UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1195

September Term, 2014

COREY CHANDLER WOLCOTT

v.

STATE OF MARYLAND

Graeff,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: October 4, 2016

Appellant, Corey Chandler Wolcott, was charged in the Circuit Court for Wicomico County by three indictments containing multiple charges relating to his alleged armed robbery of one fast food restaurant and attempted robbery of two other restaurants. Wolcott, represented by Assistant Public Defender Archibald McFadden, appeared before the circuit court in all three cases—K-12-0240, K-12-0242, and K-12-0243—on June 18, 2012. Wolcott pled guilty in cases K-12-0240 and K-12-0242 to charges of attempted theft less than $100 and in case K-12-0243 to armed robbery. In exchange for his guilty plea, the State agreed to *nolle prosse* all the remaining charges and to recommend to the trial court a total prison sentence within the sentencing guidelines' range of five to ten years.

During the September 7, 2012 sentencing hearing, the State recommended that the court sentence Wolcott to 20 years in the Division of Correction, suspending all but 10 years, and place him on supervised probation for four years following his release. The trial court sentenced Wolcott in accordance with the requested term in case K-12-0243, along with 90 days in case K-12-0240 and 90 days in case K-12-0242, to be served concurrently with the 10 year sentence.

Following the court's denial of his two *pro se* motions for modification of sentence, Wolcott filed a *pro se* petition for post-conviction relief on October 28, 2013. He filed another petition for post-conviction relief through counsel, Assistant Public Defender James Nichols, on February 14, 2014. Wolcott, represented by Nichols, was heard on his petitions on February 28, 2014. After holding the matter *sub curia* at the close of the hearing, the post-conviction court issued a written Statement of Reasons and Order denying Wolcott's petitions on May 13, 2014.

On June 2, 2014, Wolcott filed an application for leave to appeal to this Court, which we granted on February 3, 2016. In his appeal, Wolcott presents the following questions for our consideration:

> 1. Did the State breach its binding promise to recommend a "sentence within the guidelines range" of "five to ten years" when it later recommended a sentence of "20 years in the Division of Correction" suspending ten years with four years of probation?
>
> 2. Whether, in light of misleading and inaccurate advice, Mr. Wolcott waived his right to direct appeal of the State's breach of the plea agreement?
>
> 3. Whether trial counsel's deficient performance was to Mr. Wolcott's detriment?

For the reasons that follow, we find that the sentence imposed by the circuit court is illegal. Therefore, we reverse and remand the matter to that court with an order to proceed in accordance with this opinion.

FACTS AND LEGAL PROCEEDINGS

On June 18, 2012, Wolcott appeared in the circuit court to enter his plea. After detailing the charges to which Wolcott would agree to plead guilty, the Stated continued:

> As to disposition in case K-12-0243, there is no agreement as to sentencing other than that the State will be recommending a sentence which is within the guidelines range. I do understand that the guidelines range to be five years to ten years on the armed robbery---
>
> * * *
>
> And then, of course, as to the disposition in K-12-0240 and 242, the State's going to ask the Court to bind to concurrent sentences with whatever sentence might be imposed in the armed robbery case.

Wolcott acknowledged that McFadden had explained the plea details to him and that he wished to plead guilty on those terms, understanding that the maximum penalty for

armed robbery is a 20-year prison term. The court then asked Wolcott if he understood "I'm being asked to bind to concurrent sentences, but as to the sentences themselves, I'm free to impose what I choose, do you understand that?" Wolcott answered that he did. The court further explained that if it did not agree to bind itself to concurrent sentences, Wolcott would be permitted to withdraw his plea. Finally, the court explained that "[f]ollowing a guilty plea you must request permission to appeal, that request can be denied, and you may only raise the following issues: jurisdiction of the court, voluntariness of your plea, legality of the sentence and competence of your counsel." Wolcott stated he understood.

