IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHAWN KALISZEWSKI,

Petitioner,

v.

DANIEL BENIK, Warden,
Stanley Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-0213-C

REPORT

Petitioner Shawn Kaliszewski has filed this application for a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a judgment of the Circuit Court for St. Croix County finding him guilty as a party to the crime of three counts of burglary, as a repeater. Kaliszewski contends that his custody violates the laws and Constitution of the United States because his plea of no contest was induced by worthless promises made by the prosecutor and his lawyer's bad advice.[1]

The state concedes that the petition is timely and that Kaliszewski has exhausted his state court remedies. It asks this court to deny the petition on the merits, with the exception

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[1] Kaliszewski also claimed that the trial court was engaged in an ongoing violation of his right to due process by refusing to resentence him on Count 3 as ordered by the state court of appeals in its January 29, 2004, decision. *See State v. Kaliszewski*, Appeal No. 02-3061 (Ct. App. Jan. 29, 2004), at ¶ 30, (attached to the Petition, Dkt. 1, as Exh. C). However, the state has reported that a resentencing hearing was set for July 12, 2005. Having heard no objection from Kaliszewski, I presume that this issue has been resolved and that this claim is moot.

of one part of Kaliszewski's ineffective assistance claim that it contends Kaliszewski procedurally defaulted.

Although I agree with the state's procedural default argument, it is unnecessary to undertake that analysis because Kaliszewski's ineffective assistance claim is easily disposed of on the merits. As with his breach of plea agreement claim, Kaliszewski cannot show that the state appellate court's opinion is based on an unreasonable application of clearly established federal law or an unreasonable determination of the facts. Accordingly, I am recommending that this court deny the petition on its merits.

FACTS

On April 6, 2001, Theresa Schwertel returned to her rural St. Croix County home to find parked in her garage a strange white car bearing Minnesota plates. Sensing trouble, Schwertel backed out of her driveway, called 911, and watched from a distance as two men left her house and drove off in the white car.

Police were able to track down the car in transit and set up a roadblock to intercept it. Or so they thought: upon encountering the roadblock, the driver of the white car swerved around it and sped off. The police followed in hot pursuit, and a deputy eventually forced the car off the road. A search of the driver (petitioner Kaliszewski) turned up 5.5 grams of marijuana. His passenger, Edward Loeffler, later admitted to police that he and Kaliszewski had burglarized not only Schwertel's home, but five others.

Kaliszewski was charged with burglary with intent to steal as party to a crime, fleeing a police officer, first-degree reckless endangerment and possession of marijuana, all with a habitual criminality enhancement. Soon thereafter St. Croix County charged him with four additional counts of burglary as a party to the crime, as a repeater.

Kaliszewski and the prosecutor negotiated a plea agreement: Kaliszewski agreed to plead no contest to three of the burglary counts and agreed that two additional burglary counts could be dismissed and read in for sentencing purposes. He also agreed to provide complete and truthful information regarding his and Loeffler's activities in St. Croix County and to testify truthfully against Loeffler, if necessary. The prosecutor agreed to dismiss the remaining charges and to cap his total sentence recommendation at ten years of initial confinement and ten years of extended supervision.

At the time Kaliszewski negotiated this agreement, he also faced the possibility of new criminal charges in Minnesota and as well as the possibility that his existing Minnesota probation would be revoked, triggering a stayed 57month sentence. So, at Kaliszewski's insistence, the prosecutor in St. Croix County agreed to "make the best efforts" he could to help Kaliszewski serve part or all of his Wisconsin time in a Minnesota prison. In reliance on this agreement, on April 30, 2001, Kaliszewski entered no contest pleas.

At the plea hearing, the following exchange occurred:

> Prosecutor: Our agreement, in exchange for this plea, is that we will make the best efforts we can that he would serve portions of this or part of it in Minnesota. Now, that may not be possible. We're going to try to do what we can on that. But

that's our negotiation at this point. And it is his request, I believe, is that he be allowed to serve this time in Minnesota, is that correct, Counsel?

Kaliszewski's attorney: That is correct, Your Honor.

