STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP1350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY JOSEPH HAMILTON,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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The State opposes Jeremy Hamilton's petition for review. In an unpublished, one-judge decision, the court of appeals applied the correct principles of law and standard of review when it affirmed the circuit court's decision and order denying Hamilton's motion for resentencing. *State v. Hamilton*, No. 2022AP1350-CR, 2023 WL 2293962 (Wis. Ct. App. Mar. 1, 2023) (unpublished), (Pet-App. 3–18). The upshot of Hamilton's argument is that this Court should establish a "close case" rule for cases where the prosecutor gets close to breaching a plea agreement. But this Court expressly rejected any "close case" standard in *State v. Williams*,[1] and Hamilton does not undertake any meaningful stare decisis analysis to overrule that decision. Hamilton merely seeks error correction veiled behind the development of an unnecessary rule. This Court should deny his petition.

THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE IT DOES NOT SATISFY THE CRITERIA IN WIS. STAT. § (RULE) 809.62(1R).

BACKGROUND

Charges, Plea, and Sentencing

This Court should deny Hamilton's petition for review. Hamilton was originally charged with felony intimidation of a victim, strangulation/suffocation (domestic abuse), and disorderly conduct (domestic abuse). *Hamilton*, 2023 WL 2293962, ¶ 2. Hamilton entered into a plea agreement with the State. *Id.* Per the plea agreement, the State agreed to dismiss the felony witness intimidation charge, reduce the strangulation/suffocation charge to misdemeanor battery (domestic abuse), and keep the disorderly conduct charge intact. *Id.* The State also agreed to recommend an imposed and stayed sentence of two years' initial confinement followed

[1] *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733.

by two years' extended supervision. *Id.* Hamilton was free to argue. *Id.*

At the plea hearing, the terms of the plea agreement, including the State's sentencing recommendation, were put on the record. *Id.* Hamilton pleaded as indicated, and the parties moved immediately to sentencing. *Id.* ¶¶ 2–3. In support of its recommendation, the State noted that Hamilton was on extended supervision at the time of his offense but had not been revoked. *Id.* ¶ 3. The State also argued that probation would not unduly depreciate the seriousness of the offenses. *Id.* Further supporting the State's recommendation was the State's concerns with the victim's credibility and the fact that Hamilton "has already sat for roughly a year on this case." *Id.* ¶ 4. Hamilton's counsel asked the circuit court to follow the State's recommendation. *Id.* ¶ 5.

The circuit court adjourned the sentencing hearing so it could listen to the recordings of the phone calls that Hamilton made from jail that formed the basis of the witness intimidation charge. *Id.* ¶ 6. The court was concerned that it was "not getting a full picture, and I think these calls might be helpful to me getting a sense of what's happening here." *Id.*

Sentencing resumed several weeks later. The circuit court opened the hearing by restating the terms of the plea agreement, including the State's recommendation. *Id.* ¶ 8. The State "st[oo]d by its recommendation." *Id.* The prosecutor "suggest[ed] that the landscape has changed between our previous hearing and this one," but he stated that he was "ethically bound to the recommendation." *Id.* The circuit court inquired about the changed landscape, and the State informed the court that Hamilton had been charged with two additional felonies from incidents that occurred before the charges in this case and that "the victim in this case is currently—is sitting in jail on serious felony charges as well." *Id.* The State again said it was ethically bound by its

recommendation, explicitly asked the court to follow it, and stated it had no further argument. *Id.* ¶ 8.

The State maintained its argument from the prior hearing, and "recognize[d] that the State's recommendation is what it is, and the State stands by it, recognizing that the landscape has changed." *Id.* ¶ 9. The prosecutor again asked the court to follow its recommendation at least four more times before Hamilton's counsel argued and before Hamilton's allocution. *Id.*

The circuit court ultimately disagreed with the parties and considered this "a prison case." *Id.* ¶ 12. The circuit court noted that it "was 'not consider[ing]' the pending" felonies, and it sentenced Hamilton to two years' initial confinement followed by two years' extended supervision, consecutive to any other sentence. *Id.* (alteration in original).

Postconviction Proceedings and Appeal

Hamilton filed a postconviction motion for resentencing, claiming that the prosecutor breached the plea agreement by stating that the "landscape has changed" and that he was "ethically bound" by the State's agreement. *Id.* ¶ 13. He also alleged that sentencing counsel was ineffective for failing to object to the prosecutor's comments. *Id.* The circuit court noted that this was a "very, very close" case, but it ultimately denied Hamilton's motion, concluding that there was no substantial or material breach of the plea agreement. *Id.*

Hamilton appealed, and the court of appeals affirmed. The court of appeals also noted that this was a close case, but it recognized that "even close cases have to be decided one way or another." *Id.* ¶ 14. Applying well-settled precedent from the court of appeals and this Court, the court of appeals correctly noted that plea breach cases are "very fact specific." *Id.* ¶ 15. The court concluded that "[w]hile the prosecutor was inartful in his choice of terms, i.e., that 'the landscape has changed'

since the plea and he was 'ethically bound' to the sentencing recommendation . . . , he stood clearly and unwaveringly behind the agreement." *Id.* ¶ 18. The court of appeals ultimately disagreed with Hamilton that the prosecutor "backed away from its recommendation" and concluded that "the record indicates the prosecutor ardently stuck to and repeatedly asked the circuit court to go along with the recommendation." *Id.* ¶ 24.