The court found that Wolcott knowingly, intelligently, and voluntarily waived his right to a jury trial. Following the prosecutor's recitation of the facts to support the plea, the court found those facts sufficient to convict Wolcott and entered verdicts of guilty on the charges as set forth in the plea agreement. The court further agreed to bind itself to "the concurrent nature of [Wolcott's] sentence." The State *nolle prossed* the remaining charges in all three cases, and the court ordered a full pre-sentence investigation ("PSI").[1]

After having received and reviewed the PSI, the trial court sentenced Wolcott on September 7, 2012. The prosecutor reminded the court "the plea agreement called for those guilty pleas, [and] as to 243, the allegation of armed robbery, there was no agreement as to sentencing as to those charges other than that the State would be recommending a sentence within the sentencing guidelines." The prosecutor then explained that as Wolcott had "gone

[1] The charges *nolle prossed* by the State include robbery, second-degree assault, disorderly conduct, and additional counts of attempted theft under $100.

on his own personal crime spree, victimizing three different businesses, ... the guidelines range does reflect the seriousness of this event and the seriousness of Mr. Wolcott's prior record."[2] After noting that the guidelines' range for armed robbery is "5 years to 10 years active,"[3] the prosecutor asked the court

> to impose a very serious sentence and incapacitate him as long as possible under the guidelines and under the plea agreement as articulated previously, and then have a period of supervision after that.
>
> So, specifically, I would ask the Court on the charge of armed robbery to sentence Mr. Wolcott to 20 years in the Division of Correction, to suspend all of that time but 10 years active, which is a guidelines sentence, and then subsequent to his release, place him on supervised probation for a four year period of time.

McFadden, focusing primarily on a request for help for Wolcott in getting his drug addictions under control, sought "an active period of incarceration" less than the 20 years, suspending all but ten, advocated by the State. Wolcott also addressed the court, stating, "I had no idea that it was going to be a 20-year sentence that was going to be asked of me. I was told a 5 to 10-year sentence, which I at the time really was afraid of."

The court, admonishing Wolcott that he had "crossed the line" with his behavior, sentenced him to 20 years with the Division of Corrections, suspending all but 10 years for the armed robbery, after which he would be placed on supervised probation for four years.

[2] Wolcott's prior record included three convictions of CDS possession, driving on a suspended license, driving while impaired, and conspiracy to commit credit card fraud. He was on probation when he committed the crimes with which he was charged in the instant matter.

[3] The parties do not dispute that the guidelines' range of sentence for armed robbery is five to ten years.

For each of the two attempted theft less than $100 cases, the court sentenced him to "90 days … to run concurrent with the sentence in 243."

The court went on to advise Wolcott of his post-trial rights. Although asked if he had anything to add, McFadden did not object or otherwise raise any concerns with the sentence imposed. He did agree to review Wolcott's post-trial rights with him and to file the appropriate motions. From the record, it does not appear that McFadden filed any post-trial motions on Wolcott's behalf. Wolcott, *pro se*, filed two motions for modification of his sentence, which the court denied.[4]

On October 28, 2013, Wolcott filed a *pro se* "motion to correct illegal sentence/petition for post-conviction relief." Therein, he claimed that McFadden had explained to him that he "would be sentenced in the Guidelines Range of 5-10 Years with a portion of that to be suspended, along with the two 90 day Concurrent sentences in the remaining cases." When the State referred to a sentence of 5 to 10 years active, he thought "active meant 'total.'" Had he understood that the State's recommendation was a 20-year prison term, even with a 10-year suspended sentence, he would not have pled guilty.

Wolcott also complained that McFadden had failed to object to the sentence imposed "even after strong urging from the Defendant." He claimed that McFadden had rendered ineffective assistance to him by failing to: 1) maintain effective communication; 2) apprise him of alternatives to the plea or provide him with information necessary to make an informed decision about how to proceed; and 3) prepare properly for sentencing.

[4] The court granted Wolcott's motion for credit for time served to be applied to his sentence and ordered that his commitment record be amended to reflect the change.

The State responded to the petition on October 29, 2013, denying Wolcott's contentions on the ground that each was unsupported by fact and asserting that even if true, Wolcott would not be entitled to relief.

James Nichols entered his appearance as counsel for Wolcott for post-conviction purposes on November 26, 2013. On February 14, 2014, Wolcott, by Nichols, filed a supplemental petition for post-conviction relief. Therein, Nichols alleged the following errors, in addition to those claimed by Wolcott in his *pro se* petition: 1) the State violated Wolcott's due process when it breached the terms of the plea agreement by requesting a suspended sentence in excess of the guidelines' range, requesting a period of probation, and requesting that the court impose a sentence at the "top" of the guidelines' range; and 2) McFadden committed prejudicial attorney error by failing to advise Wolcott properly regarding the risks and benefits of challenging the State's breach of the plea agreement by way of motion to withdraw his plea agreement and/or application for leave to appeal from his guilty plea.

