

FILED

OCT 01 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30467-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

FLINT G. HASTINGS, Appellant.

BRIEF OF RESPONDENT

Matt Arpin, WSBA# 26302
Special Deputy Prosecuting Attorney
Stevens County Prosecutor's Office
215 South Oak Street
Colville, WA
(509) 684-7500

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I. STATEMENT OF THE CASE

On March 20, 2006, Flint G. Hastings was charged by information with one count of first degree rape of a child and one count of third degree rape of a child. CP 1-2. The alleged victims were Mr. Hastings' own daughters.

Pursuant to a written plea agreement filed October 24, 2006, the State agreed to amend the information to charge one count of second degree rape of a child and one count of third degree rape of a child in exchange for Mr. Hastings' guilty plea to the amended counts. CP 75-82.

The plea agreement originally required the State to recommend 130 months in prison with all but 12 months suspended (if eligible for SSOSA) on Count 1, and 30 months in prison with all but 12 months suspended (if eligible for SSOSA) on Count 2. CP 78 § 2.2.

The typed plea agreement, however, was modified in hand writing to provide that the State would recommend 104 months in prison with all but 12 months suspended (if eligible for SSOSA) on Count 1, and 26 months in prison with all but 12 months suspended (if eligible for SSOSA). CP 78 § 2.2.

The plea agreement further provided that “[t]he terms in counts 1 and 2 to be concurrent for a total term of: 130 months (with all but 12

months suspended (if eligible for SSOSA).” CP 78 § 2.2.

Unlike the recommended number of months of incarceration, the “concurrent” provision and total number of months to be served in prison was not modified in hand writing or otherwise. CP 78.

On October 24, 2006, a change of plea hearing was held. At that hearing, Mr. Hastings filed his *Statement of the Defendant on Plea of Guilty to Sex Offense*, which provided that “[t]he prosecuting attorney will make the following recommendation to the judge: 130 months prison with all but 12 months suspended if eligible for SSOSA.” CP 64-74.

Moreover, the following colloquy occurred at the plea hearing:

THE COURT: And what agreement, then, have you reached with Mr. Irwin and Mr. Hastings?

MR. WETLE: Thank you your Honor.

We have agreed to amend the information from rape of a child in the first degree and rape of a child in the third degree to an information charging rape of a child in the second degree and rape of a child in the third degree.

...

The prosecuting attorney stated that his recommendation to the court is 130 months prison. That would be 104 months prison on Count 1 and 26 months on Count 2. With all but 12 months suspended, if Mr. Hastings is found eligible for SOSA.

...

THE COURT: But, so I'm clear on this, if it does come back that Mr. Hastings is amenable that the state would support the treatment option.

MR. WETLE: Well, - - Yes, your Honor.

...

THE COURT: Well, now, Mr. Irwin, is that what you expected to hear, then, by way of what the agreement is?

MR. IRWIN: Yes, it is.

...

THE COURT: And Mr. Hastings, now, another key point here is the maximum penalty that the court could impose. And the maximum under Count 1 would be 136 months in prison, and the maximum under the other count would be 34 months. And Mr. Wetle, these would run consecutive.

MR. WETLE: That's correct, your Honor.

THE COURT: So, in total that could be as much as 170 months. And you understand that.

DEFENDANT: Yes.

RP 44, ll. 19-25; RP 45, ll. 1, 12-16; RP 46, ll. 20-23; RP 47, ll. 12-14; RP 50, ll. 5-14.

Ultimately, the court granted the State's motion to amend the information as outlined above (CP 58-63; RP 48, ll. 2-5), accepted Mr. Hastings' guilty plea thereto (CP 72; RP 55, ll. 12-25, RP 56, ll. 1-8), and scheduled a sentencing hearing for December

19, 2006 (RP 56, ll. 10-23).

At the December 19, 2006, sentencing hearing, the prosecuting attorney outlined his reasons for agreeing to recommend 130 months in prison:

MR. WETLE: As I went through it, we started out with Mr. Irwin and I saying, "This is a difficult case," I wanted 130 months prison. The reason for the 130 months was that it opened the door for Mr. Hastings, if he got SOSA (sic) - - if the treatment provider said, "He's amenable to treatment," - - If there was a recommendation over the 133 months or eleven years, he's not eligible for SOSA (sic). So the 130 months kept him within the range of being eligible, if he could prove to a therapist that he was amenable to treatment...

