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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON
BY Cm
DEPUTY

STATE OF WASHINGTON,) NO.: 39603-3-II
Respondent,) STATEMENT OF ADDITIONAL GROUNDS
V.) FOR REVIEW
JOSEPH SULLIVAN, III)
Appellant,)

I, Joseph Sullivan, III, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when My appeal is considered on the merits.

Additional Ground 1

INEFFECTIVE ASSISTANCE OF COUNSEL- The Confidential Informant (CI) Agreement was signed under duress as the appellant told his attorney David Kauffman that he would "Never be a Rat" and that he could not do what was asked for in the C.I. agreement, and Kauffman told the appellant to sign anyway. This denied appellant his right to a fair trial and all of the basic protections our Constitution provides and was intended for since the "stipulated" rail-road job was just that.

Additional Ground 2

DENIED DUE PROCESS OF LAW- Appellant's right to a fair trial was violated by the C.I. Agreement being used to circumvent justice and all appellant's rights as the trial court did not allow him to proceed to a jury trial when it pulled appellant's plea. The C.I. agreement is invalid on it's face and should not have bound the trial court to any action because the instrument itself foregoes all Constitutional rights and does not recognize state Evidence law.

FACTS

In August of 2008, a warrant was issued on a phone call that was made on a recorded jail phone at the Thurston County Jail by an inmate named Nathan Pedilla. Pedilla admitted that he possessed stolen property that he left in the home of Deanna Stewart, and wanted his girlfriend, or Mrs. Stewart to to get rid of it.

Based on the recorded phone conversation that specific stolen property was present in the Stewart house over a week prior, Tenino Police and Thruston County Sheriffs conducted a Search armed with said warrant.

On August 29th, 2008, this warrant was executed and the defendant was located at a back are of the house. Thurston County Sheriffs recognized the defendant and placed him under arrest due to outstanding warrants.

The defendant was taken to the living room by the front door. The defendant told the arresting officers that he had just arrived at the Stewart household and that the three bags by the door and small safe there was his. The officers told defendant Sullivan that they were going to search his bags and the safe for the stolen items under the search warrant issued. The defendant did not consent to the search and told them to get a warrant to search his personal belongings. They told him the old

warrant was good enough and that they did not need to get a new warrant to search his belongings. They told him to open the safe or they would break it open. Sullivan gave the officer the key and the key code saying that he did not want his safe broken and he was not giving consent, and insisted that they get a warrant. The safe was opened on the spot and methamphetamine was found inside.

In processing the warrant, everyone in the Stewart residence was detained and questioned. It was established that Sullivan was only in the back room and the front room.

175 grams of marijuana was found in the master bedroom in the opposite end of the house that the defendant was in. Richard Stewart admitted to police and sheriff deputies that the marijuana was his (Richard Stewarts), and that he used it for personal supply for holistic treatment of his chronic back pain.

A real sketchy plea agreement was forced upon the defendant by his attorney David Kauffman who was definitely acting on the states behalf. It entailed forcing the defendant to do acts that he could not in clear conscious because it included unethical acts. Defense attorney Kauffman was hired to defend against the charges, this he never did in any capacity.

Crystal clear evidence that the marijuana was Richard Stewart's was given to defense counsel in the form of discovery by the state. No Motion to suppress was ever made.

The prosecutor, Mrs. Terri Gailfus, agreed that Sullivan posed no risk for work release after verifying Sullivan failed to appear, was given a higher bail, and posted bond. (R.P. 4/8/2009, page 7).

The court found that there was nothing in the Statement of Probable cause about Sullivan possessing marijuana. (R.P. 4/21/2009, page 4).

Defense counsel Mr. David Kauffman sold out Sullivan by lying, cheating and consorting with the prosecutor. Kauffman had all the police reports, test results and statements of the proclaimed owner of the marijuana, and it was not Sullivan. Kauffman lied to the trial court when he said "your honor, were this case the go to trial, that is a rendition of the facts that the state would put before the jury and be likely to prove beyond a reasonable doubt." (R.P. 4/21/2009, page 8). Earlier the same day Kauffman addressed the court above, Kauffman was present at a 3.6 Hearing held on Sullivan's codefendant Mr. Stewart, who admitted that all the marijuana was his, not Sullivan's (R.P. 4/21/2009 page 7).

No notice was provided for the third amended information (R.P. 8/15/2009, page 4). The sentencing court did use the Confidential Informant Agreement as a waiver to a jury trial (R.P. 8/15/2009, page 5) and as a credibility for using the stipulated facts plea agreement to force Sullivan into having a bench trial, allowing all the bad to stand but not allowing Sullivan's original plea. The court allowed the imposition of a third amended information to be the yard stick to swat Sullivan down which was not part of Confidential Informant Agreement, a.k.a. "plea bargain" nor any plea bargain, all served up without any notice. (R.P. 8/15/2009, page 7).

The court failed to impose Community Custody on the record. No particular term was set within Sullivan's standard range and stated as such. (R.P. 8/15/2009, page 13).