Represented by Nichols, Wolcott was heard on his petition for post-conviction relief on February 28, 2014. He testified it was his understanding, as explained by McFadden, that pursuant to the plea agreement, he would plead guilty to armed robbery and attempted theft and be sentenced to five to ten years, with a portion of that suspended, on the robbery charge and to two 90-day concurrent sentences on the attempted theft charges. The State's recommendation to the court during the recitation of the plea agreement comported with his understanding.

At sentencing, however, he was surprised when the State recommended a 20-year prison term, suspending all but ten years, along with a term of probation, because he had not heard "anyone verbally say the number 20 until the sentencing hearing." When he motioned to McFadden, his lawyer told him "just to relax." He pointed out that he did mention his understanding of the plea to the court during sentencing.

Wolcott said that after sentencing, he had expressed his confusion to McFadden, who told him, "don't worry about it" and advised that he would file an "8-505 request" on Wolcott's behalf.[5] Wolcott said he had not filed an application for leave to appeal from his guilty plea because he was unaware he could; the trial court had said he was not eligible for it, and McFadden had not explained his rights to him.

Upon cross-examination, while acknowledging he had told the trial court that McFadden had explained the plea agreement to him and that he understood the plea, he claimed he had not understood the terms. He maintained his assertion that McFadden had said "the plea is 5 to 10 years. That's what I'm going to get you." He conceded, however, that he understood the court was free to impose any sentence it believed was appropriate.

McFadden testified that his understanding of the written plea agreement offer forwarded to him by the prosecutor was that Wolcott would plead guilty to armed robbery and two counts of attempted theft, with no agreement to sentencing, other than that the State's recommendation would be within the guidelines and that the court would bind itself

[5] Md. Code (1982, 2009 Repl. Vol.), §§8-505 and 506 of the Health General Article, codify the procedures for committing a criminal defendant for a drug or alcohol abuse evaluation and determining if the defendant is in need of treatment.

to concurrent sentences on the other two charges.[6] He asserted that he had discussed the terms of the State's offer with Wolcott, that it was his habit to discuss the pros and cons and possible exposure under a plea agreement with defendants he represented, and that he did not recall deviating from that practice in discussions with Wolcott. It was McFadden's understanding that with a potential maximum sentence of 20 years on the armed robbery charge, the State was limiting itself to "no more active incarceration then [sic] a sentence within the guidelines" of five to ten years, that is, "a sentence of active incarceration consistent with the guidelines."

McFadden emphasized that he would not have permitted Wolcott to enter the plea if he did not think his client understood it or if the plea agreement and recommended sentence represented by the State to the court differed substantially from his understanding of them. He denied that the State's recommendation on the sentence deviated from the plea agreement as he understood it, asserting that the prosecutor's recommendation to the trial court "was consistent with the plea negotiations."

In closing, Nichols argued that nothing in the plea colloquy explained to Wolcott the distinction between a guidelines sentence that encapsulates only active time and a sentence that exceeds the guidelines, even though it may be suspended in part. As such, the State breached the plea agreement when it asked for 20 years, suspending all but ten, and

[6] The written plea offer by the State, introduced into evidence as State's exhibit 1 at the post-conviction hearing, detailed the charges to which Wolcott would plead guilty and, "[a]s to disposition in case K-12-0243, there is no agreement as to sentencing other than that the State will recommend a sentence within the guidelines," with the prosecutor's understanding that the guidelines' range for armed robbery was "5Y to 10Y."

four years of probation. In other words, Nichols continued, "[r]egardless of the State's intention before, during or after the plea process, the record is what controls," and from the four corners of the record, the State did not comply with its agreement. In addition, McFadden had rendered ineffective assistance to Wolcott because the lawyer was obligated to object when the State breached its agreement, and he failed to do so. Therefore, Wolcott was entitled to an election of remedies—either resentencing in which the State would be held to the terms of the agreement as understood by Wolcott or a new trial.

When the post-conviction court asked the prosecutor whether he believed he had asked for a sentence in excess of the guidelines, the prosecutor replied that a request for 20 years suspending 10 was not in excess of the guideline of five to ten years. In fact, he continued, the State was free to "ask for whatever it darn well pleased so long as the active portion falls within the guidelines" because it had put on the record there was no agreement as to sentencing. Wolcott was on notice of the potential sentence by virtue of McFadden's explanation of it to him and what was read into the record.