So the recommendation was made for 130 months in prison. If he was found amenable for treatment and the court finds him amenable for treatment through SOSA (sic), then all but 12 months would be suspended.

...

So those were the standard recommendations for Mr. Hastings.

RP 62, ll. 8-23; RP 63, ll. 12-13.

After listening to the prosecutor's reasons for making the 130 month plea agreement (with no objection by Mr. Hastings or Mr. Irwin), the court was read a letter from one of Mr. Hastings' victim/daughters, and then heard personally from the second victim/daughter. RP 63, ll. 22 - RP 66, ll. 21.

Thereafter, Mr. Irwin again acknowledged the 130 month plea agreement, but nevertheless asked the court for a sentence at the low end of the standard range, stating, “[w]e would ask for a sentence at the low end, 102 months versus the 130...” RP 67, ll. 18-19.

Mr. Hastings then personally addressed the court but did not mention or object to either the State's recitation of the terms of the parties' plea agreement or to his attorney's comments acknowledging the same. RP 69, ll. 8-24.

Prior to imposing sentence, the court specifically noted the importance of the comments made at sentencing by Mr. Hastings' victims/daughters. CP 130-131; RP 70, ll. 7-8. The court also noted that the SSOSA evaluator had concluded Mr. Hastings was amenable to treatment notwithstanding his “limited remorse about the offense and concern about your victims, your daughters.” CP 106-115; RP 71, ll. 10-11. Finally, the court noted that the Pre-Sentence Investigation Report concluded that Mr. Hastings was NOT amenable to treatment and emphasized the prolonged duration of abuse and violation of parent/child trust. CP 116-126; RP 71, ll. 17-25. The court then observed:

THE COURT: [I]f there is long-term abuse, if there is multiple victims, and if it's not just touching, can be bad enough, but it's full intercourse over a period of time, that

makes the case more aggravated and more severe . . .

What I conclude is, is that you should go to prison for 136 months.

...

So, the long and short of it is, Mr. Wetle, that I conclude here, that Mr. - - Mr. Hastings is not amenable to treatment, that the penalty should be 136 months in prison. . .

RP 72, ll. 17-20; RP 73, ll. 13-15.

After declining to follow the parties' plea agreement as to the recommended prison term and finding Mr. Hastings not amenable to treatment, the court unequivocally announced that Mr. Hastings should go to prison for 136 months. RP 73, ll. 13-15.

Thereafter, the prosecutor erroneously volunteered that the existence of two different victims required the sentences on each count to run consecutively, and suggested that the court reach its stated intent of imposing 136 months in prison in total by imposing consecutive sentences of 102 months on count 1 and 34 months on count 2. RP 74, ll. 10-15.

The court acquiesced without elaboration, stating, "We'll do it that way, Mr. Wetle, so they do run consecutive." RP 74, ll. 16-17.

Consistent with the court's pronouncement, the *Judgment and Sentence* filed December 19, 2006, imposed 102 months in prison on

Count 1, and 34 months in prison on Count 2. CP 91-103. The *Judgment and Sentence* further stated that the “[a]ctual number of months of total confinement ordered is: 136 months. All counts shall be served consecutively: 2 different victims.” CP 97 § 4.5. As to Count 2, third degree rape of a child, the *Judgment and Sentence* also ordered 36 to 48 months community custody, exceeding the the five year statutory maximum for a class c felony. CP 96 § 4.4.

Although he never filed a direct appeal, more than three and one-half years after he was sentenced, on July 6, 2010, Mr. Hastings filed a personal restraint petition (hereinafter PRP) in the Washington State Supreme Court, which was transferred to this Court in March 2011 and assigned case number 29777-2-III.

On August 17, 2011, this Court dismissed Mr. Hastings' PRP in part, but also determined that the *Judgment and Sentence* entered on December 19, 2006, was on its face “unclear as to the legal basis for which the court imposed consecutive sentences, leaving this court unable to determine facial validity.” CP 140-145. The Court thus remanded the matter to the superior court “for written clarification of the judgment and sentence as to the basis articulated by the Court during the December 19, 2006 sentencing hearing for imposing consecutive sentences.” CP 145.

