

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 27, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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**Appeal No. 2024AP1549-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2022CF690

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEMAR C. NEWELL, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and JEFFREY A. WAGNER, Judges. *Order reversed and cause remanded with directions.*

Before Donald, C.J., Colón, P.J., and Geenen, J.

¶1 COLÓN, P.J. Lemar C. Newell, Jr. appeals from a judgment convicting him of first-degree reckless homicide upon his guilty plea and an order denying his postconviction motion for resentencing.¹ Newell argues that counsel rendered ineffective assistance by failing to object to the State’s characterization of the plea agreement at the sentencing hearing.

¶2 At the plea hearing, the State informed the circuit court that pursuant to the plea agreement, the second count charged—first-degree recklessly endangering safety—should be “dismissed outright” instead of being dismissed and read in. Then at sentencing, the State told the court that the second count should be dismissed and read in. Newell’s counsel never objected.

¶3 Newell contends that the State materially and substantially breached the plea agreement when it told the circuit court that the second count should be dismissed and read in instead of dismissed outright. We agree with Newell, and for the following reasons, we reverse the order and remand to the circuit court for resentencing by a different judge.²

BACKGROUND

¶4 Newell was charged with one count of first-degree reckless homicide and one count of first-degree recklessly endangering safety, both with the use of a dangerous weapon, stemming from an incident at a gas station. According to the

¹ The Honorable Ellen R. Brostrom presided over the plea hearing and sentenced Newell. We refer to her as the circuit court. The Honorable Jeffrey A. Wagner entered the order denying Newell’s postconviction motion. We refer to him as the postconviction court.

² While the appellant appeals from both a judgment and an order, we address only the order for the reasons set forth in the opinion.

criminal complaint, surveillance camera footage showed Newell in a gas station arguing with the store clerk and some customers before he went to his vehicle, reappeared with a firearm, and fired multiple times into the store. One of the customers died of multiple gunshot wounds.

¶5 Newell agreed to enter a guilty plea to the first-degree reckless homicide charge pursuant to a plea agreement. Newell and his attorney filled out and signed a Plea Questionnaire/Waiver of Rights form (the “Plea Form”) which indicated that the State agreed to recommend 25 to 28 years of initial confinement and to dismiss and read in the second count, first-degree recklessly endangering safety. At the plea hearing, the circuit court conducted a plea colloquy with Newell and subsequently accepted his guilty plea as being knowingly, intelligently, and voluntarily entered.

¶6 After accepting Newell’s guilty plea, the circuit court stated on the record that, pursuant to the negotiations, the second count would be dismissed and read in for sentencing purposes. The State then clarified, “I never understood the difference, but I had said that Count 2, in the State’s view, should be dismissed outright.” The circuit court responded, “Oh. No. That does make a difference. Thank you. I missed that detail. So Count 2 is actually dismissed outright as opposed to dismissed, but read in for sentencing purposes.”

¶7 At sentencing, the State recommended 25 to 28 years of initial confinement and noted that the second count was dismissed as part of the plea agreement. The following exchange then occurred:

THE COURT: Dismissed and read in?

[THE STATE]: I don’t recall off hand, Judge.

THE COURT: The plea form says dismissed and read in.

[THE STATE]: That would be correct then.

THE COURT: And the first-degree reckless homicide, I believe, was originally charged with a use of a dangerous weapon enhancer, was that also dismissed?

[THE STATE]: Yes, Judge.

THE COURT: Thank you. Counsel, was that your understanding of the negotiations at the time of the plea?

[TRIAL COUNSEL]: Yes, Your Honor.

THE COURT: And, Mr. Newell, was it yours as well?

THE DEFENDANT: Yes, ma'am.

The circuit court then imposed a sentence comprised of 28 years of initial confinement and 12 years of extended supervision.

¶8 Newell filed a postconviction motion for resentencing, arguing that counsel was ineffective for failing to object to the State's material and substantial breach of the plea agreement when it told the circuit court that the second count should be read in for sentencing. The postconviction court denied the motion without a hearing, finding that the alleged breach was not material and substantial; therefore, counsel could not be ineffective for failing to raise an objection.

¶9 Newell appeals.