The court did not render an oral opinion. In its May 13, 2014 written statement of reasons and order, the post-conviction court found that the trial court had "laid out a thorough litany before finding that [Wolcott] knowingly, intelligently, and voluntarily tendered his guilty plea." The post-conviction court further found that Wolcott had been fully apprised of all relevant information regarding the plea agreement.

With regard to the sentencing, the court cited *Cuffley v. State*, 416 Md. 568, 576 (2010), which explained that "for the purposes of determining whether a sentence is within the guidelines... only the active portion of the sentence is considered." Because the active

portion of the sentence imposed by the trial court was ten years, which fell within the five to ten year range prescribed by the guidelines, the sentence was within the guidelines, and the trial court had adhered to the plea agreement. The post-conviction court further found that the trial court correctly informed Wolcott of the limited grounds upon which he was permitted to file an application for leave to appeal, and his failure to do so does not provide a basis for relief or a finding of ineffective assistance of counsel. The court therefore denied Wolcott's petitions for post-conviction relief.

On May 22, 2014, Wolcott filed a *pro se* application for leave to appeal the denial of post-conviction relief to this Court, which was supplemented by counsel on June 2, 2014. In its November 30, 2015 response, the State asked that the request be denied. On February 16, 2016, this Court granted Wolcott's application for leave to appeal and transferred the matter to the regular appeal docket.

DISCUSSION

Wolcott contends that he is entitled to relief because the State breached its binding promise to recommend a sentence within the guidelines' range of five to ten years when it later recommended to the trial court a 20-year sentence, suspending all but ten years, followed by four years of probation. Although both Wolcott and the State devote large portions of their briefs to a discussion of whether Wolcott waived his right to raise this issue by failing to file an application for leave to appeal to this Court following his sentencing, or whether he should be entitled to plain error review if he did, in our view, the waiver/plain error discussion is unnecessary.

The issue raised by Wolcott, when boiled down to its essential elements, is that the State breached the plea agreement by recommending a sentence in excess of the one Wolcott bargained for and relied upon and, therefore, the sentence imposed by the trial court in compliance with the State's recommendation is illegal.[7] Although Wolcott does not couch his appeal specifically in terms of the post-conviction court's denial of a motion to correct an illegal sentence, his *pro se* post-trial petition was entitled "motion to correct illegal sentence/petition for post-conviction relief," and the court denied the motion/petition by finding that the State had not breached the plea agreement.

As such, the State's claim of waiver and Wolcott's claim that he is entitled to plain error review notwithstanding his waiver are of no moment because the Court of Appeals has "held consistently that waiver principles do not apply to allegations of substantively illegal sentences." *Greco v. State*, 427 Md. 477, 503 n.7 (2012). That is, of course, because Maryland Rule 4-345(a) permits the correction of an illegal sentence "at any time;" a sentence that is "illegal" within the meaning of Rule 4–345(a) "may be attacked on direct appeal, but it also may be challenged collaterally and belatedly, and, if the trial court denies relief in response to such a challenge, the defendant may appeal from that denial and obtain relief in an appellate court." *Johnson v. State,* 427 Md. 356, 367 (2012) (citations and quotations omitted). Indeed, the Court of Appeals has "gone so far as to vacate, *sua sponte*,

[7] The Court of Appeals has held that a sentence that exceeds the sentence to which the parties agreed as part of a plea agreement is an illegal sentence within the meaning of Rule 4-345(a). *Cuffley*, 416 Md. at 575 n.1 (citing *Dotson v. State*, 321 Md. 515, 521-22 (1991)). And, the State, in its brief, concedes that a breach of the plea agreement by the State would fall "within the categories of challenging either the voluntariness of the plea or the legality of the sentence."

a sentence which was, according to the Court, 'illegal' within the meaning of Rule 4–345(a) even though no party, at any time, complained about the particular sentence." *Waker v. State*, 431 Md. 1, 8 (2013) (citations omitted).

In our view, then, Wolcott's appeal may be considered as a cognizable claim for relief following the post-conviction court's denial of his motion to correct an illegal sentence. And, even were we to conclude that Wolcott has thus far failed to raise the issue of whether his sentence was illegal, pursuant to Maryland Rule 8-131(a)[8] we would invoke our discretion to consider the issue to obviate the need for the formal filing of a motion to correct an illegal sentence and the likelihood of another appeal, with its attendant expense and delay, if the motion were denied. *See Roary v. State*, 385 Md. 217, 225–26 (2005).