Prosecutor: And I've indicated that I would work towards that, but that may not happen. I can't control everything here. I want to make sure--my primary concern is that he serves ten years, first. Whether he serves it in Minnesota or Wisconsin, I don't care; but I want to make sure that he is incarcerated during that time. And I want to make sure that, if he is released in Minnesota, that he's not moved around or released early or whatever they do over there.

(Answer, Dkt. 7, Exh. K at 8-9.)

Immediately following these comments by the prosecutor, Kaliszewski's attorney shared with the circuit court his believe that there was a substantial chance that Kaliszewski could serve part of his Wisconsin sentence in Minnesota. Counsel informed the court:

> My client has 57 months sitting in Minnesota to at least setting it up so that he can go back to Minnesota, get the verification on that, making that the primary jurisdiction, that's why we're not looking at sentencing today. I've been working with the parole officer from Washington County [Minnesota], and it looks like that is possible working with the Lino Lakes facility such that there would be transport back here for any hearing dates necessary. Also, working to make sure, once that the primary jurisdiction is not lost–my client does understand that, if Minnesota doesn't have the entire amount of time, he would be coming to the State of Wisconsin and would serve his time.

(*Id.* at 9.)

Later in the plea colloquy, the judge cautioned Kaliszewski that he should not depend on serving his Wisconsin time in Minnesota:

The court:	. . . Now, the other thing we should discuss is that, I understand the theory about you wanting to do time in Minnesota, okay? But I don't think anybody can promise you that.
Kaliszewski:	Okay. But it is my understanding that it is worked out with Minnesota.
The court:	That may be. But I just have to explain to you that the best laid plans sometimes go astray.
Kaliszewski:	Right.
The court:	Okay? And you heard what the district attorney's going to recommend. You heard what the district attorney's going to recommend; for example, that you would do ten years, at least, in prison, according to the recommendation. Now, it's actually 20 years prison but do a definite ten years.
Kaliszewski:	Yes.
The court:	Now, I don't know how that compares to what you're going to get in Minnesota, for example. And so even if you were to do some time over there, maybe you'd end up coming back to finish time over here.
Kaliszewski:	That's my understanding. I'd be able to, first, go and serve my time in Minnesota.
The court:	That's fine with this Court, too. I was hoping that you didn't have some impression that you'd just do your time over in Minnesota.
Kaliszewski:	No, no. I understand that. My understanding is that the 57 months that I have hanging in Minnesota that, eventually, I would be released from bond here, released back to the Department of Corrections in Minnesota, get my time over

there, serve my sentence over in Minnesota. Then if something has not been worked out between the State of Minnesota and Wisconsin where I would do an interstate compact to finish my time back in Minnesota, that I would then be coming back over here to Wisconsin to start serving my time. And at that time, if they're still housing–if Wisconsin is still using facilities in Minnesota to house some of their inmates, that would be looked at for me, if I ended up having to come back over here in Wisconsin to serve the rest of my prison sentence. That is my understanding of the plea agreement, Your Honor.

The court: To be sure, that may be the negotiation. In reality, I don't know what's going to happen, okay? The plan sounds fine to me, too, all right? But you shouldn't be misled and shouldn't believe that absolutely 100 percent it's going to happen that way because I've seen way too many things go wrong between these two states to guarantee it for you. So if that's part of your negotiation, then you should not be pleading today. If you think that's absolutely going to happen 100 percent, you should not be pleading today because I don't know if it's going to happen. And, believe me, I don't have any control over what the Department of Corrections does or says.

Kaliszewski: No, I understand.

The court: And nobody in the room does either. And they don't have any control over what Minnesota does or says. And nobody over there, including the governor, doesn't have any control of what Minnesota does.

Kaliszewski: In regard to that, I have spoken to my attorney at length to that and we have spoken with my parole agent in Minnesota, as well as people within Washington County, people within the Department of Corrections, all of whom said, no problem, we'll take him. Just let us know and we'll see it gets worked out.

The court: My best advice to you is, get it in writing, and make sure you have an original signature, okay? Do you understand what I'm saying?

Kaliszewski: Yes, Your Honor.

The court: Given all that, are you still interested in proceeding today?

Kaliszewski: One moment.

The court: Yeah.

(Whereupon there was an interruption in the proceedings.)

The court: Do you want to proceed today?

Kaliszewski: Yes, Your Honor.

