

**NO. 48143-0-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**DANNY ALLEN WING,**

Appellant.

---

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

The Honorable Nelson Hunt, Judge

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**CORRECTED  
BRIEF OF APPELLANT**

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## INTRODUCTION

Danny Wing (“Wing”) and his wife, Brenda, themselves the parents of three young children, agreed to take in an acquaintance’s three year old son JHW. RP 9/25/15<sup>1</sup> at 22-23. Unfortunately, JHW died after being in the Wings’s care for less than three months. Id. at 27.

The State charged Danny Wing with crimes related to the death of JHW. CP 1-4. With the help of counsel, Wing accepted a plea offer and pleaded guilty to manslaughter in the first degree and abuse of a child in the third degree both charged as domestic violence offenses. CP 5-6, 9-18; RP 3/19/15 at 2-10. As Wing had no biological or legal family relationship with JHW, the relationship did not equate to domestic violence. RCW 10.99.020; RCW 9.94A.030(2). In entering his plea, Wing unknowingly relied on a miscalculated offender score.

Wing’s plea agreement made his sentencing options contingent on Wing passing two polygraphs. If Wing passed the polygraphs, he received a standard range sentence. If he failed the polygraphs, the court could impose sentencing enhancements in addition to Wing’s standard range. Wing failed both polygraphs. RP 9/25/15 at 2-18. But rather than introducing sentencing enhancements for the court’s consideration, the State gave the court aggravating sentencing factors to consider. RP

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<sup>1</sup> The verbatim report of proceedings reports hearings held on various dates. The hearing date is shown after “RP.”

9/25/15 at 20-21; CP 20-22. The court used the aggravating factors – one of which was the mischaracterized domestic violence – to sentence Wing to 416 months, 222 months more than the high end of Wing’s (miscalculated) standard range. CP 26-27; RP 9/25/15 at 58.

The miscalculated offender score and standard range sentence makes Wing’s guilty plea not knowing and intelligent and Wing may withdraw his plea. The prosecutor’s breach of the plea agreement entitles Wing to specific performance of the plea and resentencing without aggravating sentencing factors.

#### ASSIGNMENTS OF ERROR

1. Domestic violence was not proven contrary to Judgment and Sentence Section 2.1.

2. Wing’s plea was involuntary as it was based on an incorrect offender score calculation and incorrect standard ranges.

3. Wing’s guilty plea is involuntary as he was misadvised of the correct offender score calculation and standard ranges.

4. The prosecutor breached the plea agreement when he asserted Wing agreed to the addition of sentencing aggravating factors when the written plea agreement bound Wing only to the addition of sentencing enhancements.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court improperly characterized the relationship between Wing and JHW as domestic violence when Wing, only JHW's temporary caregiver, had no biological or legal parent-child relationship with JHW?

2. Whether Wing's guilty plea was knowing and intelligent when, in pleading guilty, he relied on a miscalculated offender score of 6 points rather than the correct calculation of 5 points and consequently wrong standard ranges?

3. Whether the prosecutor breached the plea agreement by asserting the court could use aggravating factors at sentencing when the written plea agreement only approved the use of sentencing enhancements?

## STATEMENT OF THE CASE

### **1. Danny Wing accepted temporary care of JHW, an acquaintance's three year old son.**

Twenty-six year old Danny Wing ("Wing") knew Nikki Warner "through a foster family scenario." RP 9/25/15 at 37; CP 4. Years later, in 2014, their paths crossed. RP 9/25/15 at 51; CP 1-4. By then, Warner had a three year old son, JHW. RP 9/25/15 at 51. Warner, who was raising JHW on her own, could not adequately care for the child. Id. Wing and his

wife, Brenda Wing, lived in a house and had three young children. RP 9/25/15 at 51. Warner asked if they could care for JHW while she got her life in order. RP 9/25/15 at 51. The Wings agreed to take JHW into their home and signed an agreement with Warner to care for JHW. RP 9/25/15 at 21.

