NO. 38317-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GONZALES,

Appellant.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

1. BECAUSE GONZALES WAS NOT ACCURATELY INFORMED OF ALL DIRECT SENTENCING CONSEQUENCES OF HIS GUILTY PLEA, THE PLEA WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY 6

a. Due process mandates that a guilty plea be voluntarily entered 6

b. Gonzales was not properly informed of the standard sentencing range prior to pleading guilty 8

c. Gonzales was not informed that no contact with Abundiz's family was a consequence of his guilty plea 10

d. Additionally, the no-contact order is impermissibly vague and not crime-related 12

2. THE PROSECUTION BREACHED THE PLEA AGREEMENT BY REPEATEDLY EMPHASIZING THE SERIOUSNESS OF THE CASE WITHOUT ADVOCATING FOR THE LOW OR MID-RANGE SENTENCE THAT WAS THE BASIS OF THE PLEA BARGAIN 14

a. A guilty plea is rendered fundamentally unfair when the prosecution breaches the plea agreement 14

b. The prosecutor breached the plea agreement at the first sentencing hearing 17

i. The prosecutor's remarks at the first sentencing hearing focused on uncharged crimes 19

ii. The prosecutor overstated Gonzales's criminal liability at the first sentencing 21

iii. The court's contention that it did not rely on the prosecutor's argument is irrelevant to its breach.... 23

iv. The prosecutor further breached the plea agreement at the second sentencing hearing 23

c. The prosecutor's repeated failures to pursue the agreed sentencing recommendation in good faith breached the plea agreement 25

F. CONCLUSION 28

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Hews, 108 Wn.2d 579, 741 P.2d 982 (1987) 7

In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) 7

State v. Bisson, 156 Wn.2d 507, 130 P.3d 820 (2006) 16

State v. E.A.J., 116 Wn.App. 777, 67 P.3d 518 (2003), rev. denied, 150 Wn.2d 1028 (2004) 15

State v. Harrison, 148 Wn.2d 550, 61 P.3d 1104 (2003) 16

State v. Jerde, 93 Wn.App. 774 , rev. denied, 138 Wn2d 1002 (1999) 26

State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006) ... 7, 8, 9, 10

State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988) 7, 12

State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980) 10, 13

State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997) 15, 25

State v. Van Buren, 101 Wn.App. 206, 2 P.3d 991, rev. denied, 142 Wn.2d 1015 (2000) 17

State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001) 7

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) 13

Washington Court of Appeals Decisions

State v. Carreno-Maldonado, 135 Wn.App. 77, 143 P.3d 343 (2006) 15, 16, 17, 23, 26, 27

State v. Grant, 83 Wn.App. 98, 920 P.2d 609 (1996) 10

State v. Wilson, 117 Wn.App. 1, 75 P.3d 573 (2003) 10

State v. Xavier, 117 Wn.App. 196, 69 P.3d 901 (2003) 17

United States Supreme Court Decisions

Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) 10, 13

Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) 7

Federal Decisions

United States v. Harvey, 791 F.2d 294 (4th Cir, 1986) 16

United States v. Transfiguracion, 442 F.3d 1222 (9th Cir. 2006) .. 15, 16

United States Constitution

Fifth Amendment 16

Fourteenth Amendment 2, 16

Sixth Amendment 16

Washington Constitution

Article I, § 3 16

Article I, § 22 16

Statutes

RCW 10.99.050 11

RCW 26.50.110 11

RCW 9.94A.030 13

RCW 9.94A.505 13

RCW 9.94A.700 13

RCW 9A.56.040 22

RCW 9A.56.200 22

RCW 9A.56.210 22

Court Rules

RAP 2.5 15

A. SUMMARY OF ARGUMENT.

In Michael Gonzales's earlier appeal, this Court found he pleaded guilty based on a misunderstanding of his standard sentencing range. Upon remand, the trial court improperly denied Gonzales's request to withdraw his guilty plea on the ground that he waived his right to a trial based upon this misunderstanding of his possible sentence. Additionally, he should be permitted to withdraw his plea because upon resentencing, the court imposed a no-contact order with the decedent's "family" and Gonzales had no knowledge of this direct condition of sentencing at the time he pleaded guilty. Also, the no-contact order for the victim's "family" is too vague to provide fair notice given the victim's large extended family. Finally, at both sentencing hearings, the prosecution breached the plea agreement by emphasizing uncharged and unproven inflammatory aspects of the incident without offering reasons for the court to impose the agreed low-end sentence, thus undercutting its promise to recommend a specific sentence.

