491, 630 N.W.2d 244 (2001). Factual findings will not be reversed unless clearly erroneous and whether trial counsel was deficient and prejudicial are questions of law to be reviewed de novo. *Id*. at 491-92.

There is no dispute that Attorney Jaeger did not raise an objection that Attorney Lehman breached the plea agreement. While Attorney Jaeger did not make such an objection, he strongly objected to the trial court considering the Hamilton's open case in sentencing him. The trial court ultimately made clear it would *not* consider the new case in fashioning Hamilton's sentence. The trial court also held that Attorney Lehman did not breach his plea agreement with Hamilton. With no breach, Attorney Jaeger cannot be ineffective for failing to object. Therefore, the trial court correctly held that Hamilton was not entitled to a *Machner* hearing.

Hamilton's request that the State concede his assertions presume the State agrees there was a breach. That is simply not the case. The State believes the trial court correctly held that Attorney Lehman did *not* breach his plea agreement with Hamilton. Therefore, any failure to object cannot be used to argue that Attorney Jaeger was ineffective. As such, the State would respectfully ask that this Court find that the trial court correctly denied Hamilton a *Machner* hearing.

CONCLUSION

The trial court correctly denied Hamilton's postconviction motion in this case. Based on the totality of the facts from the first and second sentencing hearing, Attorney Lehman's comments cannot be construed as a covert attempt to subvert the State's plea agreement. As the State did not breach the plea agreement, trial counsel cannot be found ineffective, therefore Hamilton is not entitled to a *Machner* hearing. For these reason, the State respectfully asks the Court of Appeals to affirm the rulings of the trial court.

Respectfully submitted, this 21st day of December, 2022.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in Wis. Stats., § 809.19(8)(b), (bm), and (c). The length of this brief is 6,565 words.

Dated this 21st day of December, 2022

Signed:

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