The Court further ordered that Mr. Hastings' *Judgment and Sentence* be amended in accordance with *In re Pers. Restraint of Brooks*, 166 Wash.2d 664, 211 P.3d 1023 (2009), "to explicitly state that the combination of confinement and community custody for Count II shall not exceed the statutory maximum." CP 145.

Finally, the Court instructed the State to file the "clarified/amended judgment and sentence within 7 days of entry by the superior court" directly in this Court, stating that it would thereafter "determine the steps necessary to properly decide any remaining issues in the petition . . ." CP 145.

On November 15, 2011, the sentence clarification hearing was held in the superior court. At that hearing, the State conceded that it neither requested an exceptional sentence nor did the court express any intent to order such a sentence at the December 19, 2006, sentencing hearing. RP 80, ll. 13-20; RP 81, ll. 8-14. Instead, the State advised the court that it believed the court's intention at sentencing "was to have Mr. Hastings serve the high end of the standard range on count 1," 136 months, notwithstanding the plea parties' agreement recommending 130 months. RP 80, ll. 18-23; RP 81, ll. 15-20.

Mr. Hastings, in contrast, argued that the court should simply

change the original sentences from consecutive to concurrent, resulting in concurrent sentences of 104 months on Count 1 and 34 months on Count 2, for 104 months of total confinement.¹ RP 82, ll. 12-24.

In response to this argument, the State reminded the court why it originally sentenced Mr. Hastings to the high end of the standard range (prolonged duration of abuse, victims were his daughters, limited remorse, not amenable to treatment). RP 83, ll. 21-25; RP 84, ll. 1-8.

The nature of the clarification hearing effectively changed to a resentencing hearing when the State then asked the court to impose a sentence of no less than 130 months pursuant to the plea agreement, “but preferably the 136” months consistent with the court's obvious original intent. RP 83, ll. 7-25; RP 84, ll. 1-10. The parties next discussed the inconsistencies between the original typed plea agreement and the hand written alterations thereto, which the State attributed to scrivener's error. RP 84, ll. 14 through RP 86, ll. 8.

The court, acknowledging the inconsistencies in the plea agreement, proceeded to resentence Mr. Hastings by imposing a sentence other than either 136 months or 102 months of total confinement; instead,

¹ It appears Mr. Hastings' counsel misspoke when he stated that removing the consecutive provision of the sentence would result in 104 months on Count 1, as Mr. Hastings had been sentenced to 102 months on that count: MR CLAY: I'm asking that you simply give him 104 months. It looks like that was your intention. That was the sentence you had originally gave him on Count 1. RP 82, ll. 22-25.

the court imposed 130 months based on the fact that was the term provided for in the parties' previously disregarded plea agreement. The court ruled:

THE COURT: Well, counsel, the court will then enter an order today that will impose a sentence of 130 months, and not 136.

The record, when I read it, I believe the judgment and sentence was meant to say 136 months, but on the other hand I - - there's enough confusion here that I think it would be better to interpret this consistent with the recommendation of the state, and that would be 130 months and - - and that would be within the standard range for the longer offense.

So it would not be an exceptional sentence; that's for sure. And it would not be based on running the two crimes consecutively, but rather just 130 months within the 102 to 136 month standard range.

And the penalty for the lesser crime would run concurrent, would be concurrent with the longer sentence.

...

And I do remember the aggravating factors that Ms. Kapri talks about, and I do remember my explanation at the time. And it was to go to the upper end of the standard range for the more serious crime.

So that's the explanation I can give to the Court of Appeals.

RP 86, ll. 9-23; RP 88, ll. 23-25; RP 89, ll. 1-3.

The November 15, 2011, hearing ended with the filing of an

Amended Judgment and Sentence imposing 130 months on count 1 and 34 months on count 2, to run concurrently, for total confinement of 130 months. CP 273-283.

The State also contemporaneously filed an *Order Clarifying Judgment and Sentence* in the superior court stating that Mr. Hastings did NOT receive an exceptional sentence. CP 272. The State never filed the clarification order directly in the Court of Appeals as instructed.