(Answer, Dkt. 7, Exh. K at 13-17.)

After this plea hearing but prior to sentencing, Kaliszewski filed a motion for specific performance of the plea bargain. In the motion, Kaliszewski's lawyer averred that he had learned from Kaliszewski's Minnesota probation agent that the St. Croix prosecutor had told the agent that Kaliszewski would not be returning to Minnesota. Kaliszewski alleged that the prosecutor's statement was counter to his agreement to support Kaliszewski's request to spend at least part of his Wisconsin sentence in Minnesota. He requested that he be allowed to return to Minnesota for his revocation hearing on the imposed-and-stayed 57-month sentence so as to make Minnesota the controlling jurisdiction.

At a hearing on the motion, the prosecutor argued that he had not broken his promise because Kaliszewski had not been sentenced yet. The court denied the motion, explaining that if Kaliszewski was going to be released to Minnesota, it would not be until after he was sentenced. The court made clear that "there was never anything said to the contrary [at the plea hearing] because I would have never allowed [presentence release] to happen." Answer, Dkt. 7, Exh. L at 4.

At the subsequent sentencing hearing, the court imposed a bifurcated sentence of 20 years' confinement followed by a 20-year term of extended supervision, double what the prosecutor had recommended. Kaliszewski filed a postconviction motion asking the court to resentence him to the shorter sentence recommended by the prosecutor or alternatively to allow him to withdraw his plea. In support of his plea withdrawal request, Kaliszewski asserted that the prosecutor did not comply with the terms of the plea agreement, that Kaliszewski's no contest pleas were induced by misleading information, and that he did not receive effective assistance of counsel.

The court held an evidentiary hearing on the motion. At the hearing, the prosecutor admitted that he had not taken any action to assist Kaliszewski's effort to be transferred to Minnesota.

Kaliszewski testified as to his mindset during plea negotiations:

> [Defense counsel] came to me with the original plea of just the ten and ten with the reckless endangerment included. The problems I have is (1) I don't want to plead to the reckless endangerment; and (2) I felt at that time the ten years was a long time to serve for burglary. And so what I had asked him to do was go back to the district attorney and ask for seven years and then I would take the plea. And if he could not get the seven years, then I was asking for boot camp or to be returned to Minnesota to serve my time as a stipulation that I would want in the deal before I would accept it.

Answer, Dkt. 7, Exh. N at 59-60.

The circuit court never made any findings of fact or issued a decision on the motion. Eventually, the motion was deemed denied pursuant to Wis. Stat. Rule 809.30(2)(I) (2001-02) and Kaliszewski appealed.

THE COURT OF APPEALS DECISION

The Wisconsin Court of Appeals denied relief, concluding that the prosecutor had not breached the plea agreement. *State v. Kaliszewski*, 2004 WI App 37, 269 Wis. 2d 889, 675 N.W. 2d 810 (Table) (unpublished decision). First, the court found no dispute that the prosecutor was not required under the terms of the plea agreement to take any particular action, but merely was to make his "best efforts" to see that Kaliszewski serve part or all of his Wisconsin sentence in Minnesota. *Id*. at ¶ 10.

The court rejected Kaliszewski's contention that the prosecutor's failure to take any action at all constituted a breach, finding that there was nothing positive the prosecutor could have done that would have made it more likely that Kaliszewski actually would serve his Wisconsin time in Minnesota. The court noted that at the time of the plea agreement, it appeared to the parties that Minnesota was interested in having Kaliszewski brought there to answer new criminal charges or to serve his imposed and stayed sentence; however, Minnesota lost interest after Kaliszewski was sentenced in Wisconsin. *Id*. at ¶¶ 12-16. In response to Kaliszewski's claim that the prosecutor could have called or written to the Department of Corrections and asked it to transfer Kaliszewski under the Interstate Corrections Compact, the court concluded, based on an affidavit in the record, that such a request would have been futile because the department's policy limited use of the compact to inmates who posed a security risk. *Id*. at ¶¶ 13-15.[2] Because Kaliszewski had failed to

[2] Apparently, the parties agreed that Kaliszewski was not a security risk.

point to any non-futile action the prosecutor could have taken, the court found no breach of the plea agreement. *Id*. at ¶ 18.

