

No. 34844-6-II  
(Consolidated with COA NOs. 34850-1-II and 34854-3-II)

FILED  
COURT OF APPEALS  
ESTABLISHED 1983  
BY 

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**MATTHEW KAYNE ROMERO,**

**Appellant/Defendant.**

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**PIERCE COUNTY SUPERIOR COURT**

**CAUSE NOs. 04-1-01423-1, 05-1-00347-4, 04-1-05350-3**

**THE HONORABLE STEPHANIE A. AREND,**

**Presiding at the Trial Court.**

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**APPELLANT'S OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

1. Mr. Romero's due process rights were violated when he was denied notice, an evidentiary hearing, and a judicial finding that he had failed to comply with the plea agreement prior to being penalized for non-compliance with the agreement.

2. The State breached, and thus invalidated the plea agreement, when it failed to recommend the sentence it had agreed upon without obtaining a written stipulation or a judicial finding that Mr. Romero had violated the agreement before attempting to rescind the agreement.

3. The State failed to honor the plea agreement, and thus invalidated it, when it charged Mr. Romero with new crimes which were allegedly committed prior to entering the agreement where the agreement purported to include all outstanding charges against Mr. Romero.

4. The State breached the terms of the plea agreement by altering its terms in violation of the written agreement's modification prohibition clause.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where the State accuses a defendant of non-compliance of a plea agreement is the defendant constitutionally entitled to written notice of the nature of the alleged violations, an evidentiary hearing, and a judicial finding that the State has proved a material breach by a preponderance of the evidence? (Assignment of Error Number One.)

2. Where the State failed to recommend the sentence it agreed upon without obtaining a judicial finding that it was so entitled, based on a material breach by the defendant, has the State failed to honor the plea agreement and thus rendered it invalid? (Assignment of Error Number Two.)

3. Where a plea agreement which purports to encapsulate all outstanding charges against a defendant is entered, and the State files new charges that were allegedly based on acts committed prior to the entry of the agreement, has the State failed to honor the plea agreement? (Assignment of Error Number Three.)

4. Where a plea agreement provides that it cannot be modified absent a signed and written agreement, does the State breach the

agreement by changing its sentencing recommendation without a new written agreement? (Assignment of Error Number Four.)

### **III. STATEMENT OF THE CASE**

#### **1. Procedural History**

##### **a. Pierce County Case Number 04-1-01423-1**

On March 23, 2004, the appellant/defendant, Matthew Kayne Romero, was charged by Information with one count of Unlawful Possession of a Controlled Substance, to wit: Methamphetamine, in violation of RCW 69.50.401(d), one count of Driving Under the Influence of Intoxicants, contrary to RCW 46.61.502(1)(b)(c), one count of Unlawful Use of Drug Paraphernalia, pursuant to RCW 69.50.102 and RCW 69.40.412, and one count of Driving While in Suspended or Revoked Status in the Third Degree, pursuant to RCW 46.29, RCW 46.20.289, RCW 46.20.342(1)(b), RCW 46.20.267, and RCW 46.20.342(1)(c). CP 1-4. On March 15, 2005, Mr. Romero entered an *Alford/Newton*<sup>1</sup> plea to the amended charge of Unlawful

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*Alford V. North Carolina*, 700 U.S. 25,91S.Ct. 160,27 L.Ed 2d 162(1970); *State v. Newton*, 87 Wn.2d 363,552 P.2d 682 (1976).

Possession of a Controlled Substance With Intent to Deliver.<sup>2</sup> CP 7-13, CP 1 5.

On April 14, 2006, the trial court sentenced Mr. Romero to one hundred twenty (120) months in the Department of Corrections, which represents the high end of Mr. Romero's presumptive range. The sentence was ordered to be served concurrent with Pierce County Case Numbers 05-1-00347-4 and 04-1-05350-3, and consecutive to Thurston County Case Number 05-1-01162-2. CP 28-40. A Notice of Appeal was filed on May 22, 2006. CP 42-43.

**b. Pierce County Case Number 05-1-00347-4**

On January 21, 2005, Mr. Romero was charged by Information with one count of Theft in the First Degree, in violation of RCW 9A.56.020(1)(a), and RCW 9A.56.030(1)(a). CP 51-52. Mr. Romero entered an *Alford/Newton* plea to the original charge on March 15, 2005. CP 53-56.

On April 14, 2006, Mr. Romero received a high end standard range sentence of fifty-seven (57) months to be served concurrent with

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<sup>2</sup>

RCW 69.50.401(1)(2)(b)

Pierce County Case Numbers 04-1-0423-1 and 04-1-05350-3, and consecutive to Thurston County Case Number 05-1-01162-2. CP 70-81. A Notice of Appeal was filed on May 22, 2006. CP 83.

**c. Pierce County Case Number 04-1-05350-3**

On November 16, 2004, Mr. Romero was charged by Information with three counts of Possessing Stolen Property in the First Degree, pursuant to RCW 9A.56.140(1) and RCW 9A.56.150(1). CP 91.94. Mr. Romero entered a guilty plea to the Amended Information charging him with a single count of Possessing Property in the First Degree on March 15, 2005. CP 97-100; CP 95.

On April 14, 2006, the trial court imposed a sentence of fifty-seven (57) months in the Department of Corrections, which represented Mr. Romero's high end standard range. The sentence was ordered to be served concurrent with Pierce County Case Numbers 04-1-01423-1 and 05-1-00347-4, and consecutive to Thurston County Case Number 05-1-01162-2. CP 118-129. A Notice of Appeal was filed on May 22, 2006. CP 131.