On December 11, 2011, in response to a request from the Department of Corrections to clarify the November 15, 2011, *Amended Judgment and Sentence*, a second *Order Clarifying Judgment and Sentence* was filed in the Superior Court. CP 286. That order states that Mr. Hastings was sentenced under RCW 9.94A.172, which appears to be a scrivener's error insofar as the last three numbers of RCW 9.94A.712 were transposed.²

That same day, December 11, 2011, Mr. Hastings filed a *Notice of Appeal* in the Superior Court seeking review of the *Amended Judgment and Sentence* filed November 15, 2011. CP 287.

More than 6 months later, on June 8, 2012, Mr. Hastings, through

² RCW 9.94A.712 was recodified as RCW 9.94A.507 by Laws 2008, ch. 231, § 56, effective August 1, 2009. By its terms, offenders such as Mr. Hastings convicted of rape of a child in the second degree are required to be sentenced under RCW 9.94A.507.

appointed counsel, filed a *Second Amended Notice of Appeal* in the trial court seeking review of the *Order Clarifying Judgment and Sentence* filed December 11, 2011.

In the meantime, on April 2, 2012, this Court, apparently on its own initiative, issued an order dismissing the PRP under which this matter was remanded to the Superior Court for sentencing clarification (no. 29777-2-III), determining that the only unresolved issues in that PRP were related to the November 15, 2011, *Amended Judgment and Sentence* that is the subject of this direct appeal.

II. ARGUMENT

A. Introduction

As outlined above, the clarification hearing held on remand revealed that the trial court did not intend to impose an exceptional sentence under RCW 9.94A.535 (or otherwise) when sentencing Mr. Hastings on December 19, 2006. CP 272.

The State submits that once this point was clarified pursuant to this Court's remand order, the trial court lacked the authority to proceed to resentence Mr. Hastings, and should have simply imposed 136 months of incarceration in total as intended at the time of the first sentencing.

The State further submits that, notwithstanding the clarification

order and entry of an *Amended Judgment and Sentence*, the December 19, 2006, *Judgment and Sentence* is not “invalid on its face” so as to avoid application of the time bar on collateral attack found in RCW 10.73.090. Moreover, even if the *Judgment and Sentence* is facially invalid, any arguments related to any issues other than Mr. Hastings' consecutive sentence are time barred under RCW 10.73.090. Finally, Mr. Hastings actually received specific performance of the parties' plea agreement and is not entitled to withdraw his guilty plea.

B. The December 19, 2006, *Judgment and Sentence* is valid on its face; Mr. Hastings' claims are time barred by RCW 10.73.090.

RCW 10.73.090 provides that “[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is *valid on its face* and was rendered by a court of competent jurisdiction. RCW 10.73.090 (emphasis added).³

“Invalid on its face” is a term of art that, like many terms of art, obscures, rather than illuminates its meaning. Generally speaking, a judgment and sentence is not valid on its face if it demonstrates that the trial court did not have the power or the statutory authority to impose the judgment or sentence. “Invalid on its face” does *not* mean that the trial judge committed some legal error. A trial court does not lose its authority because it commits a legal error, and

³ Mr. Hastings' *Judgment and Sentence* became “final” one year after its December 19, 2006, filing. RCW 10.73.090(3)(a).

most legal errors must be addressed on direct review or in a timely personal restraint petition or not at all.

In re Pers. Restraint of Scott, 173 Wash.2d 911, 916, 271 P.3d 218 (2012) (emphasis in original) citing *In re Pers. Restraint of Coats*, 173 Wash.2d 123, 143, 267 P.3d 324 (2011).

In *In re Coats*, the court held that the trial court did not exceed its authority and the judgment and sentence at issue was not facially invalid even though it contained an error where the defendant was ultimately sentenced within standard range. *In re Coats*, 173 Wash.2d at 143.

In the instant case, the trial court committed a legal error when in ordered Mr. Hastings' sentences to run consecutively based on the prosecutor's erroneous representation that the existence of a different victim on each count required consecutive sentences. However, the court did not exceed its authority rendering the *Judgment and Sentence* facially invalid by doing so because the total sentence (136 months) was within the standard range for the most serious count.

While the trial court's error may have been correctable on direct review of Mr. Hastings' original sentence, it does not render the *Judgment and Sentence* invalid on its face so as to avoid the one year time limit on collateral attacks found in RCW 10.73.090. Thus, Mr. Hastings'

challenge to the *Judgment and Sentence* entered December 19, 2006, is time barred, and this matter should be remanded to the trial court with instructions to reinstate the originally intended sentence of 136 months total confinement on Count 1 and to correct the consecutive sentence error.

C. Any claims unrelated to the imposition of consecutive sentences are time barred by RCW 10.73.090.

If this Court finds the original *Judgment and Sentence* is invalid on its face notwithstanding the authorities cited above, the proper remedy is to remand the matter for the limited purpose of correcting the consecutive sentence error; all other arguments remain time barred by RCW 10.73.090, and all other provisions of the original *Judgment and Sentence* remain unchanged and in full effect.

A finding that a judgment and sentence is facially invalid may not be used to circumvent the one year time bar on collateral attacks unrelated to the facial invalidity. *In re Coats*, 173 Wash.2d at 141.

Similarly, “the imposition of an unauthorized sentence does not require vacation of the entire judgment . . . The error is grounds for reversing only the erroneous portion of the sentence imposed.” *In re Pers. Restraint of West*, 154 Wash.2d 204, 215, 110 P.3d 1122 (2005) (citations omitted) (case remanded for deletion from judgment and sentence of a

handwritten notation prohibiting defendant from earning early release time); *See also In re Pers. Restraint of Goodwin*, 146 Wash.2d 861, 877, 50 P.3d 61 (2002) (“Correcting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed.”).

Mr. Hastings argues that the State breached the parties' plea agreement at the December 19, 2006, sentencing hearing, entitling him to specific performance. However, this Court has already ruled that Mr. Hastings' breach claim was time barred under RCW 10.73.090(1). This Court further ruled that the breach claim does not fall within any of the RCW 10.73.100 exceptions to the one year time bar of RCW 10.73.090. CP 140-145. Therefore, this claim is and remains time barred as to the December 19, 2006, sentencing.

Similarly, Mr. Hastings' request to withdraw his guilty plea entered on October 24, 2006, is time barred. *See State v. King*, 130 Wash.2d 517, 531, 925 P.2d 606 (1996) (challenge to voluntariness of guilty plea is subject to time bar under RCW 10.73.090).

In his *Statement of Additional Grounds* (hereinafter SAG), Mr. Hastings raises other issues unrelated to his consecutive sentence. Specifically, Mr. Hastings challenges both the trial court's authority to

sentence him under RCW 9.94A.712 and its finding that he has the ability or future ability to pay his legal financial obligations (hereinafter LFOs). However, since these issues are unrelated to the claimed facial invalidity of his *Judgment and Sentence*, the provisions addressing these matters in the original *Judgment and Sentence* remain in effect, and further consideration is time barred under RCW 10.70.090.

Finally, Mr. Hastings attempts to raise the issue of his trial counsel's failure to file a notice of appeal of the December 19, 2006, *Judgment and Sentence* in his SAG. This issue is similarly unrelated to the claimed facial invalidity of his *Judgment and Sentence*, was already raised and rejected in Mr. Hastings' PRP in the context of an equitable tolling claim (CP 140-145), and remains time barred under RCW 10.70.090.

D. Mr. Hastings received specific performance of the parties' plea agreement and is not entitled to withdraw his plea.

Mr. Hastings argues that the State breached the parties' plea agreement at the the November 15, 2011, clarification hearing. However, the record shows that the State recommended and the court imposed a sentence consistent with that plea agreement.

Initially, both the State and defense counsel acknowledged that the

clarification hearing was limited in scope to the specific purpose of clarifying the basis for the imposition of consecutive sentences in the original *Judgment and Sentence* as directed by this Court:

MR. CLAY: Well, the Court of Appeals sent this back down to the trial court with instructions to clarify or essentially correct the judgment and sentence.

The court had apparently run Count 1 and Count 2 consecutively, and there was an issue of whether or not that was proper. So the court simply sent this - - sent this down here to clarify the sentence.

...

MS. KAPRI: So, essentially Mr. Clay is right.

RP 79, ll 9-15, 23.

To this end, the State asked the court to clarify the judgment and sentence by amending it consistent with its unequivocally expressed intent at the time of the original sentencing to impose 136 months of incarceration in total. RP 81, ll. 15-20. The State was not at this point asking the court to resentence Mr. Hastings or making representations concerning the contents of the parties' the plea agreement.