**2. When JHW died in Wing's care, the State charged Wing with causing JHW's death.**

JHW died less than three months later due to physical abuse inflicted by both Danny and Brenda Wing. RP 9/25/15 at 27. The Lewis County prosecutor initially charged Wing with homicide by abuse<sup>2</sup> and manslaughter in the first degree.<sup>3</sup> CP 1-4. The Information alleged Wing used his position of trust to facilitate the crimes and that Wing should have known JHW was particularly vulnerable or incapable of resistance. CP 1-4.

**3. Wing negotiated a plea agreement with the State and pleaded guilty to manslaughter in the first degree and assault of a child in the third degree as domestic violence and with a sentence contingent on Wing passing polygraphs.**

The State and Wing worked together to draft and redrafted a mutually agreeable plea agreement. RP 9/25/15 at 9. The resulting document is titled "Proffer Agreement for Danny Allen Wing."

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<sup>2</sup> RCW 9A.32.055

<sup>3</sup> RCW 9A.32.060(1)

Supplemental Designation of Clerk's Papers, Response to State's "Violation" Motion (sub. nom. 83) at pages 6-8. See Proffer Agreement attached as Appendix. The agreement allowed Wing to plead guilty to manslaughter in the first degree and assault of a child in the third degree both characterized as domestic violence offenses. Appendix; RP 3/19/51 at 2-4. In exchange, the State dismissed the homicide by abuse with prejudice and Wing agreed to provide truthful information to the prosecutor about the abuse of JHW and pass two polygraphs to confirm his truthfulness. Appendix; RP 3/9/15 at 2-4. If Wing passed the polygraphs, both parties would argue for their favored sentence within the 146-194 month<sup>4</sup> standard range. However, if Wing did not pass the polygraphs, he would stipulate the prosecutor could "re-file the enhancements" for both charges. Appendix.

Wing pleaded guilty with a stipulated offender score of 6 points. CP 7-8, 10; RP 3/19/15 at 2-10. The written plea agreement was not filed with the plea. RP 3/19/15 at 3. Instead, the parties summarized it for the court. RP 3/19/15 at 3-8. Rather than using the term "enhancement" during the plea hearing, the prosecutor and defense counsel used the words "enhancement" and "aggravator" loosely and without distinction. RP 3/19/15 at 3-4.

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<sup>4</sup> This anticipates an offender score of 6.

When Wing entered his guilty plea, he understood the prosecutor's plea recommendation from two written sources: the Statement of Defendant on Plea of Guilty, CP 12, and the Proffer Agreement (Appendix).

**4. Prior to sentencing, Wing agreed he failed two polygraphs.**

Prior to sentencing, the State and Wing disagreed over whether a failed polygraph administered by an unlicensed polygrapher counted as a failure per the written plea agreement. RP 9/25/15 at 2-14; Appendix. The trial court interpreted the plea agreement's use of the word "licensed" to mean a failed polygraph could only count as a failure against Wing if the polygraph was administered by a licensed polygrapher. RP 9/25/15 at 14-15. By that standard, Wing failed only one of his pre-sentencing polygraphs. RP 9/25/15 at 15.

Because Wing wanted to go ahead with sentencing, he waived the polygrapher licensing requirement and agreed orally and in writing to having failed two polygraphs. RP 9/25/15 at 16-18; CP 19.

5. **The State breached its plea agreement by having Wing agree to the addition of aggravating sentencing factors for the court’s consideration rather than sticking with the sentencing enhancements agreed to in the plea agreement.**

Per the Proffer Agreement, even if Wing failed two polygraphs, he was not subject to the trial court having aggravating sentencing factors for its consideration at sentencing: Wing was subject only to sentencing enhancements. Appendix. But once Wing agreed he failed two polygraphs, the State introduced language that Wing stipulated to a supplemental amended information “adding aggravating [sentencing] factors.” CP 19. The State also filed a Supplemental Amended Information Adding Aggravating Factors. CP 20-22. Wing did not object to the filing. RP 9/25/15 at 19-21. The stipulation specified aggravating factors of domestic violence<sup>5</sup>, use of a position of trust<sup>6</sup>, and particular vulnerability of JHW<sup>7</sup>. CP 20-22.