DISCUSSION

¶10 On appeal, Newell maintains his ineffective assistance of counsel claim premised on counsel's failure to object to the State's material and substantial breach of the plea agreement by telling the circuit court the second count should be dismissed and read in instead of dismissed outright. In response, the State argues that its breach was not material and substantial and, even if it was, counsel was not ineffective because Newell cannot demonstrate that he was prejudiced by

counsel’s failure to object.³ We conclude that the State’s breach was material and substantial, and that Newell was rendered ineffective assistance of counsel.

¶11 “A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement.” *State v. Smith*, 207 Wis.2d 258, 271, 558 N.W.2d 379 (1997). “When examining a defendant’s allegation that the State breached a plea agreement, such as by making a different recommendation at sentencing, it is irrelevant whether the [circuit] court was influenced by the State’s alleged breach or chose to ignore the State’s recommendation.” *State v. Bowers*, 2005 WI App 72, ¶8, 280 Wis. 2d 534, 696 N.W.2d 255. If the State fails to present the negotiated sentencing recommendation to the circuit court, then it has breached the plea agreement. *State v. Williams*, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. However, in order to receive relief, the defendant must show by clear and convincing evidence that the alleged breach was not merely a technical

³ The State notes that “an argument *could* be made” that there was no breach of the plea agreement because the Plea Form reflects what was actually negotiated for—that the second count would be dismissed and read in—and that ultimately happened. Although the State references this potential argument several times throughout its brief, the State never provides any reasoning or citation to authority to actually develop an argument that dismissing the second count outright was not a term of the plea agreement. The State does not explain why this court should disregard the plea agreement that was subsequently placed on the record at the plea hearing which includes the State’s own comments correcting the circuit court on how the second count should be dismissed—outright instead of read in. The State does not otherwise address Newell’s assertions that the State’s comments reflected the parties’ modification to the plea agreement as stated in the Plea Form and that it was negotiated for.

Therefore, because the State did not develop an argument disputing whether dismissing the second count outright was a term of the plea agreement, we consider it conceded that the plea agreement, as placed on the record by the circuit court at the plea hearing, reflects the operative agreement between the parties. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (“Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.” (citation omitted)); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court does not address unsupported and undeveloped arguments).

breach but instead a material and substantial breach. *State v. Campbell*, 2011 WI App 18, ¶7, 331 Wis. 2d 91, 794 N.W.2d 276; *Bowers*, 280 Wis. 2d 534, ¶9.

¶12 “A breach is material and substantial if it ‘violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained.’” *Id.* (citation omitted). “However, even 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.” *Bowers*, 280 Wis. 2d 534, ¶9 (citation omitted). Whether the State materially and substantially breached the plea agreement under the undisputed facts of this case is a question of law that we review independently. *Id.*, ¶5.

¶13 When a defendant fails to contemporaneously object to the State’s alleged breach, as Newell failed to do, the defendant forfeits “his right to directly challenge [it]”; however, the challenge may be reviewed “in the context of an ineffective assistance of counsel claim.” *Id.*, ¶6. To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

I. The State’s breach was material and substantial.

¶14 Newell argues that the State breached the plea agreement in a material and substantial way by telling the circuit court that the second count

should be read in because read-in charges carry more weight at sentencing than charges dismissed outright.⁴ We agree.

¶15 In *State v. Frey*, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436, our supreme court explained the differences between read-in charges and charges dismissed outright. “Read-in charges are acknowledged as true[,] are subject to restitution,” are expected to be considered at sentencing, and “[t]hey may not be prosecuted separately in the future.” *Id.*, ¶¶43, 68. Whereas charges dismissed outright “may be considered by the court in sentencing, but they are not subject to restitution,” and “[w]hether they may ever be prosecuted depends on the terms of any plea agreement and considerations of due process.” *Id.*, ¶43.

¶16 The State contends that because the circuit court is able to consider both types of dismissed charges at sentencing that there is effectively no difference between the two for sentencing purposes. However, the State’s argument ignores the nature of read-in charges and undermines the reasons why they are commonly used in the plea-bargaining process.