Defense counsel then argued that the court's intent at the time of sentencing was to impose 104 months on Count 1:

MR. CLAY: I'm asking that you simply give him 104 months. It looks like that was your intention. That was the

sentence you had originally gave him on Count 1.

RP 82, ll. 22-24.⁴

When asked to reply, the State asked for nothing less than the 130 months contemplated in the plea agreement. In this instant, the clarification hearing essentially transformed into an unauthorized resentencing, and the parties began to argue over the terms of the plea agreement (which the court had originally declined to follow).

While the State maintains Mr. Hastings' sentence should have simply been clarified as having imposed 136 months total confinement (and the plea agreement should have been irrelevant to the clarification proceeding), the State nevertheless ultimately recommended the 130 month sentence according to the plea agreement.

Mr. Hastings, however, now argues that that State breached the plea agreement on remand by recommending 130 months instead of 104 months total confinement.

As outlined in the *Statement of Case*, the plea agreement contains hand written alterations to the recommended prison terms on each count without a corresponding correction to the total term. These conflicting

⁴ Again, it appears defense counsel misspoke and was referring to the hand written alteration to the plea agreement when he said 104 months reflected the court's intent at the time of sentencing as the court actually imposed 102 months on Count 1, not 104. CP 91-103.

provisions read alone would render the plea agreement ambiguous. *State v. Bisson*, 156 Wash.2d 507, 523, 130 P.3d 820 (2006) (“A plea agreement reasonably susceptible to different interpretations is ambiguous.”).

Mr. Hastings acknowledges that specific performance is NOT an available remedy for an ambiguous provision in a plea agreement. Brief at p. 6; *Bisson*, 156 Wash.2d at 524. In fact, specific performance of a provision in a plea agreement is available “only where the prosecutor’s promise was *not susceptible* to more than one meaning.” *State v. Yates*, 161 Wash.2d 714, 739, 168 P.3d 359 (2007) (emphasis added); *In Re: Personal Restraint of Murillo*, 134 Wash.App. 521, 534, 142 P.3d. 615 (Div. 3 2006).

In order to avoid this rule and demand specific performance, Mr. Hastings strains to characterize the typed recitation contained in the plea agreement providing for a total term of incarceration of 130 months as “plainly a scrivener’s error.”

In fact, a review of the entire record reveals that it was the hand written alteration of the recommended terms of incarceration on each count in the plea agreement that was the error, committed due to the parties’ mistaken belief that a different victim on each count required consecutive sentences. The record also makes clear through both

affirmative representations and silent assent that all parties understood and intended that the plea agreement recommend 130 months incarceration.

“Because as plea agreement is a contract, issues concerning the interpretation of a plea agreement are questions of law reviewed de novo.” *Bisson*, 156 Wash.2d at 518, citing *State v. Harrison*, 148 Wash.2d 550, 556, 61 P.3d 1104 (2003). Washington court's apply contract principles when construing plea agreements. *State v. Wheeler*, 95 Wash.2d 799, 803, 631 P.2d 376 (1981). The objective of contract interpretation is to ascertain and give effect to the intent of the parties. *State v. Olivia*, 117 Wash.App. 773, 779, 73 P.3d 1016 (Div. 3 2003), citing *In re Marriage of Litowitz*, 146 Wash.2d 514, 528, 48 P.3d 261, 53 P.3d 516 (2002).

In order to ascertain the intent of the parties, courts look at not only the language of the agreement, but also examine ‘the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’ *Olivia*, 117 Wash.App. at 779, citing *In re Litowitz*, 146 Wash.2d at 528.

Here, an examination of the *Plea Agreement, Statement of Defendant on Plea of Guilty*, and the subsequent acts and conduct of the

parties including the absence of any objection on the record or filing of any motion to reconsider or to vacate, as well as Mr. Hastings' abandonment of his right to a direct appeal, conclusively establish that the intent of the parties' was to recommend 130 months total confinement. This is the exact term of confinement requested by the State and imposed by the court upon resentencing; Mr. Hastings received specific performance of the parties' plea agreement on remand.