**2. The Plea Agreement**

**a. General Provisions**

On March 15, 2005, the same date Mr. Romero entered guilty pleas to the above-referenced Pierce County cases, Mr. Romero entered into a written agreement with the prosecutor's office. CP 57-59. (The agreement is attached as Appendix A and incorporated by reference herein).

The agreement required Mr. Romero to: 1) enter the above-mentioned guilty pleas in Pierce County Case Numbers 04-1-01423-1 05-1-00347-4, and 04-1-05350-3, 2) recover intact, or provide information to law enforcement which results in the recovery of, a 1990 Chevrolet Corvette<sup>3</sup>, 3) appear for all subsequent court proceedings, and 4) refrain from committing any new crimes while released.

In exchange for Mr. Romero's fulfillment of the above listed promises the State agreed to 1) dismiss without prejudice Pierce County Case Numbers 04-1-02670-1 and 03-1-05728-4, 2) recommend fifty-seven(57) months (high end standard range) for

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The Chevy Corvette was the property connected to the Theft in the First Degree charge in Pierce County case number 05-1-00347-4, to which Mr. Romero pled guilty.

Pierce County Case Numbers 05-1-00347-4, and 04-1-05350-3, the same to run concurrent to Pierce County Case Number 04-1-01423-1, and further recommend a ninety (90) months DOSA sentence in Pierce County Case Number 04-1-01423-1, 3) not object to running the present sentences concurrent with property crime cases in Thurston and Snohomish counties, and 4) recommend Mr. Romero's release on his own recognizance pending sentencing in the current cases.

**b. Penalty Clause**

The agreement between Mr. Romero and the Pierce County Prosecutors Office includes a penalty clause whereby, in the event Mr. Romero failed to perform the aforementioned promises, the agreement "WILL NO LONGER CONSTITUTE THE PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE RECOMMENDATION AND SUCH OFFICE WILL NO LONGER BE BOUND BY ANY AGREEMENT CONTAINED WITHIN THIS DOCUMENT." CP 57-59; Appendix A at page 2.

Furthermore, in the event of a breach by Mr. Romero, the penalty clause provides that the following sentence, to be *agreed upon by his attorney*, would be recommended by the State: an exceptional

sentence of one hundred fourteen (114) months under Pierce County Case Numbers 05-1-00347-4, and 04-1-05350-3, pursuant to State v. Hilyard,<sup>4</sup> 63, Wn.App. 413(1991),<sup>5</sup> plus a Restitution Order in the sum of \$17,131.39, and, in Pierce County Case Number 04-01423-1, to recommend a high end standard range sentence of one hundred twenty (120) months without any recommendation for a DOSA sentence, to be served consecutive to Pierce County Case Numbers 05-1-00347-4, and 04-1-05350-3. Additionally, the State would be free to re-file charges in the dismissed Pierce County cases.

**c. Modification Clause**

The agreement provides that it can only be modified by a written and signed agreement by both parties. The following clause is contained in the agreement:

The Pierce County Prosecutor's Office and Matthew Romero agree that this agreement is the sole agreement between the parties to the agreement; this agreement shall not be modified

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819 P.2d 809.

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The exceptional sentence provision in the penalty clause additionally includes a waiver of a jury determination of aggravating factors under Blakely v. Washington, 124 S.Ct. 2531,159 L.Ed. 2d 403 (2005).

by either party without the signed written agreement of both parties, and neither the Pierce County Sheriff's Department nor Detective Jensen possess the authority to modify this agreement.

**3. Motion to Withdraw Guilty Pleas  
and Sentencing Hearing**

On November 17, 2005, Mr. Romero filed a pro se "Motion for a Hearing on Defendant's Motion for Withdrawal of Guilty Plea under CrR 4.2(5) and Appointment of Counsel" in each of the three Pierce County cases in which he had pled guilty on March 15, 2005. CP 14-17, 104-107. The basis for the motion was that Mr. Romero's guilty pleas were not entered knowingly, voluntarily, and intelligently because (1) he believed that the written agreement between he and the Pierce County Prosecutor's office provided for all pending charges, but the prosecutor filed an additional case subsequent to entering into the agreement, in which the arrest pre-dated the agreement, (2) he did not sufficiently understand the legal "aspects" and consequences of the complicated plea agreement, (3) he was addicted to and influenced by his addiction to drugs at the time he entered into the agreement, and (4) he did not understand his offender score or standard range sentence.

On December 8, 2005, Mr. Romero appeared in court for his

motion to withdraw plea hearing represented by newly appointed counsel Robert Quillian. The motion hearing was continued until April 14, 2006. RP 12-8-05, 5-6. In Court Mr. Romero asked the judge if he could receive a mental evaluation. The Court responded that Mr. Romero should talk to his attorney. 12-8-05, 7. Meanwhile, on March 10, 2006, Mr. Quillian filed a Motion to Withdraw Pleas of Guilty with attached declaration of Mr. Romero. CP 18-20, 60-62, 104-107. On April 14, 2006, Mr. Quillian filed a memorandum in Support of Motion to Withdraw Guilty Pleas. The basis for the motion was that (1) Mr. Romero's pleas were entered without a full understanding of the direct consequences of his pleas, and (2) the State breached the plea agreement by filing new charges in Pierce County Case Number 05-1-03566-0. CP 21-24, 63-66, 111-114.