B. ASSIGNMENTS OF ERROR.

1. Gonzales did not knowingly, intelligently, and voluntarily plead guilty because he misunderstood the sentencing range and

was never informed of the condition prohibiting contact with the decedent's family for life.

2. The no-contact order violates due process by barring contact with unspecified individuals who were not the victim of the offense.

3. The court lacked statutory authority to issue the no-contact order.

4. The prosecution breached its agreement under the plea bargain by undercutting its promised sentencing recommendation.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The Fourteenth Amendment Due Process Clause requires a guilty plea be entered knowingly, intelligently and voluntarily. If the defendant is misadvised about the direct sentencing consequences, including the applicable sentence for the offense or other direct sentencing consequences, the resulting plea is not entered knowingly, voluntarily and intelligently. Here, Gonzales was misadvised about his offender score and the no-contact order imposed as part of his sentencing. Did he knowingly, intelligently, and voluntarily plead guilty without understanding the direct sentencing consequences?

2. The right to due process of law requires the court to provide fair notice of sentencing conditions, and by statute, the court may impose no-contact orders as a sentencing condition only for the victim or witness. Did the court's blanket prohibition on contact with the decedent's "family" violate the court's sentencing authority and fail to provide fair notice when the victim had a large extended family and the court order does not specify which family members it covers?

3. The State breaches a plea agreement when it undercuts its promised sentencing recommendation, even if the court asserts it did not impose its sentence based on the prosecution's argument. Here, the prosecution repeatedly undercut its sentencing recommendation and never advocated for the agreed sentence in any meaningful fashion. Did the prosecution breach the plea agreement regardless of how its arguments undercutting the plea affected the sentencing court?

D. STATEMENT OF THE CASE.

Michael Gonzales pleaded guilty to one count of second degree felony murder predicated on a theft in the second degree on May 27, 2003. CP 155. In exchange for his guilty plea, the prosecution agreed to dismiss all other pending charges and

recommend a sentence of 180 months, which was near the low-end of the standard range of 144-265 months. CP 157. The 180-month sentencing recommendation was a joint recommendation. CP 115 (transcript from sentencing hearing of June 13, 2003, entered as Re-Sentencing Exhibit).

During Gonzales's sentencing hearing in 2003, 14 family members and friends spoke on behalf of the deceased, Oscar Abundiz. CP 87-109. After they spoke, the prosecutor recounted his allegations against the numerous perpetrators of the offenses related to Abundiz's death, even though Gonzales was only being held criminally liable for a portion of those acts. CP 111-16. The prosecutor mentioned the agreed sentencing recommendation, briefly, at the end of his discussion of the allegations against the numerous perpetrators.

Abundiz's death occurred when a group of individuals tried to rob him in the course of a prearranged marijuana sale. CP 113-14. Gonzales was present during the shooting, but was not the shooter. CP 116. After the shooting, some individuals burned Abundiz's body in an effort to cover up the crime, but Gonzales was not accused or convicted of being involved in the cover up. CP 113.

At this 2003 hearing, Gonzales's attorney explained the facts mitigating Gonzales's liability and punishment, including providing valuable assistance to the prosecution's case against the principal perpetrator. CP 116-20. The prosecutor did not acknowledge whether Gonzales gave the State any assistance or offer any mitigating factors favoring leniency for Gonzales, other than saying he did not intend to kill Abundiz. CP 116. The court imposed the maximum available sentence under the standard range, 265 months. CP 125.

Gonzales appealed, arguing that his offender score was incorrectly calculated and the State breached the plea agreement by failing to advocate for the agreed sentence. CP 133-35 (Court of Appeals No. 30756-1-II). This Court agreed Gonzales's offender score was incorrectly calculated and remanded the case for resentencing. CP 134. The ruling did not reach whether the State breached the plea bargain because it ordered a new sentencing hearing. CP 134 n.1.