Mr. Hastings cites *Bisson* for the proposition that an ambiguity in a plea agreement must be construed in favor of the accused. Brief at 6-7. *Bisson*, however, does not stand for the cited proposition. In *Bisson*, the appellant argued that an ambiguity in a plea agreement attributed to the State should be construed against the State. *Bisson*, 156 Wash.2d at 521-22. The court, however, rejected this argument and declined to construe the ambiguity in favor of either party, instead holding that specific performance is not an available remedy for an ambiguous provision in a plea agreement “unless the precise act sought to be compelled is readily ascertainable.” *Bisson*, 156 Wash.2d at 524 (citations omitted); *In re Murillo*, 134 Wash.App. at 534.

Here, the record reveals the intent of the parties as to the proper interpretation of the plea agreement, which the court exactly followed as

to the recommended period of total confinement upon remand, notwithstanding its initial decision to disregard the agreement. Thus, to the extent this Court finds both the *Judgment and Sentence* at issue facially invalid and that the proper remedy is not the imposition of the 136 months originally intended, Mr. Hastings has now been resentenced consistent with the parties' plea agreement as to the total term of incarceration.

In other words, Mr. Hastings received specific performance of the bargain he made, and no legitimate basis exists to permit him to withdraw his guilty plea.

E. Because Mr. Hastings was first sentenced on December 19, 2006, the *Brooks* notation is legally sufficient.

Both the State and Mr. Hastings appear to agree that this matter should be remanded to the trial court, albeit for very different reasons.

Specifically, Mr. Hastings argues he should be sentenced to concurrent terms of 104 months on Count 1 and 26 months on Count 2, while the State argues he should be sentenced to concurrent terms of either 136 or 130 months on Count 1, and 34 months on Count 2.

In any event, if the matter is remanded for any reason, the community custody term on Count 2 should be amended consistent with

RCW 9.94A.701(9).

However, to the extent this Court determines that remand is unnecessary and accepts the concurrent terms of 130 months on Count 1 and 34 months on Count 2, the State submits that, because Mr. Hastings was *first* sentenced on December 19, 2006, well before RCW 9.94A.701(9) became effective, the “*Brooks* notation” contained in the *Amended Judgment and Sentence* complies with the requirements in effect at the time of *first* sentencing. *State v. Boyd*, 174 Wash.2d 470, 473, 275 P.3d 321 (2012) citing *State v. Franklin*, 172 Wash.2d 831, 840, 263 P.3d 585 (2011). Therefore, the DOC may retain the responsibility to reduce the term of community custody to bring the total term within the statutory maximum.

F. The reference to RCW 9.94A.172 contained in the December 6, 2011, Order Clarifying Judgment and Sentence is a scrivener's error.

Mr. Hastings filed an *Amended Notice of Appeal* to include a December 6, 2011, *Order Clarifying Judgment and Sentence* requested by the Department of Corrections. This *Order* clearly contains a scrivener's error insofar as it indicates that Mr. Hastings was sentenced under RCW 9.94A.172, when in fact he was both originally and upon remand sentenced under RCW 9.94A.712. CP 91, 286.

In his SAG, Mr. Hastings addresses this order by arguing that the trial court did not sentence him under RCW 9.94A.712 because it sentenced him to a *determinate* period of total confinement and not an indeterminate period as required by that statute. Mr. Hastings requests specific performance of the determinate standard range sentence. SAG at 3.

However, sentencing under RCW 9.94A.712/9.94A.507 is mandatory when a defendant like Mr. Hastings is convicted of second degree rape of a child. RCW 9.94A.507. Furthermore, the original *Judgment and Sentence* specifically states that “[t]he court finds that the defendant is subject to sentencing under RCW 9.94A.712.” CP 91.

Under the authorities cited above regarding the vacation of only the portion of a judgment and sentence that renders it facially invalid, this finding from the original *Judgment and Sentence* remains in full effect. Moreover, a defendant is NOT entitled to specific performance when the result is to bind the sentencing court to impose a sentence contrary to law, as would be the case here. *State v. Barber*, 170 Wash.2d 854, 872-73, 248 P.3d 494 (2011).⁵

⁵ Mr. Hastings cites *State v. Miller*, 110 Wash.2d 528, 536, 756 P.2d 122 (1988), *o’ruled in part*, *State v. Barber*, 170 Wash.2d 854, 248 P.3d 494 (2011), for the very proposition overruled by *Barber* that a defendant must be given the choice of specifically enforcing a plea agreement in conflict with law or withdrawing his plea. Brief at 5.