¶17 “The read-in procedure is not, strictly speaking, an aspect of plea bargaining. Rather, it is a sentencing mechanism that is often used in plea negotiations.” *Id.*, ¶64. “[W]hen the State and a defendant agree that charges will

⁴ Newell also suggests that read-in charges are deemed admitted for sentencing purposes; however, that proposition does not accurately reflect the current state of the law. “[N]o admission of guilt from a defendant for sentencing purposes is required (or should be deemed) for a read-in charge to be considered for sentencing purposes.” *State v. Straszowski*, 2008 WI 65, ¶¶5, 95, 310 Wis. 2d 259, 750 N.W.2d 835 (withdrawing “language in the case law that may be read as intimating that when a charge is read in a defendant must admit or is deemed to admit the read-in charge for sentencing purposes.”). Nonetheless, “read-ins are still distinguishable from acquittals and non-read-in dismissals,” and “carry more weight” at sentencing. *State v. Piggue*, 2016 WI App 13, ¶13, 366 Wis. 2d 605, 875 N.W.2d 663; *see also State v. Frey*, 2012 WI 99, ¶68, 343 Wis. 2d 358, 817 N.W.2d 436.

be read in, those charges are expected to be considered in sentencing, with the understanding that the read-in charges could increase the sentence up to the maximum that the defendant could receive for the conviction in exchange for the promise not to prosecute those additional offenses.” *Id.*, ¶68 (citation omitted). To put it another way, in exchange for the State’s promise not to prosecute the read-in charge in the future, “the defendant exposes himself [or herself] to the likelihood of a higher sentence within the sentencing range and the additional possibility of restitution for the offenses that are ‘read-in.’” *Id.*, ¶73.

¶18 Here, the State told the circuit court that the second count should be read in contrary to the terms of the plea agreement. Newell never agreed to expose himself to a potentially higher sentence, so by telling the court to read in the second count, the State exposed Newell to a higher likelihood of more punishment than what was initially bargained for. *See id.*; *see also State v. Pigue*, 2016 WI App 13, ¶13, 366 Wis. 2d 605, 875 N.W.2d 663 (stating that read-in charges “carry more weight” than acquittals and non-read-in dismissed charges). This unbargained for exposure at sentencing represents a material and substantial breach of the plea agreement.

¶19 The State also argues that the breach is not material and substantial because this case is somewhat similar to *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), in which this court found that the State’s

misstatement of the plea agreement was not a material and substantial breach. We disagree because **Knox** is distinguishable here.⁵

¶20 In **Knox**, at the sentencing hearing, the State recommended a sentence consecutive to a separate sentence on unrelated charges instead of recommending a concurrent sentence pursuant to the plea agreement. **Id.** at 319-20. “Defense counsel immediately requested a recess to confer” with the State. **Id.** at 320. After the sentencing hearing recommenced, the State informed the court that there was a miscommunication about the plea agreement and recommended a concurrent sentence instead. **Id.** at 320-21.

¶21 This court concluded that “the unintentional misstatement of the plea agreement, promptly rectified through the efforts of both counsel, did not violate [the defendant’s] due process right to have the full benefit of the plea bargain upon which he relied.” **Id.** at 323. In doing so, we focused on how the “mistake ... was quickly acknowledged and rectified,” and the State’s “earnest manner in advocating the corrected proposed disposition.” **Id.**; but see **Bowers**, 280 Wis. 2d 534, ¶12 (“There is no requirement that the [S]tate correct a misstated sentence recommendation forcefully or enthusiastically.”).

¶22 Although both **Knox** and this case involve a misstatement at sentencing, our reasoning for why there was not a material and substantial breach in **Knox** was not due to the inadvertent nature of the statement but instead hinged

⁵ We note that in **State v. Knox**, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997), this court discussed the material and substantial breach in terms of whether it was a “substantial breach.” **Id.** at 321. For clarity, we highlight that the term “[m]aterial and substantial,” though it appears to have two parts, is actually a single concept” that deals with materiality. **State v. Deilke**, 2004 WI 104, ¶12 n.8, 274 Wis. 2d 595, 682 N.W.2d 945.

on the State’s immediate and earnest correction, such that the misstatement did not taint the sentencing process. *See also Williams*, 249 Wis. 2d 492, ¶52 (“That the [State] did not intend to breach the agreement or that a breach was inadvertent ‘does not lessen its impact.’” (citation omitted)). By contrast, in this case, the State’s misstatement that the Plea Form was correct and the second count should be read in was never acknowledged or corrected before the circuit court. Therefore, *Knox*’s holding is not applicable here.