At the resentencing hearing on January 14, 2005, Gonzales asked that he be allowed to withdraw his plea because he was misadvised of the sentencing range when he pled guilty. 1/14/05RP 2-3, 13. The court believed that a reduced standard

range did not undermine the voluntariness of the guilty plea and denied the request. 1/14/05RP 3.

The lower offender score reduced Gonzales's sentencing range from 165-265 months to 144-244 months. The prosecution and defense attorney jointly requested the same sentence of 180 months despite the reduced range. 1/14/05RP 6-7. The prosecution presented the transcript from the first sentencing hearing as an exhibit and asked the court to consider it when imposing sentence. 1/14/05RP 4-5; CP 85-131. The court imposed a sentence of 242 months, close to the top end of the standard range. 1/14/05RP 15.

Gonzales appeals from his resentencing. Pertinent facts are further discussed in the relevant argument sections below.

E. ARGUMENT.

1. BECAUSE GONZALES WAS NOT ACCURATELY INFORMED OF ALL DIRECT SENTENCING CONSEQUENCES OF HIS GUILTY PLEA, THE PLEA WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY

a. Due process mandates that a guilty plea be voluntarily entered. Due process requires that a guilty plea be knowing, intelligent, and voluntary. Henderson v. Morgan, 426 U.S.

637, 644-45, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976); In re Hews, 108 Wn.2d 579, 590, 741 P.2d 982 (1987). "A guilty plea is not knowingly made when it is based on misinformation of sentencing consequences." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004).

In Isadore, the Supreme Court found a guilty plea invalid when the defendant was not informed that he faced one year of community placement when he pled guilty, without regard to whether knowledge of that sentencing consequence was material to his decision to plead guilty. 151 Wn.2d at 302-03. Likewise, a defendant may withdraw his guilty plea when he was not informed of the correct sentencing range, regardless of whether the sentencing range is lower or higher than anticipated. State v. Mendoza, 157 Wn.2d 582, 592, 141 P.3d 49 (2006); State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

A knowing and voluntary plea requires a meeting of the minds. State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988). Misinformation or mutual mistakes regarding the applicable sentencing consequences undermine the knowing, intelligent, and voluntary nature of a plea. Id. "Absent a showing that the defendant was correctly informed of all of the direct consequences

of his guilty plea, the defendant may move to withdraw the plea." Mendoza, 157 Wn.2d at 591.

b. Gonzales was not properly informed of the standard sentencing range prior to pleading guilty. In Mendoza, the defendant pled guilty believing his offender score was "7," but he learned at sentencing it was "6." 157 Wn.2d at 584. The lower offender score decreased his standard range, and the prosecution reduced its sentencing recommendation in light of the new standard range, changing its recommendation from 60 months to 54 months incarceration, which was the high end of both standard ranges. Id. The sentencing court gave Mendoza an opportunity to object but he did not do so until his appeal. Id. at 585, 591.

The Supreme Court found the reduced offender score could invalidate the plea, ruling:

> a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated.

Id. at 591. Mendoza, however, waived his right to challenge the plea on this basis because he had the opportunity to object at the time of sentencing, when the court discussed the lower standard

range with him, and he did not ask to withdraw his plea on this basis at that time. Id. at 592.

Mendoza dictates the result in the case at bar. Gonzales entered into a plea bargain based on his belief that his offender score was "4," but in fact it was "2." 1/14/05RP 4. The lower offender score decreased his standard range from 165-265 months to 144-244 months.

Unlike the defendant in Mendoza, Gonzales asked to withdraw his plea when he had the opportunity to do so, even though the court did not believe he had any basis to withdraw his plea. At his resentencing hearing following the Court of Appeals ruling that his offender score had been incorrectly calculated, Gonzales notified the court that he believed this change in the available sentencing range was a basis to withdraw his plea. 1/14/05RP 2-3. He explained that he believed his misunderstanding of the sentence range constituted a "manifest injustice because I wasn't adequately informed of my sentencing," when he spoke to the court. 1/14/05 RP 13. The sentencing court did not offer him the opportunity to withdraw his plea. The court said it would "make a note on the record," but did not believe that a

reduction in the standard range was a basis to withdraw a guilty plea. 1/14/05RP 3.