On April 14, 2006, the prosecutor represented to the Court that Mr. Romero was withdrawing his motion to withdraw his guilty pleas, "that there had been a violation" by Mr. Romero, and that the parties had an agreed sentencing recommendation. The State moved to dismiss Pierce County Case Number 05-1-3566-0, which was filed after entry of the plea agreement. The prosecutor claimed Mr. Romero

had failed to appear for a sentencing hearing, had committed several crimes in Oregon while on release status, had committed a crime in Thurston County, and had returned the Corvette in less than “intact” condition. RP 4-14-06, 6-7. No written allegations were made concerning the above statements. No evidentiary hearing was held, no written stipulation or waiver was entered, and no factual findings were made by the lower court. The prosecutor merely asserted “Now, the State considered this to be a violation.” 4-14-06, 7. The State proceeded to recommend the sentence that was ultimately adopted by the Court.

Mr. Romero’s attorney disputed the accusation that the condition of the returned vehicle was less than intact, but otherwise agreed with the prosecutor. 4-14-06, 9. Co-counsel for Mr. Romero pointed out that Mr. Romero “had a difficult drug addiction.” 4-14-06, 10.

Mr. Romero and his father addressed the court. The gist of each man’s comments was that Mr. Romero needed drug treatment, and that they hoped the court could help them. Mr. Romero also advised the court that he had been evaluated by Lakeside Milam, a substance

addiction treatment center. 4-14-06, 11-13.

#### IV. ARGUMENT

**A. MR. ROMERO IS ENTITLED TO SPECIFIC PERFORMANCE OF HIS PLEA AGREEMENT BECAUSE THE STATE'S ACCUSATIONS OF HIS NONCOMPLIANCE WITH THE AGREEMENT WERE NEVER PROPERLY ALLEGED, AND WERE NEVER PROVED OR FOUND BY THE TRIAL COURT.**

Constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3), *State v. Williams*, 103 Wn.App. 231,234-35, 11 P.3d 878 (2000). Under RAP 2.5(a)(3) a breach of a plea agreement is an issue of constitutional magnitude. Appellate courts will address the issue even where a defendant fails to object or move to withdraw his/her plea at the lower court. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991(2002).

Moreover, if a question exists as to the defendant's compliance with a plea agreement mere accusations of noncompliance are insufficient. The defendant is entitled to a full evidentiary hearing where the State is required to prove, by a preponderance of the evidence, that the defendant has failed to perform as agreed. *In re James*, 96 Wash. 2d 847,848,640 P.2d 18 (1982); *State v. Hall*, 32

Wash.App. 108,645 P.2d 1143 (1982). “[T]he issue of noncompliance is a question of fact to be determined by the court....to permit the State to unilaterally nullify an agreement would constituted “manifest impropriety,” and an abdication of the court’s duty to ensure “fairness and candor.” *In re James*, at 849, citing *United States v. Simmons*, 537 F.2d 1260 (4<sup>th</sup> Cir 1976), and *State v. Tourtellotte*, 88 Wash.2d 579,564 P.2d 799(1977).

In Mr. Romero’s case, the State accused him of violating the terms of the plea agreement, but failed to provide any written notice of the exact nature of the allegations. Although the State is likely to argue that Mr. Romero, through his attorney, stipulated to non-compliance, the record is not clear which violations Mr. Romero allegedly agreed he had committed. No written stipulation was entered.

Moreover, Mr. Romero was not ben asked to orally affirm that he had failed to comply with the agreement in any respect. The prosecutor merely stated that he had not complied, and his attorney agreed in part. Not only did the State fail to meet its burden to properly allege and prove the accusations, but the trial court abdicated its duty to ensure fairness to Mr. Romero. Mr. Romero is entitled to specific

performance of the agreement, or to rescind the agreement entirely under *In re James, supra*.

**B. MR. ROMERO’S GUILTY PLEAS ARE INVALID BECAUSE THE STATE BREACHED THE PLEA AGREEMENT.**

A defendant shall be allowed to withdraw his plea of guilty whenever it appears that withdrawal is necessary to correct a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure. *State v. Taylor*, 83 Wn.2d 594,598,521 P.2d 699 (1974). In *Taylor*, the Court set forth four indicia of manifest injustice which would allow withdrawal of a guilty plea: (1) the denial of effective assistance of counsel, 2) the plea was not ratified by the defendant, (3) the plea was involuntary, and **(4) *the plea agreement was not honored by the prosecution.*** (Emphasis added.) Any of the four indicia listed above would independently establish “manifest injustice” and would require a trial court to allow a defendant to withdraw his plea. *State v. Taylor*, 83 Wn.2d at 597; see also *State v. Wakefield*, 130 Wn.2d 464,472,925 P.2d 183 (1996).

1. **The State breached the plea agreement by failing to recommend the agreed upon sentence where no violation of the agreement by Mr. Romero was found.**

The State is obligated fully and wholeheartedly to comply with the terms of a plea bargain agreement. *Santobello v. New York*, 401 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495(1971); *State v. Tourtellotte*, 88 Wash.2d 579,584,564 P.2d 799 (1977); *In re Palodichuk*, 22 Wash.App. 107,589 P.2d 269 (1978). A defendant has a right analogous to a contract right once a plea bargain is entered. *State v. Hall*, 32 Wash.App. 104 Wn.2d 486,706 P.2d 1074 (1985); *In re Palodichuk, supra.* at 110.