GROUND ONE CONTINUED:

Defense counsel Kauffman rendered misadvice that was contrary to Washington State law by telling the appellant that he would get the previous deal offered by the state if he did not live up to the agreement. This was not what the agreement said, nor was in context to any Washington law regarding plea agreements of this nature. Kauffman knew that the appellant was going to get screwed due to being told that the appellant could not live up to his end of the bargain, yet Kauffman let him agree to the contract with the law being tossed out the window just to get paid.

To prevail on a claim of ineffective assistance of counsel, a defendant must show state counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 446 U.S. 668, @ 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, @ 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322 @ 336, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, @ 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further, Strickland, 466 @ 697; State v. Foster, 140 Wn.App. 266, @ 273, 166 P.3d 726 (2007), review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Kauffman's performance fell so far below the scale of an objective standard of reasonableness due to all the circumstances of allowing the state to get away with whatever they wanted with not one single peep of an objection, or advise of what appellant had for options, rights and a defense to the charges. Appellant did not receive notice, nor any thing close to what a lawyer should do. The prejudice prong is met, proven and check-mated by the facts that any reasonable jurist would find merited at least some defense:

1. Sullivan had no idea that there was marijuana at the residence, nor did he have constructive or any kind of possession as he was never in that part of the house that the owner resided.
2. Mr. Stewart, the owner, claimed the marijuana was his own personal stash of marijuana he used for medical purposes, and not appellant's;
3. All of the lab reports had the house owners name on them- not appellant's;
4. A search warrant was gained after the fact for drugs found;
5. No evidence what so ever exists to convict Sullivan of the marijuana charge;
6. Kauffman told appellant over the phone not to worry about showing up for court until the next day as Kauffman would let the court know appellant had car trouble, causing the appellant to be guilty of bail jumping;
7. Appellant did not consent to his safe being searched- the safe was beyond the scope of the existing search warrant regarding Mr. and Mrs. Stewart for stolen property;
8. Kauffman's misadvice of the law cost appellant his right to a fair trial by jury that would of acquitted him due to the elements not being met by the evidence and the superior weak case by the state;
9. The methamphetamine field test was left on the scene and discarded, the chain of custody was severely interrupted and as such all the substance found was part of a poisoned tree;
10. The contract itself was rendered involuntary due to it was signed under misadvice and duress, besides being invalid on it's face;

11. Any competent lawyer could easily have suppressed the evidence in this case and came up with some kind of defense to beat Kauffman's none.

This all prejudiced the appellant and if he would of went to trial the results would have been drastically different as more than half of the convictions would not of stood up to the scrutiny of a jury. The fraudulent method used by the trial court to make it's finding of facts based on uncontested (extremely ineffective assistance of counsel not even onjecting when Kauffman knew the facts were untrue) police reports containing wrong information because of a coerced agreement smacks of one-sided complicity, not justice.

Recently the Washington State Appellate Court, Division III agreed that lawyers were held accountable to the legal professional standards of the Washington State Court Rules in State v. Wessels, No. 27261-3-III (2009). The Sstandards of review of a claim of ineffective assistance of counsel are well understood. The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. Mcfarland, supra, 127 Wn.2d @ 334-335. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. Strickland v. Washington, supra, 446 U.S. @ 689-691. To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial Id. @ 690-692.

The appellant in this instant case claims that defense counsel David Kauffman absolutely failed in every way possible. No objections to the legallity of CI Agreement and the complete waiver of all of Sullican's right's, no motions to supress evidence when the drugs were obviously not the appellant's according to the police reports and witness statements relied upon any and all lawyer even remotely competent would of mandatorily tried to supress, working with the prosecutor as an agent of the state to gain a conviction through guile, lies and a "stipulated" bench trial that was a complete sell-out on it's face and so one sided that the words "manifest injustice" fits perfectly.

Defense counsel Davit Kauffman did not explain or even try to explain about the repercussions of not fulfilling the agreement and the penalties that would issue, in fact Kauffman lied to Sullivan and said that it would revert back to the previous plea when the contract itself stated the exact opposite. The State v. James, 48 Wn.App 353 (1987), court held: "Defense Counsel is under an ethical duty to discuss plea negotiations with his clients, under either the old Code of Professional Responsibility or the new Rules of professional Conduct. See RCP 1.2; CPR DR 7-101, EC 7-7, 7-8. See also 1 american Bar Ass'n, Standards for Criminal Justice, Std. 4-6.2 (a) (2d ed. 1980 & Supp. 1986). If he did not, a breach ocured, indicating deficient performance."

Plea bargaining has been recognized as "an essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, @ 260, 30 L.Ed.2d 427, 432, 92 S.Ct. 495, @ 498 (1971). A defendant is entitled to counsel in plea negotiations and in the plea process, under the Sixth Amendment and Article 1, Section 22 of the Washington State Constitution. State v. Swindell, 93 Wn.2d 192 @ 198, 607 P.2d 852 (1980); State v. Johnson, 23 Wn.App. 490, @ 497, 596 P.2d 308 (1979). The counsel required is effective counsel.