We now turn our attention to a discussion of whether the State breached the plea agreement, thereby rendering the sentence imposed upon Wolcott illegal. We conclude that the plea agreement was breached, and appellant is entitled to relief.

Maryland Rule 4-243 governs plea agreements and details the procedures to be followed when the State and a defendant have entered into a plea agreement. The Rule states, in pertinent part:

> (a) **Conditions for Agreement.** (1) Terms. The defendant may enter into an agreement with the State's Attorney for a

[8] Maryland Rule 8–131(a) provides that a Maryland appellate court "[o]rdinarily ... will not decide any ... issue unless it plainly appears by the record to have been raised in or decided by the trial court... ." "Use of the word 'ordinarily' connotes that the appellate court has discretion to consider issues that were not preserved." *Fisher v. State*, 367 Md. 218, 238 (2001).

plea of guilty or nolo contendere on any proper condition, including one or more of the following:

* * *

(B) That the State's Attorney will enter a nolle prosequi pursuant to Rule 4-247 (a) or move to mark certain charges against the defendant stet on the docket pursuant to Rule 4-248 (a);

* * *

(E) That the State's Attorney will recommend, not oppose, or make no comment to the court with respect to a particular sentence, disposition, or other judicial action;

(F) That the parties will submit a plea agreement proposing a particular sentence, disposition, or other judicial action to a judge for consideration pursuant to section (c) of this Rule.

* * *

(b) **Recommendations of State's Attorney on Sentencing.** The recommendation of the State's Attorney with respect to a particular sentence, disposition, or other judicial action made pursuant to subsection (a)(1)(E) of this Rule is not binding on the court. The court shall advise the defendant at or before the time the State's Attorney makes a recommendation that the court is not bound by the recommendation, that it may impose the maximum penalties provided by law for the offense to which the defendant pleads guilty, and that imposition of a penalty more severe than the one recommended by the State's Attorney will not be grounds for withdrawal of the plea.

(c) **Agreements of Sentence, Disposition, or Other Judicial Action.** (1) Presentation to the Court. If a plea agreement has been reached pursuant to subsection (a)(1)(F) of this Rule for a plea of guilty or nolo contendere which contemplates a particular sentence, disposition, or other judicial action, the defense counsel and the State's Attorney shall advise the judge of the terms of the agreement when the defendant pleads. The judge may then accept or reject the plea and, if accepted, may approve the agreement or defer decision as to its approval or rejection until after such pre-sentence proceedings and investigation as the judge directs.

> (2) Not Binding on the Court. The agreement of the State's Attorney relating to a particular sentence, disposition, or other judicial action is not binding on the court unless the judge to whom the agreement is presented approves it.
>
> (3) Approval of Plea Agreement. If the plea agreement is approved, the judge shall embody in the judgment the agreed sentence, disposition, or other judicial action encompassed in the agreement or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.
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> * * *
>
> (d) **Record of Proceedings.** All proceedings pursuant to this Rule, including the defendant's pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.

Although the State is not obligated to agree to any particular sentence, if it accepts the plea agreement, it is required to fulfill the terms of the agreement if the defendant pled guilty in reliance. *Solorzano v. State*, 397 Md. 661, 667 (2007). The governing principles in enforcing plea agreements are fairness, and the adequacy of procedural safeguards. *Id*. at 668.

The terms of a plea agreement are to be construed "according to the reasonable understanding of the defendant when he pled guilty." *Id*. We point out, however, that the

> test for determining what the defendant reasonably understood at the time of the plea is an objective one. It depends not on what the defendant actually understood the agreement to mean, but rather, on what a reasonable lay person in the defendant's position and unaware of the niceties of sentencing law would have understood the agreement to mean[.]

Cuffley, 416 Md. at 582. In making that determination, we look solely to the record created at the plea proceeding. *Id*.

Prosecutors and judges are expected to adhere to their part of the bargain in enforcing plea agreements. *State v. Brockman*, 277 Md. 687, 694(1976) (prosecutors); *Tweedy v. State*, 380 Md. 475, 485 (2004) (judges). As such, if a defendant's guilty plea rests, in part, on a promise concerning sentencing, and the State violates that promise, the defendant is entitled to relief. *Brockman*, 277 Md. at 694. And, if the record reflects ambiguity in the agreed-upon sentence, the ambiguity must be resolved in the defendant's favor. *Cuffley*, 416 Md. at 583.[9] "If the State has promised to make a recommendation, it must do so with at least some degree of advocacy." *Clark v. State*, 57 Md. App. 558, 561-62 (1984). "The test to be applied by us is an objective one-"whether the plea bargain agreement has been breached or not-irrespective of prosecutorial motivations or justifications for the failure in performance." *Id.* (quoting *United States v. Brown,* 500 F.2d 375, 378 (4th Cir. 1974)).