ARGUMENT

I. This Court should not take up Hamilton's invitation to create a new, amorphous standard of review for deciding breach-of-plea-agreement cases.

The crux of Hamilton's petition to this Court is his desire for this Court to implement a new "close case" rule. (Pet. 16–21.) While he recognizes that this Court expressly rejected such a rule twenty years ago, he asks that that decision be "revisited." (Pet. 16–17.) Not so. This Court's decision in *Williams* to avoid the creation of any "close case" rule was and remains sound in principle, and it should not be overruled.

Over twenty years ago, this Court was faced with a similar request. In *State v. Williams*, 2002 WI 1, ¶¶ 4–20, 249 Wis. 2d 492, 637 N.W.2d 733, the parties presented competing standards of review to this Court. The State advocated for a "clear and convincing" standard whereas the defendant urged this Court to "follow the court of appeals and adopt the close case rule." *Id.* ¶¶ 12–18. This Court described the close case rule as one that permits "a court [to] rule that the prosecutor breached the plea agreement even if it is more likely that there was no breach, as long as it is 'close.' In other words, if a court is unsure as to whether a breach occurred, but it is a 'close call,' then the defendant should prevail." *Id.* ¶ 17 (citations omitted).

This Court declined to adopt the rule. *Id.* ¶ 19. This Court first recognized that it hadn't adopted such a rule in the past, and adopting the rule would be "inconsistent with precedent." *Id.* This Court also declined to adopt a rule that considers standards of review in terms of burdens of persuasion, and it concluded that the close case rule would "not give sufficient recognition to the values described by the State in arguing in favor of the clear and convincing evidence rule." *Id.*

This Court explicitly "reject[ed] . . . the close case rule." *Id.* ¶ 20. To be sure, this Court also rejected the State's clear and convincing standard. *Id.* This Court instead adopted a standard of review akin to the constitutional fact standard, whereby the circuit court's findings of historical fact are upheld unless clearly erroneous, and appellate courts independently apply those facts to determine whether a prosecutor substantially and materially breached a plea agreement. *Id.*

Hamilton undertakes no meaningful stare decisis analysis to overrule this Court's express rejection of the close case rule. (*See generally* Pet. 16–21.) Instead, he sidesteps stare decisis entirely, asserting that he is asking this Court to only "modify" its conclusion in *Williams*. (Pet. 17 n.5.) But that simply isn't true. The standard of review was an express holding of *Williams*, and this Court would have to overrule it, at least in part, to adopt Hamilton's proffered rule. Absent any effort from Hamilton to explain why this Court's rejection of the close case rule was wrong twenty years ago or is now unworkable in practice, this Court should again decline to take it up.

Moreover, the federal cases that Hamilton cites do not move the ball forward. Every circuit holds that ambiguities in the *terms* of the plea agreement are construed against the government. *See United States v. Munoz*, 718 F.3d 726, 729 (7th Cir. 2013) ("[W]e interpret a plea agreement based on the

parties' reasonable expectations and construe ambiguities against the government *as the drafter*. (emphasis added)).[2] Our court of appeals has already soundly rejected that principle. *State v. Wesley*, 2009 WI App 118, ¶ 18, 321 Wis. 2d 151, 772 N.W.2d 232 ("[W]e do not construe plea bargains against the drafter in Wisconsin."). Further, the District of Columbia Court of Appeals relies on and merely restates the *Witte*[3] rule that this Court already rejected in *Williams*. *See, e.g.*, *White v. United States*, 425 A.2d 616, 618–19 (D.C. Ct. App. 1980).

Aside from Hamilton's inability to show why *Williams* should be overruled in part, he does not provide this Court with any guidance as to what the close case rule would entail or how it would be applied. He does not explain when a case is "close" or "ambiguous" enough to invoke the rule. He does not explain whether the rule would mean a court must automatically find that there was a substantial and material breach or whether a technical breach will do. He does not explain how the close case rule would interact with this Court's most recent breach-of-plea-agreement case, *State v.*

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[2] *Accord United States v. Newbert*, 504 F.3d 180, 185 (1st Cir. 2007) ("Ambiguities in plea agreements are construed against the government."); *Innes v. Dalsheim*, 864 F.2d 974, 979 (2d Cir. 1988); *United States v. Williams*, 510 F.3d 416, 422 (3d Cir. 2007) ("[A]ny ambiguities *in a plea agreement* must be construed against the government." (emphasis added)); *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986); *United States v. Escobedo*, 757 F.3d 229, 233 (5th Cir. 2014); *United States v. Johnson*, 979 F.2d 396, 399 (6th Cir. 1992) ("[B]oth constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in the plea agreements."); *United States v. Jensen*, 423 F.3d 851, 854 (8th Cir. 2005); *United States v. De la Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993) ("As with other contracts, *provisions* of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'" (emphasis added) (citation omitted)); *United States v. Werner*, 317 F.3d 1168, 1170 (10th Cir. 2003); *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990); *United States v. Murray*, 897 F.3d 298, 304 (D.C. Cir. 2018).