II. Newell was rendered ineffective assistance of counsel.

¶23 Newell argues that counsel rendered him ineffective assistance for failing to object to the State’s material and substantial breach of the plea agreement. To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and the deficiency was prejudicial. *Strickland*, 466 U.S. at 687. Relying on *Smith*, Newell contends that he is entitled to a remedy without demonstrating that he was prejudiced because “a breach of the State’s agreement on sentencing is a ‘manifest injustice’ and always results in prejudice to the defendant.” *Id.*, 207 Wis. 2d at 281. The State contends that prejudice can no longer be presumed when there is a material and substantial breach of the plea agreement. We agree with Newell that prejudice is still presumed under these circumstances.

¶24 In order to demonstrate that counsel’s conduct was prejudicial, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. However, prejudice is presumed in certain contexts such as when prejudice is “so likely that case-by-case inquiry into prejudice is not worth the cost,” or in those cases that “involve impairments of the

Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.” *Id.* at 692.

¶25 In *Smith*, our supreme court held that when the State materially and substantially breaches the plea agreement it “always results in prejudice to the defendant.” *Id.*, 207 Wis. 2d at 281. The *Smith* court premised its holding in part on the rule set forth by the United States Supreme Court in *Santobello v. New York*, 404 U.S. 257, 262 (1971), “when a negotiated plea rests in any significant degree on a promise or agreement of the prosecutor, such promise must be fulfilled.” *Smith*, 207 Wis. 2d at 281 (citing *Santobello*, 404 U.S. at 262).

¶26 The *Smith* court also analyzed the difficulty in measuring the harm caused by counsel’s failure to object to a material and substantial breach of the plea agreement. *Id.* at 280. It explained that attempting to determine whether the defendant would have received a different sentence if the State had recommended a sentence pursuant to the plea agreement would involve too much speculation, and requiring “[r]etrospective testimony by the judge who sentenced [the defendant] would be inappropriate, and irrelevant.” *Id.*

¶27 The State contends that we cannot follow *Smith* and presume prejudice here because in *Puckett v. United States*, 556 U.S. 129 (2009), the United States Supreme Court abrogated *Smith* by limiting the holding of *Santobello* to preserved errors. We disagree.

¶28 Our consideration of this issue is narrow because our “supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Only when this court is “confronted with a direct conflict

between a decision of [the Wisconsin Supreme Court] and a later decision of the United States Supreme Court on a matter of federal law, ... [does] the Supremacy Clause of the United States Constitution compel[] adherence to United States Supreme Court precedents” even if that requires not adhering to a conflicting decision of the Wisconsin Supreme Court. *State v. Jennings*, 2002 WI 44, ¶3, 252 Wis. 2d 228, 647 N.W.2d 142.

¶29 Newell responds that the *Puckett* Court’s holding is confined to cases involving federal plain error review because its holding relied on federal rules of criminal procedure. We agree with Newell, and conclude that *Puckett* does not directly conflict with our supreme court’s holding in *Smith*; therefore, we follow *Smith* and presume prejudice under these circumstances.

¶30 In *Puckett*, the defendant argued for the first time on appeal that the Government breached the plea agreement. *Id.*, 556 U.S. at 133. His attorney never raised the alleged error before the district court. *Id.* The United States Supreme Court considered “whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure.” *Id.* at 131. The Court held that “Rule 52(b) does apply and in the usual fashion” to claims that the Government breached the plea agreement that were not raised before the district court. *Id.* at 134.

¶31 The *Puckett* Court’s holding was premised on federal rules of criminal procedure. As the Court explained, “In federal criminal cases, Rule 51(b) tells parties how to preserve claims of error[,]” thus, “[t]he real question in this case is ... what conceivable reason exists for disregarding its evident application.” *Id.* at 135-36.

¶32 Federal decisions interpreting federal plain error review are not binding on Wisconsin courts, even regarding Wisconsin’s own plain error rule. *State v. King*, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996). Additionally, as Newell points out, *Puckett* did not interpret the federal constitutional right to effective assistance of counsel. Therefore, the question before us is whether *Puckett* directly conflicts with *Smith*’s holding specifically regarding the defendant’s federal due process right to receive the full benefit of the plea agreement recognized in *Santobello*. See *Santobello*, 404 U.S. at 262.