Cuffley, and its companion case decided by the Court of Appeals the same day, *Baines v. State*, 416 Md. 604 (2010), are instructive on the issue of whether the State or trial court breached the terms of the plea agreement with regard to sentencing in this matter.

In *Cuffley*, the defendant pled guilty to robbery in exchange for a recommendation by the State for a sentence "within the guidelines," which the parties agreed to be a four to

[9] Judge Moylan recently reminded us that the State is also entitled to the benefit of its plea agreement bargains. *Ray v. State*, __ Md. App. __ No. 1469, September Term, 2015 (filed September 29, 2016).

eight year prison term. 416 Md. at 573. The court stated its understanding of the agreement as a request for it to "impose a sentence somewhere within the guidelines. The guidelines in this case are four to eight years. Any conditions of probation are entirely within my discretion." *Id*. at 574.

The court accepted the plea, and at sentencing, the State requested that the court sentence Cuffley "within the guidelines" and make the sentence consecutive to a probation violation case. *Id*. The court sentenced him to 15 years, suspending all but six years, and a five year period of probation (with special conditions) upon his release. *Id*.

Several years later, Cuffley filed a motion to correct an illegal sentence, arguing that the sentence violated the plea agreement, which called for a total sentence of no more than eight years; he claimed he had not understood—and his lawyer had not explained to him—that he could receive suspended time above the eight year sentencing cap. *Id*. at 574-75. At the hearing on the motion, his trial attorney testified that she could not remember her conversation with Cuffley on the subject but recalled that she understood the "time to serve" would be within four to eight years, with the suspended portion and period of probation left up to the court. *Id*. The court denied the motion, ruling that the imposition of suspended time and probation conditions were within the court's discretion and that those discretionary powers were at least alluded to during Cuffley's plea hearing, even if not specifically stated on the record. *Id*. at 576.

The Court of Appeals disagreed, explaining that

> [s]imply put, the facts that the court and defense counsel understood a sentence "within the guidelines" to refer only to actual incarceration, and that the court could impose a

suspended sentence that exceeds the guidelines, are irrelevant to what Petitioner reasonably understood at the time of the plea to be the agreed-upon sentence. Also irrelevant are declarations in the *Guidelines Manual* that suspended time is not considered in determining whether a sentence falls within the guidelines range, which the Court of Special Appeals evidently found significant in affirming the judgment of the Circuit Court. Neither is it relevant that Petitioner's defense counsel believed that she had explained to Petitioner what was meant by a sentence "within the guidelines." Furthermore, it is not relevant that the Circuit Court made a factual finding that defense counsel actually explained to Petitioner sometime before the on-the-record plea proceeding that the court retained the discretion to impose a split sentence exceeding the sentencing guidelines. All that is relevant, for purposes of identifying the sentencing term of the plea agreement, is what was stated on the record at the time of the plea concerning that term of the agreement and what a reasonable lay person in Petitioner's position would understand, based on what was stated, the agreed-upon sentence to be.

The record of the plea proceeding reflects the following: The prosecutor advised the court that the agreement called for a "sentence within the guidelines as formulated by" the State and the defense, which was "four to eight years." Defense counsel added nothing to explain further what the parties meant by that sentencing term. The court then expressed to Petitioner its understanding of the sentencing term: "The plea agreement, as I understand it, is that I will impose a sentence somewhere within the guidelines. The guidelines in this case are four to eight years. Any conditions of probation are entirely within my discretion." No mention was made at any time during that proceeding—much less before the court agreed to be bound by the agreement and accepted Petitioner's plea—that the four-to-eight-year sentence referred to executed time only. Neither counsel nor the court stated that the court could impose a sentence of more than eight years' incarceration that would include no more than eight years of actual incarceration, with the remainder suspended. Based on this record, a reasonable lay person in Petitioner's position would not understand that the court could impose the sentence it did.