As in Mendoza, Gonzales pleaded guilty based on a misunderstanding of the legal sentencing range. He asked to withdraw his guilty plea at the resentencing hearing following the court's recognition of the sentencing error. 1/14/05RP 2-3, 13. Gonzales was not informed of the direct sentencing consequences of his guilty plea and remand is required so that he may have the opportunity to withdraw his guilty plea. Mendoza, 157 Wn.2d at 592.

c. Gonzales was not informed that no contact with Abundiz's family was a consequence of his guilty plea. A no-contact order is a direct sentencing consequence when imposed as part of a sentence for a criminal conviction. State v. Wilson, 117 Wn.App. 1, 11, 75 P.3d 573 (2003); see State v. Grant, 83 Wn.App. 98, 111, 920 P.2d 609 (1996) (no-contact order imposed as sentencing condition is "continuing consequence" of conviction). A person must have fair warning of the issuance of a no-contact order and the prohibited conduct. Bouie v. City of Columbia, 378 U.S. 347, 350-51, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980); RCW

10.99.050. Violation of a no-contact prohibition entered as a condition of sentence is a separate crime. RCW 10.99.050. Any alleged violation thereof subjects the person to mandatory arrest without a warrant. RCW 26.50.110(2). As it was a direct sentencing consequence, Gonzales had a right to be informed of this condition prior to entering his plea.

Gonzales pleaded guilty as part of a negotiated plea bargain. CP 155-57. The prosecution agreed to recommend a specific sentence of 180 months and "dismiss all other charges and weapon enhancements." CP 157 (Statement on Plea of Guilty, p. 3). The prosecution's plea bargain offer did not mention the no-contact order, and the court did not impose a no-contact order when sentencing Gonzales in 2003. CP 155-61(Statement on Plea of Guilty); CP 138-54 (Judgment and Sentence entered June 13, 2003).[1]

However, upon resentencing in 2005, the court imposed a no-contact order barring Gonzales from having contact with "Mr.

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[1] The undersigned counsel attempted to review the guilty plea colloquy from May 27, 2003, in full, but discovered that a portion of the file is missing from this Court's archives. However, Gonzales's opening brief in his direct appeal, pages 7-12, in Court of Appeals No. 30756-1-II, contains a verbatim recitation of almost the entire plea colloquy and does not mention any discussion of a no-contact order. A motion to take transfer the record and the brief filed in Gonzales's appeal is being filed simultaneously with this brief.

Abundiz's family" for the rest of his life. The prosecution argues in its brief in response to Gonzales's personal restraint petition that the no-contact order has been part of the sentence since its inception, but this claim is incorrect. The Judgment and Sentence entered in 2003 did not impose any no-contact orders. CP 138-54.

The no-contact order was not part of the plea agreement and was not imposed as a result of the original sentence. CP 157. By including a no-contact order in the sentence entered upon remand, the guilty plea is rendered invalid because the no-contact order constitutes a direct sentencing consequence of which Mr. Gonzales was not warned. CP 72 (Judgment and Sentence entered 2005). He was never informed that this would be a direct sentencing consequence and was not given an opportunity to object. The imposition of a direct sentencing condition restricting Gonzales's freedom renders the guilty plea invalid and entitles Gonzales to his choice of either withdrawing his plea or specific performance of the plea bargain under the terms he understood. Miller, 110 Wn.2d at 531.

d. Additionally, the no-contact order is impermissibly vague and not crime-related. The court imposed an order prohibiting Gonzales from having any contact with "Mr. Abundiz's

family." CP 72. The order does not specify which of Mr. Abundiz's family members it includes, and does not provide Gonzales with fair notice of this sentencing condition. Bouie, 378 U.S. at 350-51; Shipp, 93 Wn.2d at 515-16.