¶33 The defendant in *Puckett* argued that under *Santobello*, “the interests of justice” require “a remand *whenever* the Government reneges on a plea bargain.” *Puckett*, 556 U.S. at 139. The *Puckett* Court disagreed by distinguishing *Santobello*. It explained that in *Santobello*, defendant’s counsel had preserved the error before the district court, so the focus was on “[w]hether an error can be found harmless [which] is simply a different question from whether it can be subjected to plain-error review.” *Puckett*, 556 U.S. at 139.

¶34 The *Puckett* Court did not extinguish the defendant’s right to receive the benefit of the plea agreement which our supreme court relied on in *Smith*. Instead, it limited the scope of *Santobello*’s rule by stating that the interests of justice do not *require* a remand regardless of whether the objection was forfeited, thereby allowing for federal plain error review to apply without exception to these unobjected to claims. *Puckett*, 556 U.S. at 139, 143. This does not represent a direct conflict with *Smith*.

¶35 The State also argues we should rely on *Puckett*’s holding that under federal plain error review, prejudice should not be presumed when analyzing unpreserved claims of plea agreement breaches. However, *Puckett* contains no

language suggesting that states cannot provide broader protection by presuming prejudice under their own procedures for reviewing unpreserved errors. While **Puckett**'s analysis of why federal courts should not presume prejudice under Rule 51(b) may be persuasive regarding whether Wisconsin should continue to presume prejudice when reviewing these claims of ineffective assistance of counsel, it is not binding on Wisconsin courts.⁶ See **King**, 205 Wis. 2d at 93.

¶36 Additionally, our supreme court did more than simply rely on **Santobello** in holding that prejudice should be presumed. It independently analyzed other situations in which federal and Wisconsin courts presume prejudice before concluding that requiring defendants to show prejudice to prove ineffective assistance of counsel claims arising from material and substantial breaches of plea agreements would require too much speculation or “inappropriate[] and irrelevant,” retroactive testimony from the sentencing court. See **Smith**, 207 Wis. 2d at 278-280. Thus, if we accepted the State's argument, we would be forced to overlook the **Smith** court's independent reasoning for establishing a presumption of prejudice in Wisconsin.

¶37 Therefore, we conclude that the United States Supreme Court's holding in **Puckett** that federal plain error review applies to unpreserved claims alleging a breach of the plea agreement does not *directly* conflict with how Wisconsin presumes prejudice in ineffective assistance of counsel claims arising from such allegations. To accept the State's argument would require this court to overlook **Smith** and import the Supreme Court's holding regarding federal plain

⁶ We observe that Wisconsin's consideration of whether a plea agreement breach is material and substantial overlaps in some respects with considerations of prejudice.

error review into Wisconsin’s review process for unpreserved errors—which this court lacks the power to do. *See Cook*, 208 Wis. 2d at 189.

¶38 The State also argues that *Puckett*’s holding should be understood as applying outside of the federal plain error context because in *Campbell v. Smith*, 770 F.3d 540 (7th Cir. 2014), the Seventh Circuit did not presume prejudice when reviewing a claim of ineffective assistance of counsel in a Wisconsin case and instead considered whether the defendant had shown that he was prejudiced by counsel’s failure to object to the State’s breach of the plea agreement.⁷

¶39 We do not find *Campbell* persuasive here. In *Campbell*, the Seventh Circuit did not mention the presumption of prejudice established in *Smith* and provided no reasoning for why it did not apply *Smith* under the circumstances before it. The only authority it provided for its statement that “the circumstances in which prejudice may be presumed ... are inapplicable here,” is a citation to the *Strickland* Court’s discussion of how prejudice may be presumed when there is an “[a]ctual or constructive denial of the assistance of counsel altogether” or when “counsel is burdened by an actual conflict of interest.” *Campbell*, 770 F.3d at 549; *Strickland*, 466 U.S. at 692-93. Those circumstances are also inapplicable here.

⁷ In *Campbell*, the defendant sought a writ of habeas corpus arguing that this court had unreasonably applied United States Supreme Court precedent when we held that his ineffective assistance of counsel claim failed because the State did not materially and substantially breach his plea agreement. *Campbell v. Smith*, 770 F.3d 540, 543 (7th Cir. 2014). Based on our conclusion, we did not reach the prejudice prong and the Seventh Circuit considered it independently. *Id.* at 549. The Seventh Circuit concluded that we did not unreasonably apply the law. *Id.* at 550.