The court also rejected Kaliszewski's claim that his lawyer had provided bad advice about the plea agreement. Employing the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), the court found that Kaliszewski could not show deficient performance because he had not specified "what his counsel said to him that was misleading" or what his lawyer would have discovered had he explored further. *Id*. at ¶¶ 23-24. As for prejudice, the court rejected Kaliszewski's assertion that his testimony at the postconviction hearing established that he would not have entered a plea of no contest but for his lawyer's deficient advice; the court found this assertion conclusory because Kaliszewski did not explain why he would have insisted on going to trial absent the Minnesota stipulation. *Id*. at ¶25. Noting that there was no evidence that Kaliszewski had any defense to any of the charges, the court found that

> [s]o far as this record discloses, Kaliszewski's plea agreement was simply a mutually beneficial agreement in which Kaliszewski limited his exposure to prison time with the additional hope that the trial court would adopt the sentence recommended by the prosecutor.

Id. at ¶ 27.

Finally, the court rejected as undeveloped Kaliszewski's claim that his lawyer should have sought plea withdrawal instead of specific performance when he filed his motion based on the alleged breach of the plea agreement: there was no support for Kaliszewski 's

assumption that the circuit court would have been more likely to grant a plea-withdrawal motion before sentencing than after. *Id*. at ¶¶ 28-29.

DISCUSSION

I. Standard of Review

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to the conclusions reached by the state court of appeals. Specifically, this court may not grant Kaliszewski's application for a writ of habeas corpus unless the state court's adjudication of his claims

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). When the case falls under § 2254(d)(1)'s "contrary to" clause, the district court reviews the state court decision de novo to determine the legal question of what is clearly established law as determined by the Supreme Court and whether the state court

decision is "contrary to" that precedent. *Denny v. Gudmanson*, 252 F.3d 896, 900 (7th Cir. 2001) (citations omitted).

The "unreasonable application" clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407.

An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411. A state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

Finally, as for § 2254(d)(2), a federal court's disagreement with a state court's determination of the facts is not grounds for relief. Pursuant to § 2254(e)(1), the state court's findings of fact are presumed correct, and it is the petitioner's burden to show by clear and convincing evidence that the state court's factual determinations are incorrect *and* unreasonable. *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002). This deferential standard applies to the findings of state appellate courts as well as trial courts. *Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir. 2000). Under this standard, the state court's finding is presumed to be correct if it is supported by the record, but if it "rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254." *Id*. at 592-93.

II. Breach of the Plea Agreement

In *Santobello v. New York*, 404 U.S. 257 (1971), the Supreme Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id*. at 262. The rule that prosecutorial promises must be fulfilled "emanates as a requirement from the significant consequences of a guilty plea–the waiver of important constitutional rights and the 'adjudicative element' that is inherent in the plea." *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (citing *Santobello*, 404 U.S. at 262). Where a defendant is misled as to the consequences of his plea, it renders the plea involuntary. *Williams v. Taylor*,

529 U.S. 420, 431-33 (2000). Under Wisconsin law, a defendant must show that a plea agreement was breached in a "material and substantial" manner to be entitled to relief. *State v. Stenseth*, 2003 WI App 198, 10, 266 Wis. 2d 959, 669 N.W. 2d 776 (citations omitted).

Federal courts long have deferred to reasonable state court interpretations of state plea agreements. As the Supreme Court explained in *Ricketts v. Adamson*, 483 U.S. 1 (1987):

> [O]nce a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second-guessing the finding of a breach and is not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation.
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> * * *
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> [T]he construction of the plea agreement and the concomitant obligations flowing therefore are, within broad bounds of reasonableness, matters of state law, and we will not disturb [the state court's] reasonable disposition of those issues.

Id. at 5 n. 3.

Here, the prosecutor did not promise that Kaliszewski would serve his Wisconsin sentence in Minnesota; he promised merely that he would make "best efforts" to see that Kaliszewski could do so. The question for this court is whether it was "within the broad bounds of reasonableness" for the state appellate court to find that the prosecutor's admitted failure to take any action did not constitute a breach of the agreement.