The court's authority to order no contact with specified people rests on its power to order "crime-related prohibitions," defined as restrictions that "directly relate[ ] to the circumstances of the crime." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (citing RCW 9.94A.505(8); RCW 9.94A.030(13)). A community custody condition may include prohibiting contact with "the victim of the crime or a specific class of individuals." RCW 9.94A.700(5)(b). However, the lifetime no-contact order issued in the case at bar was not imposed as a community custody condition, and therefore it must be crime-related, in addition to complying with the due process requirement of fair notice.

The blanket and ambiguous prohibition on contacting "Mr. Abudiz's family" is too vague to provide fair notice. At the 2003 sentencing proceeding, 14 different people spoke on behalf of Oscar Abundiz, the decedent. CP 87-99. The speakers included his parents, siblings, cousins, grandparents, aunts, uncle and close friends who called Abundiz a brother. Id. Abundiz was an adult at

the time of his death and had children. According to Abundiz's brother, Gonzales did not know Abundiz but may have shared acquaintances with him. CP 96 (6/13/03RP 1474).

The lifetime prohibition on any direct or indirect contact with "Mr. Abundiz's family" is not limited to Abundiz's immediate family, the family members with whom he lived, or those with whom Gonzales had any connection. It does not define what part of Abundiz's family it covers, and given the broad range of Abundiz's extended family, the no-contact order's potential breadth stretches far.

It violates due process and is not reasonably crime-related to bar Gonzales from having contact with unspecified, unnamed people who were not involved in the incident itself and when possible family members includes a vast group of people. This sentencing condition must be stricken.

2. THE PROSECUTION BREACHED THE PLEA AGREEMENT BY REPEATEDLY EMPHASIZING THE SERIOUSNESS OF THE CASE WITHOUT ADVOCATING FOR THE LOW OR MID-RANGE SENTENCE THAT WAS THE BASIS OF THE PLEA BARGAIN

a. A guilty plea is rendered fundamentally unfair when the prosecution breaches the plea agreement. When a

criminal defendant pleads guilty with the understanding that the prosecution will recommend a particular sentence, the defendant has given up important constitutional rights based on the expectation that the prosecution will adhere to the terms of the agreement. State v. Carreno-Maldonado, 135 Wn.App. 77, 83, 143 P.3d 343 (2006). The defendant's purpose in entering into a plea agreement with the prosecution is based on the expectation that the prosecution will make a good faith recommendation at sentencing as promised. Id. at 88. The prosecution's breach of a plea is a structural error that is not subject to harmless error review. Id. at 87-88.

A breach of a plea agreement is a constitutional issue that may be raised for the first time on appeal. State v. E.A.J., 116 Wn.App. 777, 785, 67 P.3d 518 (2003), rev. denied, 150 Wn.2d 1028 (2004); RAP 2.5(a)(3). If the State has breached the plea agreement, the disposition cannot stand. Id.

A plea agreement is a contract in which ambiguities are construed against the drafter. United States v. Transfiguracion, 442 F.3d 1222, 1227-28 (9th Cir. 2006); State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Unlike commercial contracts, plea agreements require a criminal defendant waive fundamental

constitutional guarantees. Transfiguracion, 442 F.3d at 1227; State v. Harrison, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003); U.S. Const. amends. 5, 6, 14; Wash. Const. Art. I, §§ 3, 22. Therefore, due process considerations mandate especially rigorous compliance with rules on behalf of the prosecution, and "require a prosecutor to adhere to the terms of the agreement." Harrison, 148 Wn.2d at 556 (citing United States v. Harvey, 791 F.2d 294 (4th Cir, 1986)); see also Transfiguracion, 442 F.2d at 1228.

Issues concerning the interpretation of a plea agreement are questions of law reviewed *de novo* on appeal. State v. Bisson, 156 Wn.2d 507, 517, 130 P.3d 820 (2006). The prosecution is required to operate within "the literal terms of the plea it made." Transfiguracion, 442 F.2d at 1228. Ambiguities are construed in favor of the defendant. Id.