In a plea bargaining context, effective assistance of counsel requires that counsel "actually and substantially assist his client in deciding whether to plead guilty". State v. Osborne, 102 Wn.2d 87, @ 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn.App. 229, @ 232, 633 P.2d 901 9181)). This must include not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and

weaknesses of defendant's case so that the defendants know what to expect and can make an informed judgment whether or not to plead guilty.

Other jurisdictions have held that failure to advise a client of a plea bargain offer amounts to ineffective assistance of counsel. see Johnson v. Duckworth, 973 F.2d 898, 902 (7th Cir. 1986); United State ex rel. Caruso v. Zelinsky, 689 F. 2d 435, 438 (3rd Cir. 1982); United States ex rel. Simon v. Murphy, 349 F. Supp. 818 (E.D. Pa. 1972); People v. Brown, 177 Cal. App. 3d 537, 223 Cal. Rptr. 66 (1986); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983); Harris v. State, 437 N.W.2d 521, 45-46 (Ind. 1982); See generally Annot., Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R. 4th 660 (1981). A leading case is Lyles v. State, 178 Ind. App. 398, 382 N.E.2d 991 (1978) where the defense attorney ostensibly left plea negotiations to communicate the offer to his client, but in fact never informed the client. The attorney told the prosecutor and judge his client was refusing the bargain and would plead not guilty, similar to what the defendants have alleged here. The defendant in Lyles was convicted and sentenced to 10 years for armed robbery; the offer was an opportunity to plead to an offense with a recommendation of a 1-to-5 year sentence. The court cited ABA Standards Relating to the Defense Function 6.2 (a) (Approved Draft, 1971): "In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor should be communicated promptly to the accused."

Lyles, @ 401. The finalized American Bar Ass'n, Standards for Criminal Justice are the same. 1 American Bar Ass'n, Standards for Criminal Justice, Std. 4-6 (a). The commentary to standard 4-6.2 notes that "The accused, not the lawyer, has the right to decide on prosecution proposals". The Lyles court found the attorney clearly and flagrantly breached his duty to the client, and that the disparity between the sentence received and the potential outcome of acceptance showed the necessary prejudice.

As to the uncertainty of whether plea bargain negotiations would have resulted in a consummated bargain, uncertainty should not prevent reversal where "confidence in the outcome" is undermined. See People v. Brown, 223 Cal. Rptr. @ 78 n.22; Commonwealth v. Napper, 385 A.2d @ 524; Lyles, 382 N.E.2d @ 994 n.5. The standard is whether there is a reasonable probability that but for any attorney's error, a defendant would have accepted a plea agreement. Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366, @ 370 (1985).

Stipulating to a bench trial after the sentencing court refused to accept the plea agreement straight sold the defendant's constitutional rights down the proverbial drain. Not objecting, mounting any kind of defense what-so-ever, not calling any witnesses, nor contesting any of the facts or reports introduced for consideration by the state was epic ineffective assistance of counsel.

Kauffman knew that the drugs were all tested in Richard Stewart's name and not under the search warrant that was for stolen property. The drugs were found and then a warrant for them was obtained. The weed, speed and bail jump were all very beatable and Kauffman knew it. Presenting no defense what so ever violated Sullivan's Rights. Where Defense counsel fails to identify and present the sole available defense to the charged crimes and there is evidence to support that defense, a defendant has been denied a fair trial due to Ineffective Assistance of Counsel. In re Pers. Restraint of Hurbert, 138 Wn.App 924 (2007)

Where counsel failed to move to suppress evidence in a drug case, there was no legitimate tactical reason for such a decision. State v. Reichenbach, 153 Wn.2d 126 (2004).

Kauffman cheated Sullivan into going for the "DEAL" he knew would not work, and then

burned him. In the Plea Bargaining context Kauffman failed to actually assist Sullivan in deciding. State v. James, 48 Wn.App. 353 (1987)

Defendant has a right to counsel in plea negotiations at public expense if indigent. State v. Johnson, 23 Wn.App 490, 596 P.2d 308, review denied, 92 Wn.2d 1030 (1979).

Sullivan was found guilty on bias and uncontested police reports. The lab test for the methamphetamine was left at the scene, making adversarial testing impossible. No Motion to Suppress (CrR 3.6) this or any other evidence was made, when a competent lawyer would have easily had it thrown out. Theyz allowed the trial court to rely on the Police Reports as gospel acting as an agent for the state. No defense attorney with any kind of sand or backbone would sit back and remain quiet knowing Sullivan's case and innocence.

Kauffman gave Sullivan erroneous advise that he could not object to the whole stipulated mess. Sullivan would have demanded trial had it not been for Attorney's advice. Washington v. Stows, 71 Wn.App. 182 (1993).

GROUND TWO CONTINUED

The agreement that Sullivan signed was similar to a plea agreement without any constitutional safeguards or standard protections afforded in plea agreements. The agreement itself became involuntary when defense counsel Kauffman failed to explain the ramifications and consequences to Sullivan. The agreement gave up every right and went beyond the scope of any contract because it went outside the laws of Washington State.