> The court's comment at the plea proceeding that "[a]ny conditions of probation are entirely within my discretion" does not change our conclusion. A reasonable lay person in Petitioner's position could understand the court's comment to mean that the court reserved the right to suspend a part of what, at most, would be an eight-year sentence and impose a period of probation accompanied by conditions.
>
> In short, the sentencing term of the agreement to which the court bound itself, when determined by reference to what Petitioner reasonably understood that term to be at the time he pleaded guilty, was that the court would impose a total sentence of no more than eight years, a portion of which the court in its discretion might suspend in favor of a period of probation, with conditions. But even if the sentencing term of the plea agreement as expressed at the plea proceeding was ambiguous (a point Petitioner concedes), he is entitled to have the ambiguity resolved in his favor. *See Solorzano,* 397 Md. at 673 (any ambiguity in plea agreement must be resolved against the State).
>
> We therefore hold that, regardless of whether the sentencing term is clear or ambiguous, the court breached the agreement by imposing a sentence that exceeded a total of eight years' incarceration. The sentence is illegal and, upon Petitioner's motion, the Circuit Court should have corrected it to conform to a sentence for which Petitioner bargained and upon which he relied in pleading guilty.

Id. at 584-86 (footnotes omitted). The Court hastened to add, however, that a split sentence, that is, one that exceeds the guidelines, with all suspended but for that portion that falls within the guidelines, is permissible so long as either the State or defense counsel makes that term of the agreement "absolutely clear on the record of the plea agreement and the term is fully explained to the defendant on the record before the court accepts the defendant's plea." *Id*. at 586.

The factual scenario in *Baines* was similar. Therein, the defendant agreed to enter an *Alford* plea[10] to two counts of armed robbery, after which the State would *nolle prosse* the remaining charges, and recommend that "sentencing [would] be within Guidelines." 416 Md. at 609. Baines also signed a document entitled "Waiver of Rights at Plea," which contained an interlineation detailing: "[M]y sentence is to be within the guidelines." *Id*. The court accepted the plea. *Id*.

At sentencing several months later, defense counsel reminded the court that sentencing was to be within the guidelines of seven to 13 years. *Id*. at 610. The State recommended to the court a sentence of 20 years, suspending all but 13 years for each count, to run concurrently, with five years of probation. *Id*. Defense counsel did not object that the State was barred by the agreement from making that recommendation, and the court imposed a 20-year sentence, suspending all but seven years, on one count and a second 20-year sentence, suspending all but six years, on the second count; the two sentences were imposed to run consecutively. *Id*. Again, defense counsel did not object. *Id.*

Noting that the legal issue and argument presented by Baines were identical to the ones set forth in *Cuffley*, the Court of Appeals pointed out that, during the plea hearing, defense counsel advised the court that sentencing would be within the guidelines, the trial court confirmed that it was being asked to commit itself within the guidelines, and the prosecutor said nothing to elaborate on the meaning of the phrase "sentencing within the

[10] *See North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (a guilty plea in which the defendant protests his innocence but waives his right to a trial).

Guidelines." *Id*. at 619-20. As such, the Court believed it plain from the record of the plea hearing that Baines reasonably understood the plea agreement to call for a total sentence of no more than 13 years. The trial court had not indicated, much less made a plain statement, that it was free to impose a sentence beyond the guidelines so long as it suspended all but the part of the sentence that was within the guidelines. And, even assuming that the term "within the guidelines" was ambiguous, the Court was required to resolve that ambiguity in favor of Baines. *Id*. at 620. As such, the Court held that the plea agreement called for a maximum sentence of 13 years, including any suspension of sentence. *Id*.[11]

The Court of Appeals addressed the issue again two years later in *Matthews v. State*, 424 Md. 503 (2012). In *Matthews*, the plea agreement contemplated a sentence "to the top of the guidelines range," agreed to be 23 to 43 years; the State advised it would ask for 43 years as a cap "as to actual and immediate incarceration." *Id*. at 507. The trial court agreed to cap the sentence but advised Matthews that it theoretically could sentence him from the mandatory minimum of five years to life imprisonment. *Id*. At sentencing, the State recommended a sentence of life imprisonment, suspending all but 43 years, and the court sentenced Matthews to a total of life, suspending all but 30 years. *Id*.