"The State's duty of good faith requires that it not undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement." Carreno-Maldonado, 135 Wn.App. at 83. A defendant has a right to have the prosecutor act in good faith even though the sentencing judge is not bound or even influenced by the prosecutor's recommendation. Id. at 88.

b. The prosecutor breached the plea agreement at the first sentencing hearing. In Carreno-Maldonado, the court found that where the prosecution agreed to recommend a low-end sentence, it breached the plea agreement by reciting "potentially aggravating facts." 135 Wn.App. at 85. If the prosecutor's recommendation was in the middle of the sentencing range, it would have a reason to discuss the facts of the case to guard against a lower sentence, "[b]ut a prosecutor must use great care in such circumstances, and the facts presented must not be of the type that make the crime more egregious than a typical crime of the same class." Id. at 84-85; see also State v. Xavier, 117 Wn.App. 196, 200-02, 69 P.3d 901 (2003) (breach where prosecutor discussed aggravating factors and charges not pursued, and denigrated defendant as "prolific child molester"); State v. Van Buren, 101 Wn.App. 206, 217, 2 P.3d 991, rev. denied, 142 Wn.2d 1015 (2000) (breach were prosecutor only mentioned recommended sentence briefly and discussed probation report's exceptional sentence request in detail).

In exchange for Gonzales's guilty plea, the prosecution agreed to recommend a sentence close to the low end of the standard range and to dismiss some of the charges pending

against Gonzales. CP 139, 157. Gonzales agreed to waive his constitutional trial rights and also provide testimony against another perpetrator, Patrick Calfrobe. CP 116-17; CP 155-61. Gonzales pleaded guilty to one count of second degree felony murder predicated on the underlying offense of second degree theft. CP 155. The standard range was 165-265 months, and the promised joint recommendation under the terms of the plea bargain was 180 months. CP 155-57.

Gonzales challenged the prosecutor's breach of the plea agreement in his first appeal. Because this Court remanded the case for resentencing on other grounds, it did not decide the issue. CP 134 n.1 (Court of Appeals decision, ruling that because the case is being remanded for a new sentencing hearing, "we do not address the State's actions during the sentencing hearing"). However, because the transcript of the 2003 sentencing hearing was entered as an exhibit and presented to the court for its consideration at the 2005 resentencing, the prosecutor's earlier sentencing argument remain pertinent to assessing the prosecutor's good faith compliance with the plea bargain. CP 85-131.

i. The prosecutor's remarks at the first sentencing hearing focused on uncharged crimes. At the start of the 2003 sentencing hearing, and before explaining the plea bargain, the prosecutor opened the floor to family members who wished to speak on behalf of the deceased, Oscar Abundiz. CP 87 (6/13/03RP 1465). The prosecutor noted that these people had spoken to the same judge one day earlier, when the court sentenced the shooter Barbee. Id. Fourteen individuals spoke in a highly emotional fashion of their personal pain in losing Abundiz. CP 87-109 (6/13/03RP 1466-87). These speakers included Abundiz's grandmother, parents, brothers, aunts, and cousins. Two people spoke briefly on Gonzales's behalf, his mother and wife. CP 109-11 (6/13/03RP 1487-89).

When it was the prosecutor's turn to speak, he did not mention the plea bargain or his sentencing recommendation. He noted that the court had "heard from a lot of people today" and reminded the court that it had sentenced Gonzales's co-defendant Barbee the day before to 364 months incarceration. CP 111-12 (6/13/03RP 1489-90). Then the prosecutor recounted the allegations against the various perpetrators "as I did yesterday" at Barbee's sentencing. CP 112 (6/13/03RP 1490). All of the

"players" knew they were participating in a robbery and Abundiz was killed in the course of this robbery, the prosecutor explained. CP 112-13 (6/13/03RP 1490-91). After the "robbery," Abundiz's body was burned, and it was not clear who was responsible for what. CP 113 (6/13/03RP 1491). The prosecutor referred to the underlying offense as a "robbery" at least seven times. CP 112-13 (6/13/03RP 1490-91).