The record must show that in pleading guilty, the defendant understood that the he was relinquishing three constitutional rights: the right to a jury trial, the right to confront one's accuser, and the privilege against self-incrimination. State v. Elmore, 139 Wn.2d 250, @ 269, 985 P.2d 289 (1999) (citing Boykin v. Alabama, 395 U.S. 238, @ 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), superseded by statute on other grounds as stated in United States v. Gomez-Cuevas, 917 F.2d 1521 (10th Cir. 1990)). Sullivan was not afforded this in the agreement as it stood.

Sullivan was not able to ratify his plea, or to withdraw it. We have recognized the following circumstances as amounting to manifest injustice: the denial of effective counsel, the defendant's failure to ratify the plea, an involuntary plea, and the prosecutoion's breach of the plea agreement. State v. Wakefield, 130 Wn.2d 262, @ 472, 925 P.2d 183 (1996).

The appellant was prejudiced when Kauffman told him to not show up for court because he would get a continuance until the next day. When the appellant showed up in court the next day when Kauffman told him he was going to be arrested for bail jumping. Kauffman's wrong advise about the court being "O.K." with defendant's car trouble and one day continuance caused the defendant to be found julty of bail jumping.

Kauffman's wrong advise actually makes appellant not guilty of bail jumping because he did not know he was required to be in court that day or be put in jail because Kauffman said he could come the following day and every thing would be fine. The actual element needed for bail jumping was relieved due to this as the appellant did not know it was mandatory that he show up in court that very day, or else. In a simular case, State v. Elliott, No. 61949-7-I (2009), the bail jumping conviction was reversed because Elliott argued that there was insufficient evidence evidence to support her conviction for bail jumping. A person is guilty of bail jumping when she has been released by court order or admitted to bail and fails to appear for a scueduled court hearing, having knowledge that her presence is required. RCW 9A.76.170(1). Although the State introduced circumstantial evidence logically showing that Elliott was resleased by the court ordoer or admitted to bail, it failed to show that she knew her presence was reuired at the omnibus hearing.

RCW 9A.76.170(1) provides that "any person having been released by the court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... who fails to appear as required is guilty of bail jumping." The state must prove beyond a reasonable doubt that the defendant knew, or was aware, that she was required to appear at the hearing. State v. Ball, 97 Wn.App. 534, @ 536, 987 P.2d 632 (1999). In order to prove knowledge, the state must prove that the defendant was notified of the required court date before she failed to appear. State v. Fredrick, 123 Wn.App. 347, @ 353-54, 97 P.3d 47 (2004).

GROUND THREE

The State breached the Plea Agreement by not allowing Sullivan the stipulated Six Months to Accomplish his end of the Agreed upon deal.

State v. Sledge, 133 Wn.2d 828 (1997), is similar in the sense that the state there did not adhere to the plea agreement. Plea agreements are more than simple common law contracts. Because they concern fundamental rights of the accused, constitutional due process considerations come into play. Due process requires a prosecutor to adhere to the terms of the agreement. The state must comply with the terms of a plea bargain agreement.

"Plea agreements are contracts." State v. Mollichi, 132 Wn.2d 80, @ 90, 936 P.2d 406 (1997). Just as there is an implied duty of good faith and fair dealings in every contract, Badgett v. Security State Bank, 116 Wn.2d 563, @ 569, 807 P.2d 356 (1991), the law imposes an implied promise by the State to act in good faith in plea agreements. State v. Marler, 32 Wn.App. 503, @ 508, 648 P.2d 903 (1982). See also Correale v. United States, 479 F.2d 944, @ 947 (1st Cir. 1973); United States v. Bowler, 555 F.2d 851, @ 854 (7th Cir. 1978); United States v. Rexach, 896 F.2d 710, @ 710 (2nd Cir.), cert. denied, 498 U.S. 969, 111 S.Ct. 433, 122 L.Ed.2d 417 (1990); United States v. Jones, 58 F.3d 688, 692, 313 U.S. App. D.C. 128 (1995).

But plea agreements are more than simple common-law contracts. Because they concern fundamental rights of the accused, constitutional due-process consideration come into play. Due process requires a prosecutor to adhere to the terms of the agreement. Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); United States v. Harvey, 791 F.2d 294, @ 300 (4th Cir. 1986) (the defendant's underlying contract right is Constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.) Fairness is mandated to ensure public confidence in the administration of our justice system. United States v. Carter, 454 F.2d 426, 428 (4th Cir. 1972), cert. denied, 417 U.S. 933, 94 S.Ct. 2646, 41 L.Ed.2d 237 (1973). See State v. Tourtellotte, 88 Wn.2d 579, 583, 564 P.2d 799 (1997). The State must comply with the terms of a plea bargain agreement. State v. Hall, 104 Wn.2d 486, @ 490, 706 P.2d 1074 (1985). Accord Mabry v. Johnson, 467 U.S. 504, 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) ("when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand.").

Because a defendant gives up important constitutional rights by agreeing to a plea bargain, the State must adhere to the terms of the agreement by recommending the agreed-upon sentence. Sledge, 133 Wn.2d @ 839.

The State's duty of good faith requires that it not only undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement. Sledge, 133 Wn.2d @ 840; State v. Jerde, 93 Wn.App. 774, @ 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999). We review a prosecutor's actions and comments objectively from the sentencing record as a whole to determine the plea agreement was breached. Jerde, 93 Wn.App. @ 780.

The plea bargaining process requires that both the State and the defendant adhere to

their promises. When this process is frustrated, the fairness of the resulting sentencing hearing is seriously called into question. A defendant pleads guilty on a false premise when the State breaches a plea agreement. Mabry v. Johnson, 467 U.S. 504, @ 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). That the prosecutor's breach did not affect the court's decision does not alter the fact that a breach occurred. The prosecutor's conduct failing to make the bargained-for recommendation eliminates the basis for the bargain struck. Thereafter, the State is no longer entitled to benefit from the plea bargain when the defendant has received none. Such an error infects the entire proceeding and, as such, it is a structural error that cannot be harmless. Neder v. United States, 527 U.S. 1, @ 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); State v. Zimmerman, 130 Wn.App. 170, @ 176-180, 121 P.3d 1216 (2005), remanded, 157 Wn.2d 1012 (2006).

Sullivan insists that the state did not honor their part of the agreement because they did not allow him the time agreed upon, six months to perform his part. United States Supreme, without doubting the sentencing court's statements that it was not influenced by the breach, held that the interests of justice required that the defendant receive specific performance of the agreement or withdrawal of the plea. Santobello, 404 U.S. @ 262-63. Under James and Santobello, harmless error review does not apply when the State breaches a plea agreement.

A defendant entering into a plea agreement bargains for a prosecutor's good faith recommendation, not a particular sentence. This is especially true since the court is not bound by the prosecutor's sentence recommendation. The plea bargaining process requires that both the State and the defendant adhere to their promises. When this process is frustrated, the fairness of the resulting sentencing hearing is seriously called into question. A defendant pleads guilty on a false premises when the State breaches a plea agreement. Mabry v. Johnson, 467 U.S. 504, @ 509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). That the prosecutor's breach did not affect the court's decision does not alter the fact that a breach occurred. The prosecutor's conduct is failing to make the bargained-for recommendation eliminates the basis for the bargain struck. Thereafter, the State is no longer entitled to benefit from the plea bargain when the defendant has received none. Such an error infects the entire proceeding and, as such, it is a structural error that cannot be harmless. Neder v. United States, 527 U.S. 1, @ 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); State v. Zimmerman, 130 Wn.App. 170, 176, 180, 121 P.3d 1216 (2005), remanded, 157 Wn.2d 1012 (2006).

"Due process requires that a defendant's guilty plea be knowing, voluntarily, and intelligent." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.ed.2d 274 (1969)). If a defendant is not appraised of a direct consequence of his plea, the plea is considered involuntary. State v. Ross, 129 Wn.2d 279, @ 284, 916 P.2d 405 (1996). A direct consequence is one that has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." Id. The length of a sentence is a direct consequence of a guilty plea. State v. Mendoza, 157 Wn.2d 582, @ 590, 141 P.3d 49 (2006); State v. Moon, 108 Wn.App 59, @ 63, 29 P.3d 734 (2001). Therefore, misinformation about the length of a sentence renders a plea involuntarily, even where the correct sentence may be less than the erroneous sentence included in the plea. Mendoza, 157 Wn.2d @ 591. This court does not require a defendant to show that the misinformation was material to the plea. Isadore, 151 Wn.2d @ 302.

A trial court must allow withdrawal of a guilty plea to correct a manifest injustice. Washington Superior Court Criminal Rules 4.2(f). Nonexclusive criterias as to what constitutes injustice include (1) the denial of effective counsel; (2) the defendant or one authorized by the defendant did not ratify the plea; (3) the plea was involuntary; or (4) the prosecution breached the plea agreement.

The State clearly breached the their "Memorandum of Agreement" and did not allow Sullivan to "Assist Detectives in the investigation and prosecution of three (3)

investigation of a mid to high level drug dealers in controlled substances, specifically including but not limited to those dealing pounds of marijuana, ounces of cocaine, methamphetamine, heroin, and/or any other controlled substance as directed, including introduction to local undercover buys, within Six (6) Months of his agreement". This C.I. Agreement was signed April 20th, 2009. Six (6) Months was not given by the State to Sullivan to be able to do all of the above.

What constitutes a contract and whether an agreement has been breached is determined according to the law of contracts. United States v. Gonczy, 357 F.3d 50, @ 53-54 (1st Cir. 2004).

Plea agreements are contracts, and the law imposes upon the States an implied promise to act in good faith. State v. Sledge, 133 Wn.2d 828, @ 839, 947 P.2d 1199 (1997). Because plea agreements concern fundamental rights of the accused, they also implicated due process considerations that require a prosecutor to adhere to the terms of the agreement. *Id.* (Citing Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)); United States v. Harvey, 791 F.2d 294, @ 300 (4th Cir. 1986) (defendant's underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those commercial contract law).