[11] The dissent pointed out that *Cuffley* and *Baines* differed in one aspect of their factual backgrounds: In *Cuffley*, the parties had agreed to a sentence within the guidelines and to a separate probationary period, but nowhere in Baines' plea agreement was the possibility of probation discussed. *Id*. at 624 (Harrell, J., dissenting). Although standing by his ultimate conclusion that Baines knew or should have known that the court could impose the sentence that it did, Judge Harrell agreed that doubt could exist as to what Baines would have understood reasonably regarding a period of probation. *Id*. at 624-25.

As in the instant case, Matthews filed petitions for post-conviction relief, asserting ineffective assistance of counsel for failing to object to the State's breach of the plea agreement. The post-conviction court agreed that the plea agreement had been breached by the State's recommendation of life imprisonment and that Matthews had been deprived of the benefit of his bargain as a result, but it nonetheless ruled that the plea agreement was not presented as binding, so the trial court, upon resentencing, was free to impose whatever sentence it found appropriate. *Id*. at 508.

At resentencing, the court re-imposed the original sentence of life, suspending all but 30 years, on the belief that when it accepted the plea, it was clear to the parties that it could sentence Matthews as it had. *Id*. at 510. Matthews thereafter filed a motion to correct an illegal sentence, which was denied. *Id*.

The Court of Appeals explicitly made clear that a disposition that exceeds the sentence agreed upon as part of a binding plea agreement is inherently illegal and cognizable under Rule 4-345(a). *Id*. at 514 (citation omitted). The Court later reiterated that statement and added, "to be clear, a sentence imposed in violation of the maximum sentence identified in a binding plea agreement and thereby 'fixed' by that agreement as 'the maximum sentence allowable by law,' is ... an inherently illegal sentence." *Id.* at 519.

The Court concluded that the disagreement between the State and the defense about what was contemplated by the sentencing "cap" to which the trial court had bound itself rendered the record of the plea hearing ambiguous because no one had mentioned, much less explained to Matthews on the record, that a sentence greater than the 43-year cap could be imposed, with a portion in excess of that cap to be suspended. Neither did the State,

defense counsel, nor the court explain that the words "guidelines range" referred solely to executed time. *Id*. 524. Therefore, a reasonable lay defendant might reasonably have understood the State to be referring to the total years of incarceration, including any suspended portion, which made the agreement ambiguous. *Id*. And, as nothing in the court's later explanation resolved the ambiguity, the sentencing term of the plea agreement was required to be resolved in Matthews' favor because the sentence was substantively illegal. *Id*. at 525.

We hold similarly here. During Wolcott's plea proceeding, the total colloquy regarding the State's recommendation for sentencing detailed:

> As to disposition in case K-12-0243, *there is no agreement as to sentencing other than that the State will be recommending a sentence which is within the guidelines range. I do understand that the guidelines range to be five years to ten years on the armed robbery--*
>
> * * *
>
> And then, of course, as to the disposition in K-12-0240 and 242, the State's going to ask the Court to bind to concurrent sentences with whatever sentence might be imposed in the armed robbery cases. (Emphasis added).

Although the court did not specifically bind itself to the length of the State's recommended sentence before accepting the plea, the State breached the agreement when it later recommended a 20-year sentence, suspending all but ten years, along with a four year probationary period. At the plea and sentencing hearings, no one—not the prosecutor, defense counsel, or the court—made any mention of, much less explained to Wolcott, the possibility of a portion of the sentence in excess of the guidelines' suggested five to ten years being suspended in favor of a probationary period.

As in *Cuffley*, *Baines*, and *Matthews*, we conclude that a reasonable defendant in Wolcott's position would have understood the recommended sentence "within the guidelines range" of five to ten years, with no further explanation, to mean that the court would impose a total sentence that would include both suspended and non-suspended time. On this record, he would not have understood the agreement to permit the trial court to impose a suspended sentence beyond ten years' active incarceration or probation. And, even if the sentencing terms of the plea agreement were ambiguous, we must resolve any ambiguities in Wolcott's favor and find the sentence illegal. *Cuffley*, 416 Md. at 586; *Baines*, 416 Md. at 620; *Matthews*, 424 Md. at 525. As detailed in *Matthews*, the resolution of the illegal sentence entitles Wolcott to have the plea agreement enforced based on the terms he bargained for and reasonably understood them to be, which is a maximum sentence, including any suspended portion, of ten years. 424 Md. at 525-26.

ORDER OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. SENTENCE VACATED AND MATTER REMANDED TO THAT COURT FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WICOMICO COUNTY.