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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD ELTON CHEW,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:



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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the sentencing of the Appellant.

## **III. ISSUE**

Did the state breach the plea agreement by making the agreed upon recommendation for 84 months and opposing the defense recommendation for DOSA which violated the plea agreement in which both parties agreed to recommend an 84 month sentence?

## **IV. STATEMENT OF THE CASE**

The Defendant Clifford Chew was accused of manufacturing methamphetamine in a hotel in downtown Walla Walla, near Whitman College. CP 1-6, 141-43.

On February 27, 2012, the Defendant pled guilty to possession of methamphetamine with intent to manufacture. CP 130-40; RP 200-10. The change of plea came after many vigorously litigated defense motions and in

the middle of opening statements. CP 119-24; RP 198-99, 212. The Defendant agreed to plead guilty to one of three charges with an agreed recommendation for the bottom of the range. CP 130-43; RP 198-99.

According to the history attached to the Defendant's Statement on Plea of Guilty, the Defendant's offender score is significantly more than the top end of nine points. CP 140. The standard sentencing range was 84-120 months. CP 132. Both parties agreed to recommend an 84 month sentence. CP 133; RP 205.

At the sentencing hearing, after conferring with the detective, the prosecutor made an oral amendment to omit the doubling statute (RCW 69.50.408), which had the effect of rendering the offense a class B felony rather than a class A felony and reduced the top end of the standard range from 144 to 120 months. RP 200-02. *See also* CP 142.

On March 5, 2012, the Defendant was sentenced. CP 144-56; RP 211-23. At that time, contrary to the joint recommendation agreed upon, the Defendant asked for a DOSA. RP 212-13. The Defendant argued that he should be forgiven and shown mercy, because his mother had cancer and he wanted to see her "outside the bars of prison" before she died, because he was "a really sweet person when he doesn't feel like he's being persecuted," because he was an addict, and because his attorney believed he was sorry.

RP 211-14.

In response to the request for the DOSA, the prosecutor stated:

Your Honor, pursuant to the plea negotiation the State agreed to recommend 84 months and a day in this case and agreed to dismiss two of the three counts. We don't believe that he should be given a DOSA treatment program. His criminal history is probably about as long as I've ever seen in my years of this. I think I counted about 19 felonies starting back in the mid-seventies and starting about the mid-eighties he was just about convicted almost every year or every other year up until 2004, when he got about 10 years for Attempted Murder and Assault 1<sup>st</sup>, which then put him away for 10 years. And then after that, 2010, he was back at it, 2011 back at it, and he found himself here in our county in May with not just one but actually, as I understand it from the discover, two meth lab components.

But, be that as it may, knowing what we know about meth labs and the hazardous, the hazards that they give, the State believes the 84 month range recommendation is reasonable. And I know that Detective Sergeant Buttice is present and wishes to make a statement to the Court.

RP 214-15. The detective also opposed the DOSA, observing the very real danger methamphetamine manufacturing poses to those in the vicinity of the volatile lab:

Your Honor, I don't have to educate the Court on the destruction of methamphetamine or methamphetamine laboratories. As we know, it is affecting our community, our society, and actually globally.

What I want the Court to understand is we as law enforcement officer take an inherent risk to investigate these types of crimes in order to give a better quality of life to everybody here, and the citizens within the community.

The people at the hotel that day, the people in the

future to come to that hotel that day, didn't anticipate and probably would never know the inherent danger or risk associated with what was going on in room 106; the contamination, the exposure levels of the chemicals within the room.

Again, we as law enforcement take that risk so that people have a safe place to live. I don't feel it's right that we give any sort of leniency towards people who take advantage of our community in this way and bring their dirt here, it you will.

**Our position is that we would hope that Mr. Chew takes advantage of some sort of treatment program within the institutions. We would not agree or be in favor of granting DOSA in any way.** If this was a one-time scenario I might be more open to that, but this is not the first time. This is not his first encounter with methamphetamine and it's certainly not going to be the last time we see it in the community, but I just ask that you recognize the dangers and inherent danger that this posed not only to him, to us and the community which is just about everybody as a whole. Thank you.

RP 215-16 (emphasis added).

Defense immediately reminded the court that that 84 month recommendation was agreed and acceptable to the parties. RP 216.

The sentencing judge stated that he gives "a great deal of credibility and weight to the joint recommendation of the parties as a result of the plea bargain. I think the whole process needs that kind of credibility, and I want to at the outset say that I give it lots of weight in making a decision of this nature." RP 217. The judge said three factors influenced his decision not to order a low-end sentence: the incredible addictive nature of

methamphetamine, the danger to others of meth labs, and the Defendant's criminal history. RP 217-18. The judge noted that while the prosecutor mentioned the criminal history, "he didn't need to, I know it." RP 218. "It's off the charts in terms of the determinate sentencing schedule." RP 218.