This court has recognized two possible remedies where the State breaches a plea agreement. Miller, 110 Wn.2d @ 531. The defendant has the choice to either withdraw his plea and be tried anew on the original charges or receive specific performance of the agreement. *Id.* Because a plea agreement is analogous to a contract, the defendant is entitled to a remedy which restores him to the position he occupied before the State breached. State v. James, 35 Wn.App. 351, @ 355, 666 P.2d 943 (1983). Furthermore, "the defendant's choice of remedy controls, unless there are compelling reasons not to allow that remedy." Miller, 110 Wn.2d @ 535.

In this case, Court of Appeals granted Harrison's request for specific performance. Harrison I, slip op. @ 7. That remedy requires the State to make its promised recommendation at a new sentencing hearing. Inre Pers. Restraint of Powell, 117 Wn.2d 175, @ 199, 814 P.2d 635 (1991) (addressing the definition of specific performance of plea agreement where Indeterminate Sentencing Review Board would decide appropriate minimum sentence); see also State v. Van Buren, 101 Wn.App. 206, @ 218, 2 P.3d 991 (2000); State v. Henderson, 99 Wn.App. 369, @ 379, 993 P.2d 928 (2000). While the State must uphold its end of the plea agreement on remand, the court retains the ultimate decision on sentencing. Powell, 117 Wn.2d @ 200.

Washington cases generally follow the United States Supreme Court's recommendation that the petitioner should be resentenced by a different judge when specific performance is the elected remedy for the State's breach. Santobello, 404 U.S. @ 263; See Sledge, 113 Wn.2d 828, 947 P.2d 1199; State v. Van Buren, 112 Wn.App. 585, 49 P.3d 966 (2002); State v. Williams, 103 Wn.App. 231, @ 239, 11 P.3d 878 (2000); James, 35 Wn.App. @ 356.

A plea agreement is an enforceable contract between the prosecutor and defendant, and as such, it is analyzed under basic contract principles. These principals include the implied duty of good faith and fair dealing inherent in every contract and extend to both parties. Due process requires a prosecutor to adhere to the terms of the agreement. The State fulfills its obligations if it acts in good faith and does not contravene with a condition precedent excuses performance under a contract.

A prosecutor's subjective motive or justification for a breach of a plea agreement is not relevant, and defendant is entitled to relief even when a breach is inadvertent.

Washington courts construe plea agreements as contracts. After a party breaches the plea agreement, the non-breaching party may either rescind or specifically enforce it. When the State is the non-breaching party and elects to rescind the plea agreement, an appellate court measure its rights under pertinent contract law.

A plea agreement is a contract between the defendant and the prosecutor. In order to

vacate a guilty plea on the basis of a defendant's breach of the plea agreement, the State must establish the breach in a hearing. The trial court must then determine whether the agreement has been breached.

a material breach of a plea agreement is one serious enough to justify the other party's abandoning the contract because the contract's purpose is defeated. Whether a breach is material depends on the circumstances of each particular case.

An appellate court will review the breach of a plea agreement for the first time on appeal since it presents an issue of constitutional magnitude. Wash. R. App. P. 2.5. A plea agreement binds the State to recommend an agreed upon sentence to the court. A defendant's due process rights are violated if the State fails to adhere to the terms of the plea agreement.

Washington courts construe plea agreements as contracts. After a party breaches the plea agreement, the non-breaching party may either rescind or specifically enforce it. Whenever the State elects to rescind a plea agreement, its subsequent rights are measured by law, but when it opts to specifically enforce, its subsequent rights are necessarily measured by the agreement itself.

Under Washington Law, a plea is involuntary if it is not made with an understanding of all of the direct consequences of the plea. One direct consequence of a plea is the sentencing range.

The State enters into a contract with a defendant when it offers a plea bargain and the defendant accepts its terms. As such, courts analyze plea agreements using contract principals. Specific performance connotes performance specifically as agreed between the parties. Generally, a defendant may seek specific performance of a plea agreement when the State has breached a term of that agreement or the defendant has been misinformed about the direct consequence of the plea.

Sullivan signed to give up all his rights and should not have been held to the plea agreement when the State did not give him the time they signed and agreed to give him to accomplish his task, it is as simple as that, FAIR DEALING. The court should consider the prosecutor's "OVERALL CONDUCT" in determining whether breach occurred. United States v. Pallidino, 347 F.3d 29 (2nd Cir. 2003)

GROUND FOUR

Sullivan was not fully informed of the direct consequences of his plea because his lawyer misled him into believing that he would receive the original plea bargain sentencing range of eighteen (18) months, and that he would not lose all of his rights if he did not perform his part of the bargain.

The trial court in this case should not have proceeded without first determining whether Sullivan voluntarily, knowingly, and intelligently waived his right to appeal. State v. Kells, 134 Wn.2d 309, @ 313, 949 P.2d 818 (1998).

Due process requires a knowing, voluntary and intelligent guilty plea. Boykin v. Alabama, 395 U.S. 238, @ 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Isadore, 151 Wn.2d @ 297. A guilty plea is not knowingly made if based on misinformation as to the sentencing consequences. State v. Miller, 110 Wn.2d 528, @531, 756 P.2d 122 (1988). A defendant must be informed of all direct consequences of the plea. Isadore, 151 Wn.2d @ 298 (Citing State v. Rosee, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)).

Under CrR 4.2 (f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a manifest injustice. An involuntary plea produces a manifest injustice. Isadore, 151 Wn.2d @ 298 (citing Ross, Supra, @ 284; Walsh 143 Wn.2d 1, @ 8 (2001) (Mutual mistake regarding sentencing consequences rendering guilty plea invalid). A "direct" consequence includes one that "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Ross, 129 Wn.2d @ 284 (quoting State v. Barton, 93 Wn.2d 301, @ 305, 609 P.2d 1353 (1980)). in re Pers. Restraint of Fonseca, 132 Wn.App. 464 (2006).

The trial court had questions of whether or not guilt was established and accepted the prosecutors assurance that in making the plea that Sullivan was admitting guilt so it was good enough. What was not good enough was the fact that the court seen that Sullivan was not guilty of all the charges and as such should have inquired and not have accepted the plea as it stood. Sullivan's plea was involuntary and as such should be withdrawn.

To be Constitutionally valid, a guilty plea must be "intelligently and voluntarily made and with knowledge that certain rights will be waived." State v. Branch, 129 Wn.2d 635, @ 642, 919 P.2d 1228 (1996). To determine whether a plea is knowingly, intelligently, and voluntarily made, we must consider the totality of the circumstances. Branch, 129 Wn.2d @ 642. Provided the record establishes that the plea was made intelligently, voluntarily, and with knowledge of its consequences, the plea does not need to list every right being waived to be constitutionally valid. Wood v. Morris, 87 Wn.2d 501, @ 508, 554 P.2d 1032 (1976).

The defendant did not make an intelligent plea. The trial court did not allow him to withdraw his plea due to the coerced stipulation that is constitutionally invalid. The misinformation that the defendant believed to be true given to him by his lawyer kept him from making a voluntary plea. Kauffman's ineffectiveness made the plea process a manifest injustice due to the knowledge element. The sentencing court's determination that the plea was void should have been the start of trial. Since the court did not let the defendant make the plea and grant consideration to the plea agreement itself, the court was in grave error using the stipulated "bench trial" portion and not the rest. The defendant contends his agreement to an abbreviated bench trial is equivalent to a guilty plea and that he is entitled to receive the same protections given to people who plead guilty, including the right to be informed of all of the direct consequences of their plea. The right to withdraw and have a jury trial was not a choice the way this one-sided deal went down, it violated the defendant's due process rights. 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. State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

Sullivan has made a prima facie showing of involuntariness and should be allowed to withdraw his plea since part of it was used to enforce and shove the "stipulated bench trial" down his throat to choke on, and nothing else be considered.

Notwithstanding this presumption of validity, CrR 4.2 (f) provides that "the court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." A manifest injustice is obvious and directly observable, an overt injustice, and not an obscure one. State v. Taylor, 83 Wn.2d 594, @ 596, 521 P.2d 699 (1974). Manifest injustice includes instances where (1) effective assistance of counsel was denied; (2) the plea was not involuntary; (3) the plea agreement was not honored by the prosecution; or (4) the plea was not ratified by the defendant. Id. @ 597. State v. Robinson, No. 27120-0-III.

Ray next contends that both Meyer and the trial court coerced him into entering his plea. Coercion may render a guilty plea involuntary. State v. Frederick, 100 Wn.2d 550, 556, 674 P.2d 136 (1983), overruled on other grounds by Thompson v. Dep't of Licensing, 138 Wn.2d 783, 794, 982 P.2d 601 (1999). Ray's denial of improper influence in open court does not prevent him from claiming coercion here. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). But a bare allegation of coercion is insufficient. Osborne, 102 Wn.2d @ 97.

Further 'A defendant who seeks to later retract his admission of voluntariness will bear a heavy burden in trying to convince a court or jury that his admission in open court was coerced. The task will be especially difficult where there are other apparent reasons for pleading guilty, such as a generous plea bargain or virtually incontestable evidence of guilt. Frederick, 100 Wn.2d @ 558. Ray claims that the

trial court's denial of his motion for a continuance prevented Meyer from gathering necessary evidence, thus rendering Meyer's assistance ineffective. He claims that this situation coerced him to accept the plea offer against his will. State v. Ray, No. 36665-7-II (2008).

GROUND FIVE

BAIL JUMPING

The element of bail jumping requires knowledge that you must appear at a specified time. Sullivan called his defense counsel David Kauffman first thing in the morning and asked when he was suppose to be in court that day because Sullivan had two separate court appointments that had been scheduled, one which superceeded the other . Sullivan asked Kauffman which one was he to appear for. Kauffman said to Sullivan that he had to appear that day. Sullivan told kauffman that he had car problems and asked if it could be continued to the same time the following day without Sullivan getting in trouble or losing his bail. Kauffman told Sullivan he would continue the hearing and to come to the court first thing in the morning, which Sullivan duly complied by being there at 7am, an hour before court started.

When Sullivan went before the Superior Court Judge Tabor first thing that morning no warrant was issued. Judge Tabor raised Sullivan's bail and allowed Sullivan to continue on bond in which the bonding company allowed and Sullivan was a free man. Nothing was revoked.

The facts merit and show that no crime ocured. Where defendant was charged with possession of methamphetamine 1 (count I) and maintaining a vehicle or premise for drug traficking 2 (Count II), a bail jumping charge was added by amended information after defendant failed to appear for an omnibus hearing on Count II; the Court of Appeals of Washington held that the absence of the bail jumping charge from defendant's information rendered it constitutionally deficient; defendant's conviction for bail jumping was reversed. State v. Marin, 150 Wn.App. 434, 208 P.3d 1184 (2009). Because Sullivan complied with the court and the court allowed him to walk, charging him after the fact is constitutionally deficient because he did not bail jump.

RCW 9A.76.170. Bail Jumping:

91) Any person having been released by the court or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

Sullivan had car trouble and completely complied to what his counsel instructed him to do. It is crystal clear that the court believed Sullivan and allowed him to continue on bail using RCW 9A. 76.170 (2) or he would have been released.

GROUND SIX

The trial court never imposed a determined amount of community custody in open court on the record so Sullivan has an exceptional sentence that exceeds the courts authority.

A plea bargain to a sentence not in compliance with the law will not be enforced. In re Pers. Restraint of Moore, 116 Wn.2d 30, 38 (1991) (Sentence imposed pursuant to a plea bargain must be statutorily authorized;; Defendant cannot agree to be punished more than that the legislature has allowed). State v. Miller, 110 Wn.2d 528, 538 (1988).

GROUND SEVEN

Sullivan never received notice of the Third Amended information.

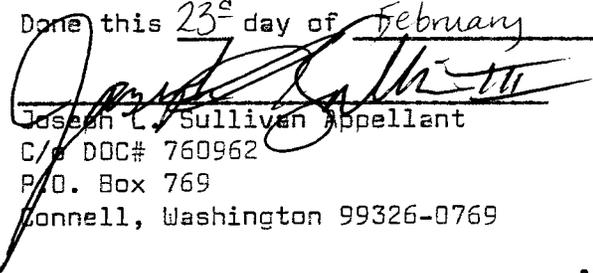
Sullivan's constitutional right to a fair trial was extremely violated by the last minute addition of the Third Amended Complaint that was used to ram a whole bunch more time on to the plea he previously made that he was not given an opportunity to pull. The same day of Sentencing this deceitful move was made and created a manifest injustice of epic and created a manifest injustice of epic proportions that all counsel and the trial court should not have allowed.

The State's failure to get it right previously violated Sullivan's Right to Notice and to Prepare a Defense. Washington Constitution Article I, Section 22; United States Constitution, Sixth Amendment; State v. Berrier, No. 35470-5-II (2008).

RELIEF REQUESTED

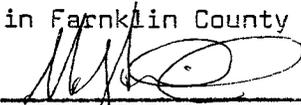
1. Vacate Convictions and Remand for a New Trial Consistent with Due process.
2. Hold an Evidentiary Hearing on any Facts in contention.
3. Allow Specific Performance of the Original Plea, Resentence to Eighteen (18) Months and call it good.

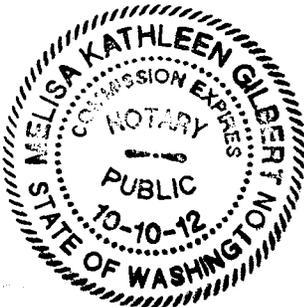
Done this 23^d day of February, 2010.


Joseph L. Sullivan Appellant
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Connell, Washington 99326-0769

ACKNOWLEDGEMENT

SWORN AND SCRIBED to before me a Notary Public this 23^d day of February, 2010, in Franklin County at Connell Washington.

 SEAL:
NOTARY PUBLIC-STATE OF WASHINGTON
My Commission Expires: 10-10-2012



WASHINGTON STATE COURT OF APPEALS
DIVISION II
AT TACOMA

STATE OF WASHINGTON, Respondent,

Vs.

JOSEPH SULLIVAN, III, Appellant.

C.O.A. Number: 39603-3-III

DECLARATION OF SERVICE BY MAIL

FILED
COURT OF APPEALS
DIVISION II
10 FEB 26 PM 1:03
STATE OF WASHINGTON
BY Joseph E. Sullivan, III
DEPUTY

I, JOSEPH SULLIVAN, III, declare that, I deposited the foregoing:

STATEMENT OF ADDITIONAL GROUNDS

Or a copy thereof, in the internal mail system of the Coyote Ridge Correction Center and made arrangements for postage, addressed to

CAROLLA VERNE, Deputy Prosecuting Attorney
Thurston County Prosecutor's Office
2000 Lakeridge Drive S.W.
Olympia, Washington 98502

By placing same in the United States mail via the prison legal mail box at the Coyote Ridge Correction Center, in the city of Connell, State of Washington, in compliance with the General Rule (GR) 3.1.

I declare under the penalty of perjury under the laws of Washington that the foregoing is true and correct.

Dated: February 23RD, 2010.

Signed: Joseph E. Sullivan, III

Joseph E. Sullivan, III
Coyote Ridge Correction Center
P.O. Box 769, BA26, DOC #760962
Connell, Washington 99326