The law in this state requires that a plea agreement, once entered, be scrupulously honored by the prosecution. This is because a plea of guilty constitutes a waiver of significant rights by the defendant, among which are the right to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond a reasonable doubt. *Tourtellotte, supra.* 88 Wn.2d 579 (citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495). When a plea rests to such a degree on a promise or agreement of

the prosecutor that is part of the inducement or consideration, that promise must be fulfilled. State v. Hall, *supra*, at 490 (citing Santobello, 404 U.S. at 262). Due process requires that the prosecutor adhere to the terms of the plea bargain agreement. Palodichuk, *supra*. at 109.

In Mr. Romero's case, the State did not honor its sentencing recommendation agreement to Mr. Romero despite the fact that no violation of the agreement was specifically alleged, proved, or found by the trial court. The prosecutor unilaterally determined that Mr. Romero was in violation of the plea agreement without any stipulation by Mr. Romero, and without any finding by the court. Where a plea agreement is not honored by the State a "manifest injustice" is established, and a defendant is allowed his choice of remedy.

Two remedies are available when a defendant has entered a guilty plea where the prosecutor refused to abide by the terms of the agreement. "The court can permit the accused to withdraw his plea and be tried anew on the original charges, or grant specific performance of the agreement. State v. Miller, 110 Wn.2d, 528,531,756 P.2d 122

(1988), (quoting *State v. Tourtellotte*, 88 Wash.2d 579,585,564 P.2d 799 (1977)).

The *Miller* court also held “the defendant’s choice of remedy controls, unless there are compelling reasons not to allow that remedy.” *Miller*, 110 Wn.2d at 536. *Miller* noted some circumstances in which compelling reasons might exist to override the defendant’s choice of remedy - - for example, if a plea agreement violation was caused by misinformation provided by the defendant, or if the prosecutor detrimentally relied on the bargain and lost witnesses or evidence. *Miller*, 110 at 535.

In *Tourtellotte*, the court held: “a court ought to accord a defendant’s preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor’s breach of a plea bargain are those of the defendant, not of the State.” *Tourtellotte*. 88 Wn.2d at 585 (quoting *Santobello v. New York*, 404 U.S. 257,267, 30 L.Ed.2d 427, 92 S.Ct. 495(1971) (Douglas J. concurring)).

In the case a bar, Mr. Romero’s choice of remedy should

control. Based on the invalid guilty plea this Court should reverse and remand to the trial court to determine Mr. Romero's choice of remedy.

**2. The State breached the plea agreement by charging Mr. Romero with new crimes that were allegedly committed prior to the entry of the plea agreement**

Washington courts recognize that a plea agreement is a binding contract once accepted by a trial court. *See, e.g. State v. Hunsicker*, 129 Wn.2d 554,559,919 P.2d 79 (1996); *State v. Miller*, 110 Wn.2d 528,536,756 P.2d 122 (1988); *State v. Hall*, 104 Wn.2d 486,490,706, P.2d 1074 (1985). Contract law requires a duty of good faith and fair dealing. RESTATEMENT, SECOND, CONTRACTS.' 205.<sup>6</sup> Moreover, a maxim of contract interpretation is that provisions of a contract are to be interpreted against the drafter.<sup>7</sup>

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205. Duty of Good Faith and Fair Dealing

Every Contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. RESTATEMENT, SECOND, CONTRACTS ' 205.

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206. Interpretation Against the Draftsman

In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds. RESTATEMENT, SECOND, CONTRACTS ' 206.

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Because a plea agreement is a binding contract, the State is obligated to fully and wholeheartedly comply with the terms of a plea agreement. Santobello v. New York, U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495(1971); State v. Tourtellotte, 88 Wash.2d 579,584,564 P.2d 799 (1977). The constitutional dimensions of the plea agreement make it essential that the State fulfill its “implied promise to act in good faith.” State v. Williams, 103 Wn.App.231,235,11 P.3d 878 (2002).

Additionally, due process is violated when the State breaches the terms of a plea agreement. See, In re Palodichuk, 22 Wash.App. 107,589 P.2d 269 (1978) (due process requires that the prosecutor adhere to the terms of the plea bargain agreement reached with a criminal defendant.). In the context of a criminal charge, principles of substantive due process are implicated by, and inherent in, the process of enforcing a plea agreement. State v. Scott, 230 Wis. 2d 643,651,602 N.W.296 (Ct.App. 1999). The Washington Supreme Court has ruled that “[b]ecause they [plea agreements] concern fundamental right of the accused, constitutional due process considerations come into play.”

State v. Sledge, 133 Wn.2d 828,839,947 P.2d 1199 (1997).

Where a prosecutor violates a plea agreement it does not matter that the violation was the result of bad faith or was an inadvertent mistake. State v. Collins, 46 Wn.App. 636,731 P.2d 1157 (1987) (citing Santobello, *supra*). A defendant is entitled to relief regardless of whether the prosecution breached the agreement deliberately or otherwise. The test to be applied is “an objective one - whether the plea agreement has been breached or not - - irrespective of prosecutorial motivations or justifications for the failure in performance.” In re Palodichuk, 22 Wn.App.at 110.

Here, the plea agreement between Mr. Romero and the State seemingly covered all possible charges Mr. Romero was facing, including those in Snohomish and Thurston Counties as well as Pierce County. The thorough coverage, which assured Mr. Romero of a specific sentencing range, expresses the plain intent of the parties.

On July 20, 2005, the State, nonetheless, filed new charges in Pierce County Case Number 05-1-03566-0. The new charges were based on incidents that occurred on November 4<sup>th</sup> through November

10<sup>th</sup> of 2004, which was well before the entry of the plea agreement on March 15, 2005. The effect of the new charges was to substantially alter the length of prison time Mr. Romero was facing, in spite of the plea agreement.