¶40 Furthermore, this court may only deviate from Wisconsin Supreme Court precedent if United States Supreme Court precedent directly conflicts. We are not persuaded that the discussion of prejudice in **Campbell** demonstrates that **Puckett** directly conflicts with **Smith** because the Seventh Circuit provided no discussion of why it departed from the rule established in **Smith**.

¶41 Therefore, we conclude that the **Puckett** Court's holding that the plain error rule under Federal Rule of Criminal Procedure 54(b) applies to claims regarding the breach of a plea agreement does not directly conflict with our supreme court's holding in **Smith**. Accordingly, we presume that Newell was prejudiced by his counsel's failure to object to the State's material and substantial breach of the plea agreement.

¶42 Finally, we discuss whether Newell showed that his counsel's conduct was deficient. Newell argues that failing to object to a material and substantial breach of the plea agreement is deficient conduct. The State does not dispute that, if the State materially and substantially breached the plea agreement, counsel was deficient for failing to object at the sentencing hearing.⁸

¶43 Like the defendant's claim in **Smith**, Newell's claim "is based on a failure to object to adversary counsel's breach of a negotiated agreement." *Id.*,

⁸ The State asserts that Newell failed to show that his counsel's conduct was deficient; however, the State's deficiency arguments are premised on the State's breach of the plea agreement being a technical breach. In a single paragraph, the State redirects us to its arguments that we already addressed above regarding why the State believes it did not materially and substantially breach the plea agreement and then concludes that counsel's performance cannot be deficient for failing to object. The State does not submit any argument that, if the breach is material and substantial, counsel's failure to object to the breach is not deficient conduct. Therefore, because we conclude that the State materially and substantially breached the plea agreement, we consider it conceded that counsel's conduct was deficient. See **Charolais Breeding Ranches**, 90 Wis. 2d at 109.

207 Wis. 2d at 274. Newell was represented by the same counsel who was present both at the plea hearing during which the plea agreement was placed on the record and the sentencing hearing where the State told the circuit court that the second count should be read in pursuant to the Plea Form. “No further information or investigation was required to enable defense counsel to offer an objection at the sentencing hearing.” *Id.* Counsel’s failure to object to the State’s breach “flew in the face of the ‘informed strategic choice’ made by [Newell] earlier when he entered into the plea agreement,” and “constituted a breakdown in the adversarial system.” *Id.* Therefore, counsel performed deficiently when he failed to object at sentencing.

¶44 Because of our conclusion regarding counsel’s deficiency, the State’s decision not to dispute whether counsel’s conduct was deficient, and our conclusion that prejudice must be presumed here, there is no need to remand for an evidentiary hearing to determine the ineffectiveness of Newell’s counsel. *See id.* at 274, 275 & n.11, 282. Instead, we grant Newell’s request for a new sentencing hearing before a different judge conducted in accordance with the terms of the plea agreement.⁹

⁹ Newell sought a resentencing hearing before the postconviction court and argued that he was entitled to resentencing in his brief-in-chief on appeal. For the first time in his reply brief on appeal, Newell argues that he is also entitled to withdraw his plea and requests that we remand this case to the circuit court so that Newell can later determine whether he still wants a resentencing hearing or whether he would prefer to withdraw his plea. We generally do not address issues raised for the first time in reply briefs, and do not address Newell’s argument further. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

CONCLUSION

¶45 A plea agreement induces a defendant to waive his or her fundamental right to a trial and ultimately has a profound effect on a defendant's liberty. It is important for everyone in the courtroom, especially trial counsel, to be aware of the terms of the agreement so as to not taint the sentencing process and expose the defendant to the likelihood of a higher sentence than what was bargained for. For the foregoing reasons, we conclude that the State materially and substantially breached the plea agreement when it told the circuit court that the second count should be dismissed and read in instead of dismissed outright. We also conclude Newell's counsel was ineffective for failing to object to the State's breach at sentencing. Therefore, we reverse the order denying Newell's postconviction motion and remand with directions for a new sentencing hearing to be held before a different judge conducted in accordance with the terms of the plea agreement.

By the Court.—Order reversed and cause remanded with directions.

Recommended for publication in the official reports.