6. **The trial court reached outside the plea agreement and sentenced Wing using aggravating sentencing factors – rather than sentencing enhancements – to give Wing an exceptional 416 month sentence.**

Rather than imposing a sentence within the standard range, or applying any enhancements, the court relied on three aggravating factors – domestic violence, abuse of trust, and particular vulnerability – to impose

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<sup>5</sup> RCW 10.99.020

<sup>6</sup> RCW 9.94A.535(3)(n)

<sup>7</sup> RCW 9.94A.535(3)(b)

exceptional sentences of 416 and 48 months, respectively, on the manslaughter and the abuse of a child. RP 9/25/25 at 58, 64; CP 26.

The court specifically chose 416 months because it felt homicide by abuse was the crime Wing committed and 416 months was the high end with an offender score of 6. RP 9/25/15 at 58-59. The court also found any of the three aggravating factors, standing alone, support the exceptional sentence imposed. RP 9/25/15 at 61. Supplemental Designation of Clerk's Papers, Findings of Fact and Conclusions of Law for an Exceptional Sentence (sub. nom. 122).

Wing appeals all portions of his Judgment and Sentence. CP 35-47.

## ARGUMENT

### **1. Wing's offenses are not domestic violence.**

*Summary of Argument.* Wing's relationship with JHW does not meet the statutory criteria for characterization as domestic violence because they are not, by definition, family or household members. They had to be family or household members for the current offenses of manslaughter in the first degree and assault of a child in the third degree to be proved as domestic violence.

- A. To be domestic violence, the parties must be family or household members.

A crime is properly characterized as "domestic violence" only if two criteria are met. First, the crime must qualify to be on the approved list of "domestic violence" crimes. RCW 10.99.020(5). Second, the crime



must be committed by a family or household member against a family or household member. RCW 10.99.020(5).

Under the first prong, neither manslaughter in the first degree nor abuse of a child in the third degree is on the list of crimes that qualify for characterization as a domestic violence crime. While the list is “not limited to” the listed crimes, the State neither recognized the two crimes’ absence from the list nor argued why they should be included on the list. RCW 10.99.020(5).

On the second prong, and more importantly, a crime cannot be domestic violence unless the crime is committed by “one family or household member against another.” RCW 10.99.020(5). The definition of “family or household member” is both specific and limited. Family or household member means

spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020(3).

B. Wing is not a family or household member of JHW.

Wing's relationship with JHW was that of temporary caregiver. He has no biological relationship with JHW, no legal parent-child relationship with JHW, and is not JHW's stepparent or grandparent. RP 9/25/15 at 37, 51. Wing's relationship to JHW does not satisfy the statutory criteria for domestic violence.

Division Three of this Court recently held a mere living arrangement between an adult and an unrelated child, such as Wing's relationship with JHW, does not qualify the parties as "family or household members" and a crime committed by one against the other cannot be characterized as domestic violence. *State v. Munoz-Rivera*, 190 Wn. App. 870, 885-86, 361 P.3d 182 (2015).

In *Munoz-Rivera*, ten-year old KT lived with her mother and Munoz-Rivera, her mother's boyfriend. After Munoz-Rivera was convicted of second degree assault against KT, the court named KT as a protected party in a domestic violence no-contact order. *Id.* at 880. On appeal, Munoz-Rivera argued the trial court lacked statutory authority to name KT as the protected party in the domestic violence order because KT did not qualify as a "family or household member" of Munoz-Rivera. *Id.* at 884.

The court correctly noted the issue turned on interpreting the domestic violence act, chapter 10.99 RCW. *Munoz-Rivera*, 190 Wn. App. at 884.

The meaning and purpose of a statute is a question of law, subject to de novo review. *State v. O'Brien*, 115 Wn. App. 599, 601, 63 P.3d 181 (2003). An appellate court's "function in interpreting a statute is to discover and give effect to the intent of the Legislature." *State v. Hansen*, 122 Wn.2d 712, 717, 862 P.2d 117 (1993). "Absent ambiguity, this court relies on the plain language of the statute to derive its meaning." *State v. Garnica*, 105 Wn. App. 762, 772, 20 P.3d 1069 (2001).