Whether the new charges were filed in bad faith or somehow inadvertently is of no consequence. *State v. Collins*, 46 Wn. App.636,731 P.2d 1157(1987). The State offered no explanation for the new charges. Likewise, that the new charges were later dismissed without prejudice (but with restitution in the amount of \$9,263.47 ordered) is irrelevant.<sup>8</sup> The newly charged case served as leverage for a modification in Mr. Romero's plea agreement, and constituted a breach by the State of the plea agreement by the parties.

**3. The State breached the plea agreement by violating the modification prohibition clause contained in the agreement.**

As discussed above a prosecutor is bound by the terms of a plea

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The Information, Motion and Order for Dismissal Without Prejudice, and Order Setting Restitution and Disbursement in Pierce County Case Number 05-1-03566-0 are attached as Appendix B and incorporated by reference herein.

agreement both under principles of contract and constitutional law.

*State v. Tourtellolle, supra, In re Palodichuk, supra.*

In Mr. Romero's case, the plea agreement includes a modification clause which strictly prohibits any modification of any term(s) of the agreement "by either party without the signed written agreement of both parties." CP 57-59. See Appendix A. The State violated the modification prohibition clause of the plea agreement by altering its sentencing recommendation and by charging additional crimes. (For a detailed discussion of the new crimes charged please refer to appellant's Argument B3.)

The State's original sentencing recommendation pursuant to Mr. Romero's plea agreement includes the following: 1) a high end standard range sentence of fifty-seven (57) months for Pierce County Case Number 05-1-00347-4 and 04-1-05350-3, to run concurrent with one another and concurrent to Pierce County Case Number 04-1-01423-1, 2) a ninety (90) month DOSA sentence in Pierce County Case Number 04-1-01423-1, and 3) no objection to running the above sentences concurrent with the property crimes cases in Thurston and

Snohomish Counties.

The State's modified sentencing recommendation was as follows: 1) a high end fifty-seven (57) month prison term for Pierce County Case Numbers 05-1-00347-4 and 04-1-05350-3, to run concurrent to one another and to Pierce County Case Number 04-1-01423, but *consecutive* to Thurston County Case Number 05-1-01162-2, 2) a high end one hundred and twenty (120) month sentence in Pierce County Case Number 04-1-01423-1 also to run *consecutive* to Thurston County Case Number 05-1-01162-2 with no DOSA recommendation, and 3) restitution in the sum of \$9,263.47 in the newly charged Pierce County Case Number 05-1-03566-0. CP 28-40, 70-81, 118-129.

That the State's modified sentencing recommendation was less severe than the penalty clause of the plea agreement <sup>9</sup> is irrelevant to the State's breach of the modification prohibition clause where the

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The penalty clause provided for a recommendation of an exceptional sentence of one hundred and fourteen (114) months in Pierce County case Numbers 05-1-00347-4 and 04-1-05350-3 to run consecutive to Pierce County Case Number 04-1-01423-1.

written agreement plainly precluded any modification of the terms without written authorization by both parties. Also, the State was not at liberty to unilaterally rescind the plea agreement, so the changes in the sentencing recommendation constitutes a modification of that term.

Furthermore, it bears noting that Mr. Romero was not questioned by the court concerning the modifications, nor did he appear to understand them. At the sentencing hearing both he and his father appeared to believe that a DOSA sentence was a distinct possibility or even a probability. RP 4-14-06. 11-13.

The modification of the plea agreement was not accomplished by written agreement of the parties as required in the modification clause of the plea agreement. Such unauthorized modification necessitates remand for Mr. Romero to choose his remedy.

## **V. CONCLUSION**

Although the lower court record is unclear whether the State's intention was to partially specifically enforce, rescind, or modify the plea agreement all such actions are violative of Mr. Romero's constitutional rights and constitute a breach of the plea agreement by

the State. For all of the foregoing reasons Mr. Romero respectfully requests that this Court remand to the trial court for his election of specific enforcement of the plea agreement or withdrawal of his guilty pleas.

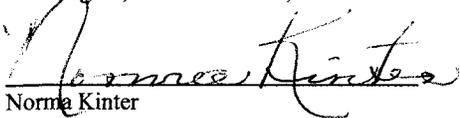
RESPECTFULLY SUBMITTED this 4th day of December, 2006.



Sheri L. Arnold  
WSBA # 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 4, 2006, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by the U.S. Post Office to appellant, Matthew K. Romero, DOC # 7496184, McNeil Island Corrections Center, Post Office Box 881000, Steilacoom, WA. 98388, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on December 4, 2006.

  
Norma Kinter

FILED  
COURT OF APPEALS

06 DEC -4 PM 12:15

STATE OF WASHINGTON

BY  DEPUTY

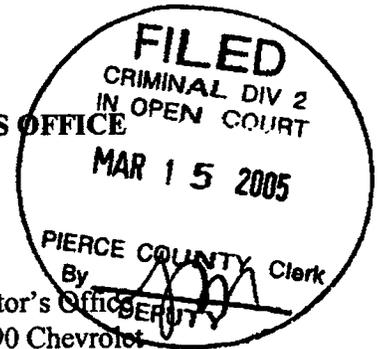
Romero, Matthew K. - Opening Brief - COA No. 34844-6-II

**APPENDIX A - Agreement Between Pierce County  
Prosecutor's Office and Matthew Romero  
(filed March 15, 2005).**



05-1-00347-4 22716703 AG 03-16-05

**AGREEMENT BETWEEN PIERCE COUNTY PROSECUTOR'S OFFICE  
AND MATTHEW ROMERO**



*05-1-00347-4*

This document is an agreement between the Pierce County Prosecutor's Office and Matthew Romero, by which Matthew Romero will recover intact a 1990 Chevrolet Corvette VIN 1G1YY3389L5105781, owned by Donald Hanson, or provide information to law enforcement which shall result in the recovery of said vehicle.