[3] *State v. Witte*, 245 N.W.2d 438 (Minn. 1976).

Nietzold, 2023 WI 22, ¶ 9, 986 N.W.2d 795, wherein this Court held that "some breaches can be cured." Does the close case rule preclude further inquiry into whether the breach was cured? Relatedly, if courts must conduct a cure inquiry beyond the breach inquiry, what purpose does the close case rule serve? Hamilton does not say.

Without a showing that *Williams* was wrong or unworkable and with all of the above unanswered questions, this Court should decline to create a new imprecise rule when it has already established a familiar and workable standard of review for breach-of-plea-agreement cases.

II. Absent the creation of Hamilton's proffered rule, this case is nothing more than error correction.

Outside of his request for this Court to implement the close case rule, Hamilton seeks nothing but error correction. True, the circuit court and the court of appeals concluded that the case was "close," but each court ultimately concluded that there was *no* breach.[4] *Hamilton*, 2023 WL 2293962, ¶¶ 14, 25. Breach-of-plea-agreement cases are highly fact bound, and the court of appeals addressed the essential facts of this case to conclude there was no breach. *Id.* ¶¶ 17–24.

The court of appeals, while acknowledging the prosecutor's language was "inartful," noted the prosecutor's contemporaneous reaffirmation of the State's sentencing recommendation. *Id.* ¶¶ 18, 21–24. It noted that in the first sentencing hearing the prosecutor "asked the circuit court no fewer than seven times to follow the State's sentencing recommendation." *Id.* ¶ 21. At the subsequent hearing, and despite his statement that the landscape had changed, the prosecutor repeatedly affirmed that he was standing by the

[4] For that reason, even if this Court adopted the close case rule, it would not matter to Hamilton's case because neither court was "unsure" as to whether a breach occurred. *See Williams*, 249 Wis. 2d 492, ¶ 17.

State's recommendation. *Id.* ¶ 22. He at least twice reiterated that the State was not recommending jail time or prison, and he made no argument beyond that which he made at the prior hearing. *Id.* ¶¶ 22–23.

The court of appeals concluded that the prosecutor "ardently stuck to and repeatedly asked the circuit court to go along with the sentencing recommendation." *Id.* ¶ 24. Unlike in *Williams*, the court of appeals here concluded that "[t]he record does not suggest the prosecutor was trying to do a nod, nod, wink, wink in an attempt to get the court to impose a stiffer sentence than the agreed-upon recommendation." *Id.* ¶ 24; *Williams*, 249 Wis. 2d 492, ¶¶ 47–52. Relying on *State v. Wood*, 2013 WI App 88, ¶ 9, 349 Wis. 2d 397, 835 N.W.2d 527, the court of appeals concluded that the prosecutor did not "covertly convey to the trial court that a more severe sentence is warranted than that recommended." *Hamilton*, 2023 WL 2293962, ¶ 24.

Hamilton simply disagrees with the lower courts' decisions, but his disagreement does not warrant this Court's review. Applying this Court's well-established standard of review, and its equally well-established breach-of-plea-agreement jurisprudence just as the circuit court and court of appeals did, this Court would come to the same conclusions as those courts,[5] and "[t]here are much better uses of this [C]ourt's time than repeating work already done correctly by a lower court."[6] *State v. Lee*, 2022 WI 32, ¶ 2, 401 Wis. 2d 593, 973 N.W.2d 764 (R.G. Bradley, J., concurring to the per

[5] Because there was no breach of the plea agreement, counsel could not have performed deficiently for failing to object, and there is no need to remand for a *Machner* hearing.

[6] Even if this Court concluded that the prosecutor's comments constituted a substantial and material breach, it could easily conclude, like the circuit court did, that that breach was cured by its subsequent comments, which steadfastly stood by the State's recommendation and specifically disavowed a prison sentence. In that sense, this Court would simply be affirming on different grounds.

curiam dismissal of the case as improvidently granted) (per curiam).

CONCLUSION

This Court should deny Hamilton's petition for review.

Dated this 24th day of April 2023.

Respectfully submitted,

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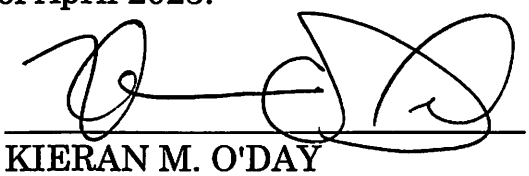
FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,596 words.

Dated this 24th day of April 2023.



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

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This electronic response is identical in content and format to the printed form of the response filed as of this date.

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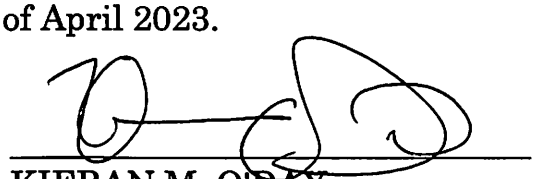
Dated this 24th day of April 2023.



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