*Munoz-Rivera*, 190 Wn. App. at 884.

In agreeing with *Munoz-Rivera*, the court found no ambiguity in the definition of family or household member as defined by RCW 10.99.020(5). Further, the court gave no credence to the State's argument that the term "family or household member" should be broadly interpreted to include what, by its plain language, it excluded: a non-biological, non-legal parent child relationship.<sup>8</sup> *Id.* at 885. The court held the trial court erred in including KT as a protected part in the domestic violence no contact order and struck the order. *Munoz-Rivera*, 190 Wn. App. at 886.

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<sup>8</sup> This dating relationship language of the statute has no bearing on the facts of Wing's case.

- C. The “domestic violence” mischaracterization should be stricken from Wing’s judgment and sentence.

Section 2.1 of Wing’s judgment and sentence notes:

[X] For the crime(s) charged in Count I & II, domestic violence was plead and proved. RCW 10.99.020.

CP 24. A trial court's sentencing authority is limited to that granted by statute. *In re Post-Sentence Review of Combs*, 176 Wn. App. 112, 117, 308 P.3d 763 (2013), *review denied*, 353 P.3d 631 (2015). Whether a sentencing court has exceeded its statutory authority is a question of law reviewed de novo. *State v. Button*, 184 Wn. App. 442, 446, 339 P.3d 182 (2014). Counts I and II are not domestic violence. The trial court exceeded its authority by noting to the contrary on the judgment and sentence. The domestic violence language should be stricken.

**2. Wing did not enter a knowing and intelligent guilty plea because the plea was premised on an incorrect offender score calculation and incorrect standard ranges.**

*Summary of argument.* The State miscalculated Wing’s offender score as 6 points when it was actually 5 points. Wing relied on this miscalculation, and the consequent incorrect standard ranges, in entering his guilty plea. The misinformation undermines the requirement that Wing’s plea be knowing and intelligent. Wing may withdraw his plea.

- A. A constitutionally valid knowing and intelligent guilty plea requires knowledge of, and a correct representation of, all direct consequences of the plea to include standard ranges.

It violates constitutional due process to accept a guilty plea without an affirmative showing that the plea was made knowingly, intelligently,

and voluntarily. Due process requires a defendant's guilty plea be knowing, voluntary, and intelligent. *State v. Weyrich*, 163 Wn.2d 554, 556, 182 P.3d 965 (2008); *State v. Barton*, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)); U.S. Const. Amend XIV; Const. Art. I, § 3.

This standard is reflected in CrR 4.2(d), which mandates that the trial court “shall not accept a plea of guilty, without first determining that it was made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” Under this rule, once a guilty plea is accepted, the trial court must allow withdrawal of the plea “to correct a manifest injustice.” CrR 4.2(f). An involuntary plea constitutes a manifest injustice, and a defendant may raise this claim of error for the first time on appeal. *State v. Walsh*, 143 Wn.2d 1, 6–8, 17 P.3d 591 (2001).

A defendant must understand the sentencing consequences for a guilty plea to be valid. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988), *overruled on other grounds by State v. Barber*, 170 Wn.2d 854 (2011). The standard sentence range is a direct consequence of a guilty plea about which a defendant must be correctly informed to satisfy due process requirements. *Weyrich*, 163 Wn.2d at 557. A defendant need not establish a causal link between deficient information regarding direct

sentencing consequences and his decision to plead guilty. *Weyrich*, 163 Wn.2d at 557 (citing *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)).

B. Wing's offender score is miscalculated and invalidates the voluntariness of his guilty plea.

A defendant's standard sentence range is based upon the seriousness of the offense and his offender score. RCW 9.94A.530(1). RCW 9.94A.525 governs the calculation of an offender score. Offender scores are calculated by adding prior non-wash out convictions to current offenses while following any specific rules laid out in RCW 9.94A.525 to determine the sum of the convictions. Prior convictions are defined as convictions which existed before the date of sentencing for the offense for which the offender score is being computed. RCW 9.94A.525(1). Current offenses are convictions entered or sentenced on the same date as the conviction for which the offender score is being computed. RCW 9.94A.525(1). A trial court's offender score calculation is reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

(i) The manslaughter in the first degree miscalculation.