The Pierce County Prosecutor's Office and Matthew Romero agree that this agreement is the sole agreement between the parties to the agreement; this agreement shall not be modified by either party without the signed written agreement of both parties; and neither The Pierce County Sheriff's Department nor Det. Jensen possess the authority to modify this agreement.

Matthew Romero agrees to: recover the aforementioned Chevrolet Corvette in intact condition or provide information to law enforcement which leads to the recovery of said vehicle in an intact condition.

- a. Plead guilty to the following felony under Pierce county Superior Court Cause 05-1-00347-4 accompanied by its respective standard-range:
  - Theft in the First Degree
  - Offender score 12
  - Standard range: 43-57 months
- b. Plead guilty to the following felony under Pierce County Court Cause 04-1-05350-3 accompanied by its respective standard-range
  - Possession of Stolen Property First Degree
  - Offender score 12
  - Standard range: 43-57 months
- c. Plead guilty to the following felony under Pierce County Court Cause 04-1-01423-1
  - Unlawful Possession of a Controlled Substance with the Intent to Deliver
  - Offender score 12
  - Standard range: 60-120 months
- d. The State agrees to dismiss without prejudice causes 04-1-02670-1 and 03-1-05728-4.

**UPON THE CONDITION THAT MATTHEW ROMERO HAS PERFORMED THE PROMISES ENUMERATED ABOVE, THE PIERCE COUNTY PROSECUTOR'S OFFICE AGREES TO MAKE THE FOLLOWING SENTENCING RECOMMENDATION FOR THE CASE(S) LISTED ABOVE, THE DEFENDANT UNDERSTANDING THAT THE SENTENCING JUDGE NEED NOT FOLLOW SUCH RECOMMENDATION: under 05-1-00347-4 and 04-1-05350-3, the State will recommend 57 months for both causes concurrent with 04-1-01423-1, along with standard fines and costs and restitution. Under 04-1-01423-1, the State will recommend a**

90 month DOSA sentence, concurrent with 05-1-00347-4 and 04-1-05350-3, along with standard fines and costs and a term of community custody.

IN ADDITION, the State will move to dismiss with prejudice causes 04-1-02670-1 and 03-1-05728-4.

FURTHER, the State will have no objection if these sentences are run concurrently with property crime cases in Thurston and Snohomish counties.

FURTHER, the State agrees to set over sentencing and recommend to the Court that **MATTHEW ROMERO** be released pending sentencing on his own recognizance

Defendant's initials M.R.

UPON THE CONDITION THAT **MATTHEW ROMERO** FAILS TO PERFORM ANY OF THE ABOVE PROMISES, FAILS TO APPEAR FOR ANY SUBSEQUENT COURT PROCEEDINGS OR COMMITS ANY CRIMES WHILE RELEASED THIS DOCUMENT WILL NO LONGER CONSTITUTE THE PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE'S RECOMMENDATION AND SUCH OFFICE WILL NO LONGER BE BOUND BY ANY AGREEMENT CONTAINED WITHIN THIS DOCUMENT.

**MATTHEW ROMERO** FURTHER ACKNOWLEDGES AND UNDERSTANDS THAT:

I, **MATTHEW KAYNE ROMERO**, do acknowledge that under Blakely v. Washington, 124 S.Ct 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573. I have a right to a jury determination of aggravating circumstances in this matter and I waive this right. I waive any right to appeal under the Blakely decision.

Matthew Romero  
**MATTHEW KAYNE ROMERO**

**FURTHERMORE,**

In the event that I, **MATTHEW KAYNE ROMERO**, 1. do not perform my promise of returning the aforementioned Chevrolet Corvette intact or 2. providing information to law enforcement information which results in the recovery of said vehicle or 3. fails to appear for any subsequent court proceedings or 4. commits any new crimes while released, the exceptional sentence of 114 months under cause 05-1-00347-4 and 04-1-05350-3 months will be recommended and agreed upon by my attorney and the

State per State v. Hilyard, 63 Wn.App. 413 (1991). This recommendation will include a Restitution Order in the amount of \$17,131.39 payable to the victim Donald Hanson. Under cause 04-1-01423-1, the MATTHEW ROMERO agrees to a standard range sentence of 120 months without any recommendation for a DOSA sentence, consecutive to 05-1-00347-4 and 04-1-05350-3. FURTHER, that the State may re-file causes 04-1-01423-1 and 03-1-05792-1.

**MATTHEW ROMERO** fully understands each and every term of this document, the entire document having been written in his primary language of English, and that **MATTHEW ROMERO** does not have any further questions;

Defendant's Initials MR

**MATTHEW ROMERO'S** attorney, Jay Berneburg has fully informed **MATTHEW ROMERO** of the contents of this contract, its obligations, and all alternatives to entering this contract, including exercising right to a trial;

**MATTHEW ROMERO'S** attorney, Jay Berneburg, has fully reviewed the police reports in this case and has fully discussed with **MATTHEW ROMERO** the merits of the State's case and chance of successful prosecution;

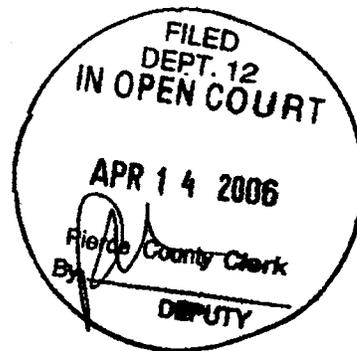
Understanding the entire contents of this agreement, **MATTHEW ROMERO** wishes to enter into this agreement and accepts its obligations, doing so of **MATTHEW ROMERO'S** own free will, voluntarily, intelligently, and knowingly.

