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JUN 15 2015

COURT REPORTERS  
OF  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 328988-III

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. NEISLER

Appellant.

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**APPELLANT'S REPLY TO BRIEF OF  
RESPONDENT**

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Submitted by:

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Law Office of Steve Graham  
1312 North Monroe, #140  
Spokane, WA 99201  
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## **I. DISCUSSION**

- A. The Appellant did not assign error to the imposition of the exceptional sentence, rather, the assigned error pertains to the prosecutor's conduct in regards to the understood terms of the plea agreement.**

The petitioner did not assign error to the imposition of an exceptional sentence; but rather, the petitioner assigns error to the conduct of the prosecutor, which was in violation of the plea agreement. Brief of Appellant at 4.

The Respondent argues that the appellant is prohibited from requesting that the conviction be reversed because the Appellant is actually assigning error to the exceptional sentence imposed by the sentencing court as opposed to the conduct of the prosecutor and such an error would be subject to the invited error doctrine. Brief of Respondent at 2.

This contention, however, is misinterpreting the Appellant's brief and the real issue. Rather, the real issue is specifically addressing comments made by the Prosecuting attorney during sentencing and how those statements circumvented the negotiated terms of the plea agreement.

To support this contention, the Respondent relies on the fact that the defendant plead guilty to the aggravating factor of

count 2. *Id.* at 3-4. Additionally, the Respondent also asserts that the defendant recommended a sentence, implicating the exceptional sentence, of 16 to 18 months. *Id.* at 4.

Consequently, the Appellant concedes these assertions are correct. However, the focus of this inquiry is not on the defendant's statements at the time of sentencing, nor the imposition of the exceptional sentence imposed by the court.

The real issue pertains to the conduct of the State. *See* Brief of Appellant at 4. Namely, it was understood, prior to the entering of Defendant's Statement on Plea of Guilty, that the defense would plead guilty to the aggravating factor of Count 2. CP at 42-43. In exchange for the plea, the State would remain silent as to sentencing. Consequently, while the State did not recommend a specific sentence, the State over emphasized the nature of the injuries in this case as amounting to a fate worse than death thereby straying from the agreed terms of the plea agreement. RP at 13.

Ultimately, the Appellant does not assign error for the imposition of the exceptional sentence. Rather, the Appellant argues that the State breached the terms of the plea agreement by its conduct and statements.

## **II. Conclusion.**

The Respondent contends that the Appellant is prohibited from seeking a reversal of the conviction pursuant to the Invited Error Doctrine because its position is that the Appellant is actually assigning error to the exceptional sentence imposed by the court even though the Defense, at the time of sentencing, recommended a sentence outside the standard range. However, this argument is misplaced, the Appellant does not contend that the sentencing court erred. Rather, the Appellant asserts that the State violated the terms of the negotiated plea agreement and due to this violation, the Appellant's conviction should be reversed.

DATED this 18<sup>th</sup> day of June, 2015.

By   
Anthony P. Martinez, WSBA #46392  
Law Office of Steve Graham  
Attorney for Appellant Michael D. Neisler

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**NO. 328988- III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

<p><b>STATE OF WASHINGTON</b></p> <p style="text-align: right;"><b>Respondent,</b></p> <p style="text-align: center;"><b>vs.</b></p> <p><b>MICHAEL D. NEISLER,</b></p> <p style="text-align: right;"><b>Appellant.</b></p>	<p><b>STEVENS COUNTY NO. 13-1-00247-1</b></p> <p><b>AFFIDAVIT OF SERVICE</b></p>
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I, Anthony Martinez, do hereby certify under penalty of perjury that on June 18th, 2015, I hand delivered a true and correct copy of the foregoing Appellant's Reply to Brief of Respondent, to:

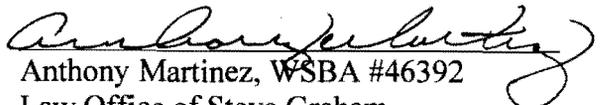
The Court of Appeals, Division III  
500 North Cedar Street,  
Spokane, WA 99210

I also mailed, by US Mail, on June 18th, 2015, a true and correct copy of the forgoing Appellant's Reply to Brief of Respondent to the following parties:

Mr. Lech Radzinski  
Deputy Prosecuting Attorney  
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Mr. Michael D. Neisler, #378161  
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Washington State Reformatory Unit  
P.O. Box 777  
Monroe, WA 98272

DATED this 18<sup>th</sup> day of June, 2015

  
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