Manslaughter in the first degree is defined as both a serious violent offense and a violent offense. RCW 9.94A.030(46), (55). Regardless of whether it is categorized as a violent offense or a serious violent offense,

in scoring it each prior adult nonviolent felony conviction counts one point and a current non-violent felony counts one point. RCW 9.94A.525(8), (9). Wing has four prior non-violent felony convictions<sup>9</sup> and the current non-violent conviction for assault of a child in the third degree. CP 25; RCW 9.94A.030(34). Added together, Wing's offender score is 5 with an offender score of 120-158 months. RCW 9.94A.510; RCW 9.94A.515. Wing's Stipulation on Prior Record, Statement of Defendant on Plea of Guilty, and Judgment and Sentence misrepresent his offender score as 6 with a standard range of 146-194 months. CP 8, 10, 26.

- (ii) The assault of a child in the third degree miscalculation.

Assault of a child in the third degree is a non-violent offense. RCW 9.94A.030(34). Both prior and current felonies count as one point regardless of whether the felony is a violent or a serious violent offense. RCW 9.94A.525(7). With Wing's history of four prior felonies and one current felony his offender score is 5 and his standard range is 17-22 months. RCW 9.94A.510; RCW 9.94A.515. Wing's Stipulation on Prior Record, Statement of Defendant on Plea of Guilty, and Judgment and Sentence misrepresent his offender score as 6 with a standard range of 22-29 months. CP 8, 10, 26.

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<sup>9</sup> Two counts felony violation of a no-contact order, one count hit and run injury, each characterized as domestic violence, and one count attempting to elude, all committed in November 2008 and sentenced in December 2008. CP 7.

C. Wing's stipulation to his offender score is without legal consequence.

Although Wing stipulated to his offender score, the erroneous score results from a legal error entitling him to relief. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). The law is well settled. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *Id.* at 867–68 (citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997)); *In re Pers. Restraint of Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980) ("a plea bargaining agreement cannot exceed the statutory authority given to the courts"); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (emphasis omitted) ("[W]hen a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.") (quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)); accord, *State v. Wilson*, 170 Wn. 2d 682, 688-89, 244 P.3d 950 (2010).

D. Wing may withdraw his plea.

An involuntary guilty plea produces a manifest injustice and due process requires that the defendant be permitted to withdraw his plea. *Isadore*, 151 Wn.2d at 298.



When a defendant pleads guilty under a plea agreement, the agreement is indivisible if the charges were made at the same time, described in one document, and accepted in a single proceeding. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). When a defendant shows manifest injustice on one charge in an indivisible plea agreement, he may move to withdraw the agreement. *Id.*

Here, the plea agreement is indivisible because the charges were made at the same time, described in one document, and accepted in a single proceeding. CP 5-6, 9-18; RP 3/19/15 at 2-10.

An indivisible plea agreement is a “package deal.” *State v. Bisson*, 156 Wn.2d 507, 519, 130 P.3d 820 (2006). If Wing chooses to withdraw the plea agreement, the plea in its entirety must be withdrawn. *Id.*

**3. The prosecutor breached the plea agreement when he changed the terms at sentencing.**

*Summary of Argument.* The prosecutor breached the plea agreement when, at sentencing, he mischaracterized the written plea agreement to require Wing to allow the judge to consider supplemental aggravating factors. Instead, the agreement required Wing to agree to sentencing enhancements. The breach entitles Wing to his choice of relief.

A. The prosecutor must abide by the plea agreement.

Plea agreements are contracts. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). Due process requires the prosecutor to adhere to terms of the agreement. *Id.* at 839; *Santobello v. New York*, 404 U.S.

257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The law imposes on the prosecutor an implied promise to act in good faith. *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003). A prosecutor must fulfill the State's duty under the plea agreement by making the promised sentencing recommendation. *Sledge*, at 840. Although the recommendation need not be enthusiastically made, the State has a duty not to undermine the terms explicitly or by conduct suggesting intent to circumvent the plea agreement. *Id.* at 840-41.

The prosecution must operate within "the literal terms of the plea it made." *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9<sup>th</sup> Cir. 2006). Ambiguities are constructed for the defendant. *Transfiguracion* at 1227-28; *Sledge*, 133 Wn.2d at 838. Issues concerning interpreting a plea agreement are questions of law reviewed de novo. *Bisson*, 156 Wn.2d at 517.

B. The prosecutor changed the terms of the agreement from sentencing enhancements to sentencing aggravating factors.

Rather than abiding by Wing's commitment to allow the court to consider only sentencing enhancements, the prosecutor violated the terms of the plea agreement by arguing for sentencing aggravating factors.<sup>10</sup> RP

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<sup>10</sup> At the prosecutor's urging, Wing also signed a Supplemental to Amended Information Adding Aggravating Factors. CP 20-22.

9/25/15 at 20-31. The Proffer Agreement allows only sentencing enhancements.

The difference between aggravating factors and sentencing enhancements is no small matter. Aggravating factors permit the trial court to sentence a defendant to the statutory maximum for his offense. Because Wing pled to manslaughter in the first degree, a class A felony, the aggravating factors subject Wing to the possibility of life in prison. RCW 9.94A.535; RCW 9.94A.537(6); RCW 9A.20.021. The court used aggravating factors to sentence Wing on the manslaughter to 416 months, 222 months more than the high end of the standard range relied on at the plea hearing.<sup>11</sup> Similarly, the court used aggravating factors to sentence Wing on the abuse of a child to 48 months, 26 months more than the high end of the standard range relied on at the plea hearing. CP 10; RP 3/19/15 at 2-10. By contrast, the court could use a sentencing enhancement to impose only a few additional years on Wing's sentence.<sup>12</sup> See RCW 9.94A.533.

When Wing entered his guilty plea, he understood the prosecutor's plea recommendation from its two written sources: the Statement of Defendant on Plea of Guilty, CP 12, and the Proffer Agreement for Danny Allen Wing (Appendix).

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<sup>11</sup> See Issue 2 regarding incorrect calculation of offender score.

<sup>12</sup> No specific enhancements were referenced in the plea agreement or Proffer Agreement.

C. Breach of the plea agreement entitles Wing to remand before a different judge and Wing's choice of remedies.

A breach of a plea agreement is a constitutional issue that can be raised for the first time on appeal. *State v. E.A.J.*, 116 Wn. App. 777, 785, 67 P.3d 518 (2003); RAP 2.5(a)(3). When the state breaches a plea agreement, the disposition cannot stand. *E.A.J.* at 777.

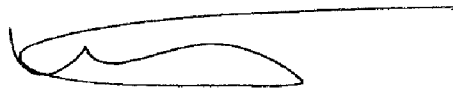
The proper remedy for the breach of a plea agreement is to permit the defendant to elect to withdraw the guilty plea or to seek specific performance. *Barber*, 170 Wn.2d at 873; *State v. MacDonald*, 183 Wn. 2d 1, 21, 346 P.3d 748 (2015). The matter should be remanded to be heard by a new trial judge. *Sledge*, 133 Wn.2d at 846. Remand before a new judge is not dictated by any misconduct by the original trial judge, but rather by a general rule recognizing the need to return the defendant close to the place he held prior to the breach, including to the court of a judge who has been unaffected by the State's conduct in breach. *Sledge*, at 846, n.9.

#### CONCLUSION

Wing's case should be remanded to the trial court for Wing to elect his remedy. His miscalculated offender score and involuntary guilty plea allow him to withdraw his plea. The prosecutor's breach of the plea agreement allows him to demand specific enforcement of the plea

agreement and be subject only to the addition of sentencing enhancements to his standard range sentences. Regardless of Wing's elected remedy, the trial court should strike any language suggesting Wing's crimes were domestic violence offenses.

Respectfully submitted May 4, 2016.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

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LISA E. TABBUT/WSBA 21344  
Attorney for Danny Allen Wing