Mr. Hastings points out that the *Amended Judgment and Sentence* imposes only a minimum determinate term of confinement rather than an indeterminate term under RCW 9.94A.712.⁶ The record of the clarification hearing, however, reveals that the parties and court addressed only the total term of incarceration in clarifying the original *Judgment and Sentence*. Thus, the *Amended Judgment and Sentence* in its present state is not a complete recitation of the court's ruling and needs to be read in conjunction with the original *Judgment and Sentence* to ascertain the entire order of the court.

The State asks this Court to remand this matter with instructions to consolidate the original and amended judgment and sentence forms into a single judgment and sentence encompassing the entirety of the original terms of the sentence that remain unchanged and whatever term of total incarceration this Court ultimately determines is appropriate after considering this appeal.

In the alternative, the State submits the *Order Clarifying Judgment and Sentence* should be independently corrected to reference RCW 9.94A.507.

⁶ The maximum term of imprisonment is listed as "Life" at section 2.3 of the *Amended Judgment and Sentence*, and community custody is ordered for "any period of time released from confinement before the expiration of the maximum sentence" at section 4.2. CP 275, 277.

G. Mr. Hastings' ability to pay Legal Financial Obligations is supported in the record.

Mr. Hastings also challenges the trial court's finding on remand that he “has the ability or likely future ability to pay the legal financial obligations imposed.” SAG at 3.

First, this challenge is another attempt to avoid the time limitation on collateral attacks contained in RCW 10.73.090. As previously argued, a finding that a judgment and sentence is facially invalid may not be used to circumvent the one year time bar on collateral attacks unrelated to the facial invalidity (which in this case is limited to the imposition of consecutive versus concurrent sentences). *In re Coats*, 173 Wash.2d at 141. The record reveals that Mr. Hastings' ability to pay LFOs was not addressed at the clarification/re-sentencing; instead, the terms of the original *Judgment and Sentence* were simply copied onto the *Amended Judgment and Sentence* form. The time bar contained in RCW 10.73.090 should not be reset by the restatement of previously unchallenged findings in an *Amended Judgment and Sentence* issued in response to a request for clarification from this Court.

Notwithstanding the time bar, the challenged finding is in fact supported by the record. *See State v. Bertrand*, 165 Wash.App. 393, 404,

267 P.3d 511 (Div. 2 2011) (A trial court's finding that a defendant has the ability to pay legal financial obligations is clearly erroneous if the finding lacks support in the record). Specifically, the Pre-Sentence Investigation Report filed December 21, 2006, indicates that at the time of his original sentencing, Mr. Hastings was receiving 100% VA disability benefits in the amount of \$2600 per month, in addition to between \$200 and \$400 per month in Social Security benefits. CP 121, 107.

Moreover, Mr. Hastings agreed to the imposition of the LFOs ordered in both his plea agreement (CP 77) and *Statement of Defendant on Plea of Guilty*. CP 68 § g, CP 66 § e. Finally, the court did note on the record that Mr. Hastings has “I would say, a strong and impressive work history, that you've done things in your life; you're a man of intelligence and accomplishment.” RP 70, ll. 18-20.

In sum, notwithstanding the time bar, the record supports the court's finding that Mr. Hastings has the present or future ability to pay his LFOs.

III. CONCLUSION

Based on the foregoing, the State respectfully urges this Court to remand this matter to the Stevens County Superior Court with instructions (1) to impose concurrent sentences of 136 months on Count 1 and 34

months on Count 2 consistent with the trial court's original intent as expressed at the time of sentencing; (2) to amend the community custody term imposed on Count 2 consistent with RCW 9.94A.701(9); and, (3) to consolidate the entirety of the trial court's original and amended judgment and sentence into a single form and/or to correct the scrivener's error referencing RCW 9.94A.172 in the *Order Clarifying Judgment and Sentence* filed December 11, 2011, by replacing it with reference to RCW 9.94A.507.

Respectfully submitted this 2nd day of October, 2012.



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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that, on October 2, 2012, I mailed (postage prepaid) a true and correct copy of Respondent's *BRIEF OF RESPONDENT* to:

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Flint G. Hastings, #300866
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Signed at Spokane, Washington, on October 2, 2012.



Matt Arpin