The Defendant received a sentence of 108 months. CP 150; RP 220.

## **V. ARGUMENT**

### **A. THE STATE DID NOT BREACH THE PLEA AGREEMENT BY RECOMMENDING THE AGREED 84-MONTH SENTENCE AND BY OPPOSING THE DEFENDANT'S DOSA RECOMMENDATION WHICH VIOLATED THE AGREEMENT.**

A defendant may raise the issue of a prosecutor's breach of the plea agreement for the first time on appeal. *State v. Xavier*, 117 Wn. App. 196, 199, 69 P.3d 901 (2003).

If a breach is found, the Defendant may request either specific performance of the plea agreement or withdrawal of his guilty plea. *In re James*, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982). The defendant's preferred remedy is entitled to considerable weight. *In re James*, 96 Wn.2d at 852. If the Defendant chooses specific performance, only the prosecutor's recommendation is mandated. The sentencing court is still free to disagree with and depart from any recommendation. *State v. Henderson*, 99 Wn. App. 369, 379, 993 P.2d 928 (2000).

The State may not undercut its plea bargain. *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997). However, the prosecutor's recommendation need not be made enthusiastically. *State v. Sledge*, 133 Wn.2d at 840. The prosecutor fulfills his duty by simply making the promised recommendation. *State v. Coppin*, 57 Wn. App. 866, 791 P.2d 228, review denied 115 Wn.2d 1011, 797 P.2d 512 (1990). The prosecutor is obliged to act in good faith, to participate in the sentencing proceedings, to answer the court's questions candidly, and to provide relevant information regarding the plea agreement. *State v. Carreno-Maldonado*, 135 Wn. App. 77, 83, 143 P.3d 343 (2006). It is not a breach of the agreement for the prosecutor to recount salient facts which are not unduly inflammatory and which support the prosecutor's recommendation. *State v. Monroe*, 126 Wn. App. 435, 440, 109 P.3d 449 (2005).

In the instant case, the challenged remarks were relevant, were not unduly inflammatory, and supported the agreed recommendation. The prosecutor did not ask for any different sentence, but directed his remarks as opposition to the last minute DOSA request only. Although the detective was not bound by the plea agreement, his remarks were also relevant to the DOSA request, not unduly inflammatory, and supported the 84 month sentence.

The judge recognized the purpose of the remarks was to support the agreed recommendation. The judge recognized that the prosecutor was asking for an 84 month sentence and no more. He stated that he gave a lot of weight to that recommendation and to the “whole process” which arrived at that recommendation. RP 217. However, the judge stated that he was departing from that recommendation.

The Defendant cites *State v. Xaviar*, 117 Wn. App. 196, 69 P.3d 901 (2003), *State v. Carreno-Maldonado*, 135 Wn. App. 77, 143 P.3d 343 (2006), and *State v. Van Buren*, 101 Wn. App. 206, 2 P.3d 991 (2000) as examples of a breach of an agreement. Those cases are distinguished from the facts here.

In *State v. Xaviar*, the prosecutor ostensibly recommended the bottom of the range (240 months) while highlighting at least six *aggravating factors* (deliberate cruelty, vulnerable victim, multiple victims or incidents, high degree of sophistication over lengthy period of time, betrayal of position of trust and fiduciary responsibility, and lack of remorse), which would support an exceptional sentence. *State v. Xaviar*, 117 Wn. App. at 198. The court departed from the standard range and gave the defendant twice the recommended term (480 months). *State v. Xaviar*, 117 Wn. App. at 199. Unlike the instant case, the prosecutor in *Xaviar* was not responding to a defense breach of the agreement. These then were “unsolicited remarks” and

“not relevant.” *State v. Xaviar*, 117 Wn. App. at 201.

The same rationale for reversal is also apparent in *State v. Carreno-Maldonado*, 135 Wn. App. 77, 82, 143 P.3d 343 (2006) and *State v. Van Buren*, 101 Wn. App. 206, 209, 2 P.3d 991 (2000). In those cases too, although the prosecutors were ostensibly recommending a low-end sentence, they used words which mirrored the *statutory aggravating factors* which could permit an exceptional sentence. In *State v. Carreno-Maldonado*, the prosecutor spoke about the special vulnerabilities of the victims (RCW 9.94A.535(3)(b)) and characterized the crimes as “so heinous and so violent it showed a complete disregard and disrespect for these women” (*Cf.* RCW 9.94A.535(3)(a) and (y)). *State v. Carreno-Maldonado*, 135 Wn. App. at 80-81. And in *State v. Van Buren*, the prosecutor made “fleeting and tangential reference” to a recommendation “listed in the plea form” and then volunteered to the sentencing judge “without prompting” the evidence needed to impose an *exceptional sentence* for deliberate cruelty, lack of remorse, and foreseeable impact on others. *State v. Van Buren*, 101 Wn. App. at 215-16; RCW 9.94A.535(3)(a), (q), and (r).

The comments in those cases were unduly inflammatory. They “highlighted” statutory aggravating factors and “downplayed” the ostensible recommendation. *State v. Van Buren*, 101 Wn. App. at 216-17. They were

“not a response to argument by defense counsel” or the court’s questions.  
*State v. Carreno-Maldonado*, 135 Wn. App. at 85.

The same cannot be said in Mr. Chew’s case. Here the prosecutor’s remarks were in direct response to the defense breach of the agreement. The prosecutor did not highlight the availability of an exceptional sentence or downplay the recommendation. The court accepted the remarks as support for the recommended 84 month term and did not impose an exceptional sentence.

There is no breach of the agreement.

**B. THE LEAD INVESTIGATOR IS NOT BOUND BY THE PLEA AGREEMENT.**

The Defendant argues that Detective Buttice’s remarks were bound by the plea agreement. Appellant’s Opening Brief at 13-14, citing *State v. Sanchez*, 146 Wn.2d 339, 46 P.3d 774 (2002). This is not the holding in *State v. Sanchez*. The holding is exactly the opposite.

In *Sanchez*, the prosecutor agreed to make no sentencing recommendation and in fact made no sentencing recommendation. *State v. Sanchez*, 146 Wn.2d at 343. The victim, her parents, and the investigating officer (IO) Sergeant Dave Ruffin spoke at sentencing and opposed a SSOSA. *Id.* The court did not grant a SSOSA. In the consolidated case of

*State v. Harris*, the prosecutor made the agreed recommendation for 29 months while the community corrections officer (CCO) asked for an exceptional sentence of 60 months. *State v. Sanchez*, 146 Wn.2d at 344. Harris received 60 months. *Id.*

The Washington Supreme Court held that a person who is not a party to the plea agreement does not breach the plea agreement. *State v. Sanchez*, 146 Wn.2d at 342, 348. “[W]hether a government employee other than the prosecutor is bound by the agreement depends not on the employee’s role vis-à-vis the prosecutor, but on the employee’s role vis-à-vis the sentence court.” *State v. Sanchez*, 146 Wn.2d at 349. The court noted that a juvenile court probation counselor is an employee of the court and not bound by the plea agreement. *State v. Sanchez*, 146 Wn.2d at 349, citing *State v. Poupart*, 54 Wn. App. 440, 446-47, 773 P.2d 893 (1989) and *State v. Merz*, 54 Wn. App. 23, 771 P.2d 1178 (1989). But a parole officer “who has no statutory role in the sentencing hearing” and “whose input is not requested by the trial court” acts on behalf of the prosecutor and is, therefore, bound by the plea agreement. *State v. Sanchez*, 146 Wn.2d at 349, citing *State v. Sledge*, 133 Wn.2d 828, 843, 947 P.2d 1199 (1997).

A lead investigator like Detective Buttice has a separate statutory role in the sentencing hearing. RCW 9.94A.500 (“The court shall consider the

risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and **an investigative law enforcement officer** as to the sentence to be imposed”) (emphasis added). *See State v. Sanchez*, 146 Wn.2d at 351, *citing* former RCW 9.94A.110. It is the statute, which invites law enforcement to the hearing, not the prosecutor. A prosecutor may consult with an investigating officer (RP 201) regarding a proposed plea agreement as one would a victim, but the prosecutor “does not control the actions of an IO.” *State v. Sanchez*, 146 Wn.2d at 352. The Washington Supreme Court held that the investigating officer was not bound by the plea agreement.

Because former RCW 9.94A.110 specifically contemplates “arguments” from an IO regarding the sentence, and because that officer is not under the control of the prosecutor’s office, he is more like the independent officer in *Poupart* than the parole officer in *Sledge*. We therefore hold that Sanchez’s IO did not have a duty to abide by Sanchez’s plea agreement with the county prosecutor, and therefore, his plea agreement was not breached by Sergeant Ruffin’s testimony at the sentencing hearing.

*State v. Sanchez*, 146 Wn.2d at 352.

Although a CCO is not mentioned in the sentencing statute, the outcome was the same in *Harris*. Specifically, the court held that a

community corrections officer (CCO) who prepares a presentencing investigation report “has an independent duty of investigation and recommendation,” “is not part of the prosecution team,” and “cannot be bound by the plea agreement.” *State v. Sanchez*, 146 Wn.2d at 354.

The detective was not bound by the plea agreement.

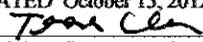
**VI. CONCLUSION**

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

DATED: October 15, 2012.

Respectfully submitted:

  
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<p>Oliver R. Davis wap office mail@washapp.org</p> <p>Clifford Chew, DOC # 256175 Coyote Ridge Corrections Center 1301 N Ephrata Ave. P.O. Box 769 Connell, WA 99326</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court’s e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 15, 2012, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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