DATED THIS 15 day of March, 2005

Matthew Romero  
(Defendant)

Jay Berneburg  
(Attorney for the Defendant)

William D. [Signature] 12902  
(Pierce County Prosecutor's Office)



**SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

**STATE OF WASHINGTON,**

**Plaintiff,**

**CAUSE NO. 05-1-03566-0**

**vs.**

**MATTHEW KAYNE ROMERO,**

**Defendant.**

**MOTION AND ORDER FOR  
DISMISSAL WITHOUT PREJUDICE**

**DOB: 11/06/75**

**SID #: WA17145313**

**MOTION**

Comes now the plaintiff, herein, by its attorney, GERALD A. HORNE, Prosecuting Attorney for Pierce County, and moves the court for an order dismissing WITHOUT prejudice the above entitled action, on the grounds and for the reason that the defendant will be pleading guilty to three other felonies. The defendant is also agreeing to pay restitution in this case.

DATED: this 14<sup>th</sup> day of April, 2006

**GERALD A. HORNE**  
**Pierce County Prosecuting Attorney**  
by: [Signature]  
**MARCUS MILLER**  
**Deputy Prosecuting Attorney**  
**WSB#: 27563**

**MOTION AND ORDER FOR  
DISMISSAL -1**  
jedissmis.dot

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: (253) 798-7400

**ORDER**

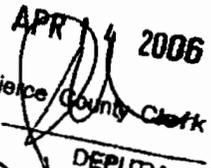
The above entitled matter having come on regularly for hearing on motion of **GERALD A. HORNE**, Prosecuting Attorney, and the Court being fully advised in the premises, it is hereby;

**ORDERED** that the above entitled action be and same is hereby dismissed **WITHOUT** prejudice, bail is hereby exonerated.

DATED the 14<sup>th</sup> day of April, 2006.

  
JUDGE

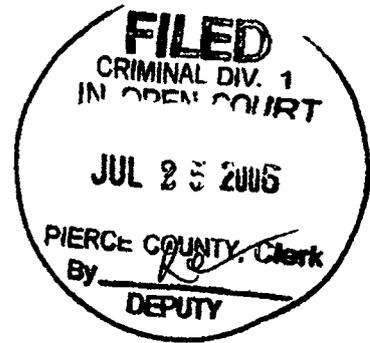
**MJM**

FILED  
DEPT. 12  
IN OPEN COURT  
APR 14 2006  
Pierce County Clerk  
By   
DEPUTY

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05-1-03566-0 25856002 ORSR 07-26-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03566-0

vs.

MATTHEW KAYNE ROMERO,

ORDER SETTING RESTITUTION AND  
DISBURSEMENT

Defendant.

THIS MATTER having come on before the undersigned judge of the above entitled court and restitution having been ordered pursuant to a criminal conviction and RCW 9.94A.753 which provides in part that restitution be ordered for easily ascertainable damage for injury or loss of property and actual expenses incurred for treatment for injury to persons and lost wages resulting from injury, but that the amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime; and the files of the Prosecuting Attorney having reflected that the following persons or entities should receive restitution; Now, Therefore, IT IS HEREBY

ORDERED that restitution in the above entitled matter be, and the same is hereby set in the sum of \$9,263.47 and the Clerk of the above entitled Court is hereby directed to disburse said funds as they are received in the manner following:

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: (253) 798-7400

THOMAS LITTLE \$5,213.47

MICHAEL HENDERSON \$3,050.00

DONE IN OPEN COURT this 29<sup>th</sup> day of July, 2006.

Beverly K Grant  
JUDGE  
BEVERLY GRANT

Presented by:

William J. Hurney  
WILLIAM J. HURNEY  
Deputy Prosecuting Attorney  
WSB # 12902

I, MATTHEW KAYNE ROMERO, Cause No. 05-1-03566-0 being fully advised I have a right to be brought before the Court for a full Restitution Hearing, and to have an attorney present to represent me, and that the Court will appoint an attorney if I cannot afford one, hereby waive these rights and agree to entry of this order.

7/25/06  
Date

Presence waived  
Signature of Defendant

AM Quill # 6806  
Signature Witness or Attorney for Defendant

jl\*

**FILED**  
CRIMINAL DIV. 1  
IN OPEN COURT  
JUL 25 2006  
PIERCE COUNTY, Clerk  
By KC  
DEPUTY

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: (253) 798-7400

90 month DOSA sentence, concurrent with 05-1-00347-4 and 04-1-05350-3, along with standard fines and costs and a term of community custody.

IN ADDITION, the State will move to dismiss with prejudice causes 04-1-02670-1 and 03-1-05728-4.

FURTHER, the State will have no objection if these sentences are run concurrently with property crime cases in Thurston and Snohomish counties.

FURTHER, the State agrees to set over sentencing and recommend to the Court that **MATTHEW ROMERO** be released pending sentencing on his own recognizance

Defendant's initials M.R.