I disagree with the state court's conclusion that there was no breach, but I agree with its conclusion that Kaliszewski is not entitled to relief on this claim. As noted in the

concurring opinion, the prosecutor's failure to do anything at all "hardly qualifies as 'best efforts.'" *Kaliszewski*, 2004 WI App at ¶ 32 (Dykman, J., concurring). It would have been more accurate for the court of appeals to deem the prosecutor's inaction a breach that did merit relief because it was immaterial. Nonetheless, that the court of appeals may have taken a path to reach the same conclusion does not bespeak unreasonableness. *Hennon v. Cooper*, 109 F.3d at 334 ("[T]he criterion of a reasonable determination [under § 2254] is [not] whether it is well reasoned . . . [i]t is whether the determination is at least minimally consistent with the facts and circumstances of the case.")

No matter how we characterize the prosecutor's conduct, the bottom line is that Kaliszewski has not–indeed, cannot–show that he actually suffered any measurable harm as a result. Kaliszewski cannot point to anything the prosecutor could have said or done that might have resulted in Kaliszewski actually serving part of his Wisconsin sentence in Minnesota. Tellingly, he does not quibble with the appellate court's determination that sometime after the parties entered into the plea agreement, Minnesota abandoned lost interest in charging Kaliszewski with new crimes or having him sent over to serve his stayed sentence. As the court of appeals found, the prosecutor's promise was made on the assumption that one of these two events was going to occur.

The only action suggested by Kaliszewski is a transfer pursuant to the Interstate Corrections Compact. However, the record contains an affidavit from a DOC official who stated that the department uses the compact only for security reasons. This led the appellate

court to deem futile any ICC transfer request. Kaliszewski has presented no evidence suggesting that he was a security risk or that the department would have deviated from its policy if only the prosecutor had asked. Accordingly, under § 2254(e)(1), this court must presume that the appellate court's finding of futility is correct. The record reasonably supports the court of appeals' conclusion that there was nothing the prosecutor could have done to make it more likely that Kaliszewski could have served any part of his sentence in Minnesota.

Kaliszewski argues that if there was nothing the prosecutor could do to effectuate Kaliszewski's transfer, then his promise was "worthless;" therefore, his guilty plea is invalid. *See Brady v. United States*, 397 U.S. 742, 755 (1970) (guilty plea cannot stand if induced by unfulfilled or unfulfillable promises) (citation omitted). However, as the court of appeals found, at the time they entered into the agreement, both sides reasonably believed there was a possibility of Kaliszewski serving part or all of his sentence in Minnesota. This belief was based on indications from Minnesota it intended either to charge Kaliszewski with crimes committed in that state or to request his return to Minnesota to serve his stayed sentence. The court implies that if either of these events had occurred, then there would have been something concrete that the prosecutor could have done to assist Kaliszewski's efforts to serve some of his sentence in Minnesota. Kaliszewski has not presented *any* evidence, much less evidence that is clear and convincing, to refute the court of appeals' finding that the at the time of the agreement both sides thought the prosecutor was offering valuable consideration.

But even if the prosecutor was obliged by his agreement to do *something*, however pointless and futile, Kaliszewski still loses. To establish a constitutional violation, Kaliszewski must show that the prosecutor's promise induced him to plead no contest. In the context of deciding Kaliszewski's ineffective assistance of counsel claim, the court of appeals found Kaliszewski's inducement claim unbelievable, noting that his testimony on this point was conclusory because he failed to explain *why* he would have insisted on going to trial absent the prosecutor's promise. Although credibility findings of this sort usually are made in the trial court, § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court." *Sumner v. Mata*, 449 U.S. 539, 546 (1981) (reviewing predecessor to § 2254). *See also Mendiola*, 224 F.3d at 592 (noting that rule still applies with passage of AEDPA). Thus, under § 2254(e)(1), the appellate court's credibility finding is presumed correct unless Kaliszewski clearly and convincingly rebuts it.

He has not. Apart from pointing to the testimony rejected by the court of appeals, Kaliszewski points only to his lawyer's testimonial narrative that Kaliszewski had requested the Minnesota clause as part of the plea negotiations. However, no one followed up by asking whether the absence of this clause would have impelled Kaliszewski to reject the state's other concessions and go to trial on all the charges. Because the burden now is on Kaliszewski, a silent record on this point will not suffice to rebut the appellate court's finding.

