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NO. 50169-4-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

CURTIS KK ESCALANTE,

Appellant.

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

The Honorable Bryan E. Chushcoff, Judge

REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY**

**1. THE STATE BREACHED THE PLEA AGREEMENT BY ALL BUT IGNORING ITS AGREEMENT TO RECOMMEND 216 MONTHS AND BY ENGAGING IN IMPERMISSIBLE ADVOCACY ON BEHALF OF A VICTIM**

In its response, the State argues that the State adhered to the terms of the plea agreement,<sup>1</sup> and that restrictions on a prosecutor's advocacy are relaxed when the plea agreement calls for a high-end sentencing recommendation.<sup>2</sup> The State then argues, however, the "prosecutor no more undercut the plea bargain than did the defense."<sup>3</sup> The State was entitled to rebut mitigation facts propounded by Escalante and former co-defendant Michael Williams at the sentencing hearing.<sup>4</sup> In its response, however, the State blurs the distinction between rebutting factual information advocated by Escalante and Williams and an outright undercutting of its agreement to request a sentence within the standard range. The State attempts to have it both ways by arguing that it adhered to the agreement, but if it was violated, it was violated by both sides. This 'both sides were doing it' argument should be rejected.

A defendant gives up important constitutional rights by agreeing to enter into a plea bargain; the State must adhere to the terms of a plea agreement by recommending the agreed upon sentence. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). The State is not required to enthusiastically advocate its sentencing recommendation, but nevertheless the prosecution has a duty of good faith to not undercut the terms of the

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<sup>1</sup>Brief of Respondent (BR) at 9.

<sup>2</sup>BR at 10-11.

<sup>3</sup>BR at 11.

<sup>4</sup>Escalante was sentenced with former co-defendant Michael Williams, who also appealed his sentence in Cause No. 50129-5-II.

agreement explicitly or implicitly. *State v. Carreno-Maldonado*, 135 Wash.App. 77, 83-84, 143 P.3d 343 (2006). The prosecutor must not “undercut the terms of the agreement explicitly or by conduct evidencing an intent to circumvent the terms of the ... agreement.” *Sledge*, 133 Wn.2d at 840 (quoting *In re Palodichuk*, 22 Wn. App. 107, 589 P.2d 269 (1987)). A breach occurs, however, when the State offers unsolicited information by way of report, testimony, or argument that undercuts the State's obligations under the plea agreement. See, e.g., *Carreno-Maldonado*, 135 Wn. App. at 83-84, (breach where prosecutor agreed to recommend a low-end sentence and mid-range sentences for first and second degree rape but recited potentially aggravating facts at sentencing, and defendant was sentenced to high end sentences); *State v. Xaviar*, 117 Wn. App. 196, 200-02, 69 P.3d 901 (2003) (breach where prosecutor referred to aggravating sentencing factors and other charges not pursued and called the defendant one of the most “prolific child molesters”); *State v. Van Buren*, 101 Wn. App. 206, 217, 2 P.3d 991 (breach where prosecutor downplayed mid-range sentencing recommendation and focused the court's attention on three aggravating factors), review denied, 142 Wn.2d 1015 (2000); *State v. Jerde*, 93 Wn. App. 774, 782, 970 P.2d 781 (1999) (breach where prosecutor emphasized aggravating factors when obligated to make a mid-range sentencing recommendation).

In *Sledge*, the prosecutor insisted on an evidentiary hearing, notwithstanding a guilty plea. 133 Wash.2d at 831. At the hearing, the State announced its standard range sentencing recommendation but then brought forth a probation officer and parole officer, both of whom testified in support of factors supporting an exceptional disposition. *Sledge*, 133 Wash.2d at 831, 833-36, 947 P.2d 1199. The State's examination of both witnesses focused on facts supporting aggravating factors. *Sledge*, 133

Wash.2d at 833-36. The State summarized the evidence supporting an exceptional disposition. *Sledge*, 133 Wash.2d at 837. The Supreme Court held that the State's conduct breached the plea agreement. *Sledge*, 133 Wash.2d at 843.

In this case, the State referred to a recommendation for 216 months only once during closing argument,<sup>5</sup> and instead argued that the defense argument for mitigating circumstances was “beyond appalling” and “preposterous.” RP at 74, 98. This was compounded when the State, under circumstances similar to those condemned in *Sledge*, argued that the facts of the case constituted an aggravating factor, thereby not only undercutting the defense request for an exceptional sentence downward, but implicitly arguing for an exceptional sentence upward. The prosecution argued:

It is a statutory aggravator factor. How in the world, if that is a statutory aggravating factor, can they then say another part of the statute, which, of course, doesn't apply here? They are not willing participants.

RP at 68-69.

This is compounded by the State's sentencing memorandum, in which the prosecution argues:

It fact, however, RCW 9.94A.535(3)(1), indicates a person convicted of “human trafficking in the second degree and any victim was a minor at the time of the offense” is an **aggravating factor**.

CP 70 (emphasis in original).

The improper argument affected the court's analysis of the defense's request and was reflected in the comment by the sentencing judge, who stated “[w]ell, I think I can reconcile at least the legal part of the this in

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<sup>5</sup> RP at 95.

terms of whether something is mitigation circumstances or an aggravating circumstance.” RP at 87. The prosecution further undercut the plea argument when he argued that both Escalante and Williams committed a higher, undercharged offense “Certainly [R.], by legal definition, is being raped every single day, and these guys are the accomplices to rape. Every single count of these guys, they are an accomplice to Rape Child III.” RP at 64-65.

Breach of a plea agreement is reversible error and not subject to harmless error analysis. *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). “The prosecutor's conduct in failing to make the bargained-for recommendation eliminates the basis for the bargain struck. ... Such an error infects the entire proceeding and, as such, it is a structural error that cannot be harmless.” *Carreno–Maldonado*, 135 Wn. App. at 88. Here, the trial court rejected the defense request for an exceptional sentence below the range and imposed 200 months. CP 53-67.

An objective assessment of the prosecutor’s conduct in this case shows that he undercut the terms of the plea agreement. The prosecutor made virtually no attempt to speak to the agreed sentencing recommendation, with the exception of the state’s sole reference to a 216 month sentence. RP at 95.

The State also breached the agreement by speaking for L. during sentencing. RP at 28-29. Chapter 7.69 RCW does not give the State the right to speak for victims when they have not requested the State's assistance in communicating with the court. *Carreno–Maldonado*, 135 Wash.App. at 86; RCW 7.69.030(14) (requires a reasonable effort enabling “victims and survivors of victims[ ] to present a statement personally or by representation [ ] at the sentencing hearing for felony convictions”).

Here, the State argues that L. later requested permission to address

the court,<sup>6</sup> but by that time, the impermissible advocacy, in violation of the plea agreement, had already occurred. The prosecutor's assertion that L. is "afraid" "of these two men right here" constitutes a breach because the record did not show that the prosecutor was answering questions posed by the sentencing court or assisting L. in the exercise of her right to address the court, nor is there a showing that L. asked the prosecutor to serve as her proxy. Instead, the prosecutor's statement that she is "afraid" and that she supports the State's recommendation of "the high end" were the same caliber of unsolicited advocacy which this Court in *Carreno-Maldonado* found to be a breach of the State's recommendation. *Id.* at 85-87.

Where, as here, the prosecutor breaches the plea agreement, a defendant has his choice of remedies. He may vacate the agreement and demand a trial or elect a new sentencing hearing in front of a different judge. *Sledge*, 133 Wn.2d at 846. Escalante was denied the benefit of his bargain and should be offered these options.

**B. CONCLUSION**

For the reasons stated herein, and in appellant's opening brief, Curtis Escalante respectfully requests this Court to vacate the sentence and remand for election of remedy, which includes withdrawal of his guilty plea.

DATED: March 16, 2018

Respectfully submitted,  
THE TILLER LAW FIRM



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<sup>6</sup>RP at 86.

CERTIFICATE OF SERVICE

The undersigned certifies that on March 16, 2018, that this Reply Brief of Appellant was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Michelle Hyer, Pierce County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following appellant at:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 16, 2018.



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