UPON THE CONDITION THAT **MATTHEW ROMERO** FAILS TO PERFORM ANY OF THE ABOVE PROMISES, FAILS TO APPEAR FOR ANY SUBSEQUENT COURT PROCEEDINGS OR COMMITS ANY CRIMES WHILE RELEASED THIS DOCUMENT WILL NO LONGER CONSTITUTE THE PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE'S RECOMMENDATION AND SUCH OFFICE WILL NO LONGER BE BOUND BY ANY AGREEMENT CONTAINED WITHIN THIS DOCUMENT.

**MATTHEW ROMERO FURTHER ACKNOWLEDGES AND UNDERSTANDS THAT:**

I, MATTHEW KAYNE ROMERO, do acknowledge that under Blakely v. Washington, 124 S.Ct 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573. I have a right to a jury determination of aggravating circumstances in this matter and I waive this right. I waive any right to appeal under the Blakely decision.

Matthew Romero  
MATTHEW KAYNE ROMERO

**FURTHERMORE,**

In the event that I, MATTHEW KAYNE ROMERO, 1. do not perform my promise of returning the aforementioned Chevrolet Corvette intact or 2. providing information to law enforcement information which results in the recovery of said vehicle or 3. fails to appear for any subsequent court proceedings or 4. commits any new crimes while released, the exceptional sentence of 114 months under cause 05-1-00347-4 and 04-1-05350-3 months will be recommended and agreed upon by my attorney and the

State per State v. Hilyard, 63 Wn.App. 413 (1991). This recommendation will include a Restitution Order in the amount of \$17,131.39 payable to the victim Donald Hanson. Under cause 04-1-01423-1, the MATTHEW ROMERO agrees to a standard range sentence of 120 months without any recommendation for a DOSA sentence, consecutive to 05-1-00347-4 and 04-1-05350-3. FURTHER, that the State may re-file causes 04-1-01423-1 and 03-1-05792-1.

**MATTHEW ROMERO** fully understands each and every term of this document, the entire document having been written in his primary language of English, and that **MATTHEW ROMERO** does not have any further questions;

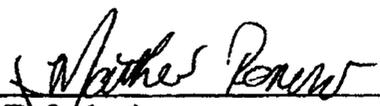
Defendant's Initials MR

**MATTHEW ROMERO'S** attorney, Jay Berneburg has fully informed **MATTHEW ROMERO** of the contents of this contract, its obligations, and all alternatives to entering this contract, including exercising right to a trial;

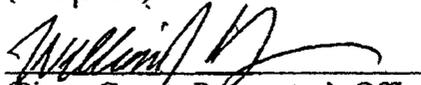
**MATTHEW ROMERO'S** attorney, Jay Berneburg, has fully reviewed the police reports in this case and has fully discussed with **MATTHEW ROMERO** the merits of the State's case and chance of successful prosecution;

Understanding the entire contents of this agreement, **MATTHEW ROMERO** wishes to enter into this agreement and accepts its obligations, doing so of **MATTHEW ROMERO'S** own free will, voluntarily, intelligently, and knowingly.

DATED THIS 15 day of March, 2005

  
(Defendant)

  
(Attorney for the Defendant)

 12902  
(Pierce County Prosecutor's Office)

**APPENDIX B - Pierce County Case Number  
05-1-03566-0: Information,  
Order for Dismissal, and  
Restitution Order.**



05-1-03566-0 23408322 INFO 07-21-05

18696 7/21/2005 08019

FILED  
IN COUNTY CLERK'S OFFICE

A.M. JUL 20 2005 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03566-0

vs.

MATTHEW KAYNE ROMERO,

INFORMATION

Defendant.

037 57137

DOB: 11/6/1975

SEX : MALE

RACE: WHITE

PCN#:

SID#: 17145313

DOL#: WA ROMERMK250QF

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MATTHEW KAYNE ROMERO of the crime of POSSESSING STOLEN PROPERTY IN THE FIRST DEGREE, committed as follows:

That MATTHEW KAYNE ROMERO, in the State of Washington, on or about the 4th day of November, 2004, did unlawfully, feloniously, and knowingly receive, retain, possess, conceal, or dispose of stolen property other than a firearm, to-wit: a 2004 Polaris loader, of a value in excess of \$1,500.00, belonging to Thomas Little/Zurich Insurance Co., and withheld or appropriated said property to the use of any person other than the true owner or person entitled thereto, contrary to RCW 9A.56.140(1) and 9A.56.150(1), and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse MATTHEW KAYNE ROMERO of the crime of THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

INFORMATION- 1

Office of the Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, WA 98402-2171  
Main Office (253) 798-7400

ORIGINAL

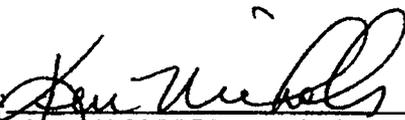
1 That MATTHEW KAYNE ROMERO, in the State of Washington, on or about the 4th through  
2 the 10<sup>th</sup> day of November, 2004, did unlawfully and feloniously obtain control over property and/or  
3 services other than a firearm, to-wit: \$3000, belonging to Michael Henderson/Lonnie Phillips dba H&P  
4 Yard Works, of a value exceeding \$1,500, by color or aid of deception, with intent to deprive said owner  
5 of such property and/or services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and against the  
6 peace and dignity of the State of Washington.

7 DATED this 20th day of July, 2005.

8 PIERCE COUNTY SHERIFF  
9 WA02700

10 GERALD A. HORNE  
11 Pierce County Prosecuting Attorney

12 Kln

13 By:   
14 KENNETH LYNN NICHOLS  
15 Deputy Prosecuting Attorney  
16 WSB#: 12053

22 ORIGINAL  
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