Only after delving into the disputed allegations and reciting his version of horrific events leading to and following the murder did the prosecutor even mention his recommended sentence. CP 115 (6/13/03RP 1493). After mentioning he agreed to recommend 180 months, he also explained that he did not see any aggravating factors available that would justify an exceptional sentence greater than the high end of the standard range, but did not explain why he thought a low-end sentence was appropriate. CP 116 (6/13/03RP 1494). He noted Gonzales was not the actual killer and thus should not receive a sentence as severe as Barbee's, although he added that Gonzales should not be treated more leniently than others, because, "Even in light of my recommendation, I view it the same with respect to the other actors, the other defendants in this particular case." Id.

The court imposed the maximum sentence under the standard range, 265 months, far above the 180-month agreed recommendation. CP 125 (6/13/03RP 1503). The prosecutor did not echo, or even speak to, defense counsel's plea for a sentence in accordance with the joint recommendation based on Gonzales's significant assistance with the prosecution of Barbee, as well as the lack of evidence of Gonzales's involvement in the arson following the shooting, his limited role in the incident, and his lack of advance participation or planning of any of the events. 6/13/03RP 1495-97.

ii. The prosecutor overstated Gonzales's criminal liability at the first sentencing. As discussed above, the prosecutor barely mentioned, much less advocated for the low-end sentence that was central to the plea bargain. Instead, he greatly overstated Gonzales's criminal liability. His remarks were not in response to questions from the court and were not an effort to respond to defense arguments seeking a lower sentence, as the joint recommendation was agreed by both parties.

Gonzales pleaded guilty to felony murder predicated on second degree theft. CP 155. He did not plead guilty to being involved in a robbery. But the prosecutor repeated at least seven times that Gonzales participated in a robbery. CP 112-13

(6/13/03RP 1490-91). He claimed there was no dispute that Gonzales participated in the robbery's planning and execution. Id.

A robbery is a violent offense: first degree robbery is a class A violent offense with a seriousness level of 9; second degree robbery is a class B violent felony with a seriousness level of 4. RCW 9A.56.200; RCW 9A.56.210. The predicate offense underlying the felony murder for which Gonzales pleaded guilty was second degree theft -- a nonviolent, class C felony, with a seriousness level of 1. RCW 9A.56.040. Gonzales did not plead guilty to participating in a robbery but the prosecutor repeatedly emphasized Gonzales's purported involvement in a robbery and his equal liability with all participants in the robbery other than the actual shooter. CP 115-16 (6/13/03RP 1495-96).

The prosecutor did not present Gonzales's role as limited, rather he said he was as equally guilty as everyone else, other than the actual shooter. He did not offer any mitigation in Gonzales's favor, such as his assistance to the prosecution of the shooter. He referred to Barbee's sentencing several times, and to the emotional victim testimony the court had heard for Barbee as well as Gonzales. The clear emphasis on the egregious facts of the case even when Gonzales was not being sentenced for and had not

been convicted of involvement in those acts constituted a direct attempt to undercut the plea bargain.

iii. The court's contention that it did not rely on the prosecutor's argument is irrelevant to its breach. At the resentencing, the prosecutor asked the court to declare that he had not breached the plea agreement at the first sentence, because Gonzales had argued this breach in his direct appeal. The court found the prosecutor had not "undercut" his sentencing recommendation. 1/14/05RP 14.

But the actual effect of the prosecutor's arguments on the court is irrelevant. Carreno-Maldonado, 135 Wn.App. at 88. The prosecutor is required to act in good faith and advocate for the agreed sentence regardless of whether the court imposes that sentence. Id. No harmless error test applies. Id.

iv. The prosecutor further breached the plea agreement at the second sentencing hearing. At the resentencing hearing, the prosecutor offered the court the transcript from the first sentencing hearing as an alternative to presenting testimony from members of Abundiz's family who were in the courtroom. 1/14/05RP 4-5. The prosecutor gave the court a copy of the full

sentencing transcript from 2003, not only the portion of the transcript involving testimony from Abundiz's family. CP 85-131.

Despite repeating the 180-month sentencing recommendation at the resentencing hearing, the prosecutor offered no argument as to why this was an appropriate sentence. He did not explain whether Gonzales gave any assistance to the prosecution against Barbee, as defense counsel contended. He did not speak to whether Gonzales was peripheral to the incident or was the only individual of the group prosecuted who was uninvolved in the planning, as defense counsel argued.

Rather than offering any argument that Gonzales had only a minor role in the incident or was helpful to the prosecution, the prosecutor interrupted defense counsel when he argued Gonzales was less culpable than the other defendants and deserved a lesser sentence. 1/14/05RP 11. The prosecutor told the court that one of the co-defendants said Gonzales gave him the taser that others used on Abundiz, presumably as evidence of Gonzales's increased liability. Id. The prosecutor said, "if we are going to talk about culpability and not what the recommendation is, there is tons of culpability that attaches to each and every one of these particular defendants." Id. at 12.

The prosecutor explained to the court the various guilty pleas and sentences received by the other people charged and convicted in the case. 1/14/05RP 8-10. The other defendant who pleaded guilty to second degree murder received 220 months; one who pleaded guilty to second degree murder and arson received 242 months; one who pleaded guilty to first degree murder received 364 months. Id. at 9-10.

The prosecutor repeated his 180-month sentencing recommendation but gave the court no reason to impose this sentence. When given the opportunity to articulate any factual basis for imposing a sentence less than the sentences imposed on other participants, the prosecutor instead snipped that there was "tons of culpability" for every defendant.

c. The prosecutor's repeated failures to pursue the agreed sentencing recommendation in good faith breached the plea agreement. The prosecution is not required to make an agreed sentencing recommendation with particular enthusiasm, but it has "a duty not to undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the plea agreement." Sledge, 133 Wn.2d at 840. An objective standard applies to determining whether the prosecution has

breached the plea agreement, "irrespective of prosecutorial motivations or justifications for the failure in performance." Carreno-Maldonado, 135 Wn.App. at 83; State v. Jerde, 93 Wn.App. 774, 780, rev. denied, 138 Wn2d 1002 (1999).

In Jerde, the prosecutor announced his or her recommendation but then emphasized and advocated factors supporting an exceptional sentence, thus breaching the plea agreement. 93 Wn.App.at 780. In Carreno-Maldonado, the prosecutor described the offenses as heinous and the defendant as violent but repeated several times that the State was not straying from the agreed recommendation. 135 Wn.App. at 81-83. The trial court far exceeded the agreed recommendation, but it expressly ruled that it was not swayed by and did not impose sentence based on the prosecutor's arguments. Id. at 83.

In the case at bar, the prosecutor emphasized Gonzales's involvement in events for which he was not convicted and expressly contradicted defense counsel's claim that he was not as culpable as other co-defendants by insisting that all defendants shared equal culpability. Because no other defendant who pled guilty to murder received a sentence less than 220 months, the "equally culpable" argument implicitly sought a sentence at least

that high, and certainly supplied no basis for a sentence of 180 months. 1/14/05RP 9.

The prosecutor offered no explanation as to why Gonzales should receive a lower-end sentence and said "tons of culpability attaches to each and every" defendant. 1/14/05RP 11. He continually asserted that Gonzales participated in a robbery, although Gonzales pled guilty to participating in a theft, and harped on the disturbing facts of the case even when Gonzales was not accused of having participated in those aspects of the incident.

The prosecutor had no right to undercut his promised 180-month sentencing recommendation. "The plea bargaining process requires that both the State and the defendant adhere to their promises." Carreno-Maldonado, 135 Wn.App. at 88. By focusing on aggravating facts that were not part of the basis of Gonzales's conviction and proclaiming his "equal" culpability with those who received sentences higher than 180 months, the prosecutor undermined the plea bargain, as it was now predicated on the false premise that the State would seek a sentence that it asked for in name only. Gonzales was entitled to a good faith recommendation by the State as promised. Instead the prosecutor clearly signaled his belief that the offense was egregious and Gonzales deserved a

sentence in line with that imposed upon other perpetrators. His case should be remanded to allow him the opportunity to withdraw his guilty plea.

F. CONCLUSION.

For the reasons stated above, Michael Gonzales respectfully asks this Court to remand his case for the opportunity to withdraw his guilty plea.

DATED this 30th day of January 2009.

Respectfully submitted,

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. MICHAEL GONZALES, Appellant.	)))))))))	NO. 38317-9-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JANUARY, 2009.

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