In any event, it was logical and reasonable for the court of appeals to determine that Kaliszewski's prison location preference was not so important that in its absence he would have risked doubling his sentence after enduring a can't-win trial on all charges. Notably, Kaliszewski went ahead with his plea in the face of the court's explicit warning that he had no guarantee that he would serve any of his time in Minnesota because neither the court nor the prosecutor had any control over Minnesota. Kaliszewski knew before finalizing his plea that the prosecutor's promise of "best efforts" was almost worthless. Kaliszewski does not contend that the prosecutor agreed to take any specific action, or that anything he did or failed to due caused the unfavorable outcome. Because Kaliszewski decided to enter a plea with a full understanding of the limitations of the prosecutor's promise, he cannot establish that his plea was induced by an unfulfillable promise.

In sum, the Wisconsin Court of Appeals' conclusion that Kaliszewski was not entitled to relief on his claim that the prosecutor breached the plea agreement was a reasonable decision based upon a reasonable determination of the facts. Kaliszewski cannot obtain habeas relief on this claim.

III. Ineffective Assistance of Counsel

In light of the foregoing, the court need not dwell on Kaliszewski's claims of ineffective assistance of counsel. Even if Kaliszewski were to have proved that his lawyer erroneously advised him that the prosecutor's promise of "best efforts" had value (a fact the

appellate court found Kaliszewski has not proven), the circuit court cured counsel's error during its plea colloquy with Kaliszewski. In other words, Kaliszewski cannot show prejudice. *Strickland*, 466 U.S. at 687, 691-92.

Kaliszewski also faults his lawyer for not obtaining the prosecutor's promise of more specific action, but he fails to suggest what this action might be. Absent evidence showing that his lawyer's performance"fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, the court of appeals reasonably rejected Kaliszewski's claim that he received ineffective assistance of counsel prior to entry of his plea.

Kaliszewski contends that his lawyer should have advised him before sentencing to seek to withdraw his plea instead of seeking specific performance of the plea agreement. As he did in the state courts, Kaliszewski suggests that the state's failure to keep its promise was a "fair and just reason" that would have supported plea withdrawal before sentencing. However, this claim fails because Kaliszewski has not shown that the state breached its promise. It seems Kaliszewski is contending that his plea agreement with the state included a promise by the prosecutor to allow him to be returned to Minnesota before he was sentenced in Wisconsin. However, the circuit court made clear at the hearing on Kaliszewski's motion for specific performance that it would not approve of any attempt to have Kaliszewski transferred to Minnesota before sentencing and found that "nothing was said to the contrary" at the plea hearing.

Even assuming that Kaliszewski understood his plea agreement differently, he has not alleged that he told his lawyer after the hearing on specific performance that he no longer wanted to plead or that he had misunderstood the scope of the prosecutor's promise. Moreover, as discussed above, the court of appeals found that Kaliszewski had not made a credible showing that "the Minnesota issue was of such great importance . . . that he would have passed up the agreement . . . and insisted on going to trial on charges against which he had no apparent defense." These facts reasonably support the court of appeals' conclusion that Kaliszewski failed to show that there was a likelihood that the court would have granted a motion for plea withdrawal. Accordingly, Kaliszewski is not entitled to relief on this aspect of his ineffective assistance claim.

The record suggests that if anyone bamboozled Kaliszewski, it was the Minnesota bureaucrats who led Kaliszewski, his lawyer and the prosecutor to believe that either Minnesota was about to charge Kaliszewski or that Minnesota would seek Kaliszewski's return to serve his stayed sentence. Kaliszewski knew before entering his plea that there were no guarantees about where he could serve his sentence, and that the matter was up to Minnesota, not the prosecutor. In spite of this, he decided to plead out, which still was (and remains) the most rational decision he could have made under the circumstances. The record amply supports the court of appeals' conclusion that Kaliszewski is not entitled to relief on his breach of plea agreement or ineffective assistance claims.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that the petition of Shawn Kaliszewski for a writ of habeas corpus be DENIED in its entirety on the merits.

Entered this 17th day of October, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

October 17, 2005

Shawn Kaliszewski
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Re: Kaliszewski v. Benik
Case No. 05-C-0213-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before November 4, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 4, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge