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A. IDENTITY OF PETITIONER

Danny Joe Barber, Jr, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS OPINION

Petitioner seeks review of the Court of Appeals decision filed July 21, 2009. The decision affirmed the trial court's order modifying Mr. Barber's judgment and sentence at the request of the Department of Corrections to add a term of community custody of 9 to 18 months. A copy of the decision is in the appendix at pages A 1-6.

C. ISSUES PRESENTED FOR REVIEW

1. On November 16, 2007 Mr. Barber plead guilty to two crimes, one of which does not require community custody and the other, Felony Driving Under the Influence does. He was, nonetheless, sentenced without the requirement of community custody pursuant to the plea agreement and based upon a collective mistake by the parties and by the trial court.

Whether the trial court may, at re-sentencing six months later- on May 23, 2008, enter an order modifying the judgment and sentence and impose 9 to 18 months of community custody where the defendant elected specific performance and the prosecutor again recommended no community custody based on the original plea bargain agreement?

2. Community custody of 9-18 months was imposed six months after sentencing where the prosecutor was informed by the Department of Corrections of the mistaken sentence. The trial court's original sentence was based on the plea agreement of the parties and was accepted by the trial court without any requirement of community custody as required by RCW 9.94A.715.

Whether the defendant's due process rights guaranteed by the Fourteenth Amendment prohibited the trial court from imposing 9 to 18 months of community custody following his release from a 51 month sentence for Felony Driving Under the Influence?

D. STATEMENT OF THE CASE

On November 16, 2007 Danny Joe Barber, Jr., then age 43, plead guilty to Felony Driving Under the Influence alleged to have occurred on October 1, 2007. 11/16/07 RP 3; CP 15; RCW 46.61.502(1) and (6).

During the plea colloquy the following occurred:

THE COURT: There is no community custody for this offense?

MR. MURPHY: I don't believe so Your honor. That is surprising to me as well." ...

THE COURT: "...I will advise you that this is an agreement between you and the state. It's not binding upon the judge at time of sentencing. You could be sentenced anywhere within the standard range, which is 51 to 68 months.

Any questions about anything I just told you?

THE DEFENDANT: No, ma'am.

THE COURT: Then, to the charge of felony driving under the influence, do you plead guilty or not guilty?

THE DEFENDANT: Guilty. RP 4-5.

The trial court followed the plea agreement and sentenced Mr. Barber to 51 months in prison. 11/16/07 RP 9; CP 32. His standard range was 51 to 68 months. CP 32.

In conjunction with the driving offense Barber also plead guilty to Unlawful Possession of a Firearm in the second degree, alleged to have occurred on April 29, 2007. RP 9-11; CP 33. Mr. Barber's standard range was 12 to 16 months. The court followed the plea agreement and sentenced him to 12 months and one day. RP 12. The court stated: "And there is no community custody for this cause number [07-1-00683-2]. I will run the time concurrent with your other cause number...." [07-1-01380-4]. Id.

Thereafter, on April 25, 2008 the trial court heard argument on a motion to amend the Judgment and Sentence. 4/25/08 RP 1. The prosecutor received a letter from the Department of Corrections indicating that the felony charge of driving under the influence "...was an offense for which community custody is statutorily required."¹ RP 2. The court was

¹ RCW 9.94A.030(5) states: "Community custody" means that a portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715 or 9.94A.545, served in the community subject to controls placed on the offender's movement and activities by the department. For offenders placed on

advised that a felony DUI is an offense for which community custody is required for a period of 9 to 18 months.² RP 3.

Pursuant to the parties understanding- and given that the prosecutor would recommend not imposing community custody- Mr. Barber elected specific performance instead of moving to withdraw his guilty pleas. RP 4.

On May 23, 2008 the trial court heard additional argument from the parties. The prosecutor argued: "State is asking the court to follow the recommendation that the state made in the plea agreement. We did not request community custody, and we are asking that you follow that recommendation. 5/23/08 RP 2. The court stated that it was not bound by the plea agreement and instead imposed community custody of 9 to 18 months. RP 6; CP 56. The court left it up to the Department of Corrections to determine the actual amount of time the defendant would spend on community custody. RP 7. A written order was entered that stated "The

community custody for crimes committed on or after July 1, 2000, the department shall assess the offender's risk of reoffense and may establish and modify conditions of community custody, in addition to those imposed by the court, based upon the risk to community safety.

² RCW 9.94A.715 is entitled "Community Custody for specified offenders." (1) refers to RCW 9.94A.411(2) which lists crimes against persons including Felony Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor or Any Drug (RCW 46.61.502(6)). See also RCW 9.94A.850 (community custody range). See appendix; including CP 34 (Judgment and Sentence) "9 to 18 months for Crimes Against Persons".

judgment and sentence is hereby modified to include a period of community custody of 9-18 months.” CP 59.

On July 21, 2009 the Court of Appeals entered a decision terminating review by affirming the trial court’s decision to enter an order modifying Mr. Barber’s judgment and sentence to add a term of community custody. Op. at 6. Mr. Barber seeks review by this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth considerations governing acceptance of review: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Court.

A. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT.

The factual situation in *In re Pers. Restraint of Isadore*, 151 Wn2d. 294, 83 P.3d 390 (2004) is strikingly similar to the case at bench. There,

the Kitsap County Court asked the prosecutor if community placement³ was part of the sentence. The reply was that it did not apply to convictions for the crimes of second degree burglary and third degree assault. Also, community placement was not indicated on the plea form. Isadore was sentenced to 54 months. One and a half years later the Department of Corrections notified the prosecutor that this sentence should have included the mandatory one-year community placement.

After hearing, the trial court amended the sentence and added one-year of community placement to the sentence. Isadore filed a personal restraint petition (PRP). The Court of Appeals dismissed the PRP. The Supreme Court reversed and held:

“The defendant has the initial choice of specific performance or withdrawal of the plea. *Turley*, 149 Wn.2d at 399 (citing *Miller*, 110 Wn.2d at 536.) “The defendant is entitled to the benefit of his original bargain.” *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977). Once the defendant has made his or her choice, the State bears the burden

³ Former RCW 9.94A.120(9)(a)(i) (2000). See now RCW 9.94A.030(7) “Community placement” means that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.”

According to *State v. Crandall*, 117 Wn.App.448, 451, 71 P.3d 701 (2003) community custody is a subset of community placement.

of showing that the remedy chosen is unjust and there are compelling reasons not to allow that remedy. *Turley*, 149 Wn.2d at 401....

Defendant Isadore requests specific performance of his plea agreement. The State has not objected to the defendant's chosen remedy and in oral argument could not assert any reasons why specific performance would be unjust in this case."

In re Pers. Restraint of Isadore, 151 Wn.2d at 303 (citing *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003)⁴ and *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988)).

The Court of Appeals attempted to distinguish *Isadore and Miller* when it stated in its opinion: "*Isadore and Miller* held that a defendant is entitled to choose a remedy when his guilty plea is rendered involuntary. *In re Isadore*, 151 Wn.2d at 303; *Miller*, 110 Wn.2d at 531-32." Op. at 4.

The holding in *Isadore* applied to the trial court as well as to the prosecutor when the Supreme Court concluded: "We order that the amended sentence be stricken and the original sentence enforced." *id.* at 303.

⁴ See *State v. Turley*, 149 Wn.2d at 399:(the trial court was reversed and Turley was allowed to withdraw guilty pleas to two counts, including one [escape] which did not require mandatory community custody) "...failure to inform a defendant that he will be subject to mandatory community placement if he pleads guilty will render the plea invalid." (citing *State v. Ross*, 129 Wn.2d at 280). " If the defendant was not informed that the charge was subject to a mandatory community placement condition, the defendant is entitled to a remedy. *Id.* At 288."

In the case at bench, the facts of Mr. Barber's case are essentially the same as in *Isadore*. Here, the trial court inquired about the applicability of community custody: "THE COURT: There is no community custody for this offense?" 11/16/2007 RP 4. The defense responded: "I don't believe so, Your Honor." *id.* The prosecutor remained silent.

As in *Isadore*, community placement/custody was not indicated on the plea form in Mr. Barber's case. *id.* at 297; CP 19. Just as *Isadore* was entitled to the remedy of enforcement of his original sentence, without the requirement of community placement, so too is Mr. Barber entitled to the same remedy he chose under similar circumstances.

The Supreme Court cited both *Ross* and *Walsh* for the holding that *Isadore* was entitled to a remedy. It is no remedy for Mr. Barber to elect to choose specific performance over withdrawal of his guilty pleas and then have the same judge impose community custody in the same proceeding. This procedure nullified his momentary choice.

This Court should reverse the Court of Appeals and enforce specific performance based on *State v. Schaupp*, 111 Wn.2d 34, 757 P.2d 970 (1988) and *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988).

Schaupp argued, and this court agreed, that he was entitled to specific enforcement of the plea agreement based on the charge of second

degree manslaughter instead of a first degree manslaughter charge a jury convicted him of. The plea agreement had been vacated and the original charge of second degree murder reinstated when it was found, after hearing, that the prosecutor's misrepresentation regarding the reason for the plea agreement violated RCW 9.94A.090(1) and was not consistent with the interests of justice or with prosecuting standards.

The Supreme Court stated with regard to the role of the trial court:

"If a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire justice system would be thrown into question. No attorney in the state could in good conscience advise his client to plead guilty and strike a bargain if that attorney cannot be assured that the prosecution must keep the bargain and not subvert the judicial process through external pressure whenever the occasion arises.

A plea bargain is a binding agreement between the defendant and the State which is subject to the approval of the court. When the prosecutor breaks the plea bargain, he undercuts the basis for the waiver of constitutional rights implicit in the plea.

Tourtellotte, at 584. Those principles operate to bind the court as well, once a plea agreement has been validly accepted. See *State v. Miller*, 110 Wn 2d 528, 756 P. 2d 122 (1988); *United States v. Blackwell*, 694 F.2d 1325, 1337-39 (D.C. Cir. 1982); *United States v. Holman*, 728 F.2d 809, 813 (6th Cir.), cert. denied, 469 U.S. 983 (1984); *Banks v. State*, 56 Md.App. 38, 466 A.2d 69 (1983).

State v. Schaupp, 111 Wn.2d at 38 (citing *State v. Tourtellotte*, 88 Wn.2d 579, 564 P.2d 799 (1977) (emphasis mine).

B. THE DECISION OF THE COURT OF APPEALS INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

In *Banks v. State*, cited in *Schaupp* supra, the Maryland trial court committed itself to the plea bargain recommendation of not more than 10 years in prison at the time of sentencing for the reduced charge of murder in second degree. The court accepted the defendant's guilty plea. Prior to sentencing it was discovered that Banks had criminal history that the trial judge was not aware of at the time he accepted the defendant's guilty plea and when he obligated himself to the maximum sentence of no more than 10 years imprisonment.

Upon learning of Bank's undisclosed criminal record at sentencing, the trial court gave him the choice of withdrawing his plea or continuing with a guilty plea with the proviso that the court was not bound to a 10 year limit. Banks chose to withdraw his plea. He was subsequently found guilty and sentenced to 30 years.

The Court of Special Appeals of Maryland reversed Banks' conviction and remanded for imposition of a sentence consistent with the original plea agreement of not more than 10 years. The reasons stated by the Maryland Appellate Court apply to the case at bench as well. The Court began:

"As a general rule, once a judge has accepted a guilty

plea and bound the defendant to it, the judge cannot refuse to carry through the bargain that induced the plea. *United States v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982).⁵

The Maryland Appellate court was also concerned about the notions of certainty in the plea bargaining process and the notion of fair play when it stated:

“Some jurisdictions, to be sure, have held that a judge who accepts a guilty plea and who agrees to a sentencing provision in a plea agreement may subsequently change his mind and repudiate the agreement if he allows the defendant to withdraw the plea. *See e.g. State v. Wenzel*, 306 N.W.2d 769 (Iowa, 1981) and *Barker v. State*, 259 So.2d 209 (Fla.App. 1972). But this approach undermines the plea bargaining process since it cannot assure either side of the benefits for which it has bargained. It also seem inconsistent with the standard of fair play and equity espoused by the Court of Appeals in *Brockman*, 277 Md. At 697, 357 A.2d 736 and with the notion of preservation of reasonable expectations we explained in *Rojas v. State, supra*.

Banks v. State, 466 A.2d at 76 (citing *Rojas v. State*, 52 Md. App. 440, 450 A.2d 490 (1982)).

Federal Precedent Supports Mr. Barber's Position

Federal courts have reached the same conclusion as Washington

⁵ According to Md. Rule 733 c. 3: “If the judge accepts the plea agreement, he shall accept the defendant’s plea in open court and embody in his judgment the agreed sentence, disposition or other judicial action encompassed in the agreement, or, with the consent of the parties, a disposition more favorable to the defendant than that provided for in the agreement.”

Appellate Courts regarding this issue. Another case cited in *State v. Schaupp*, supra at 38, was *United States v. Holman*, 728 F.2d 809 (6th Cir. 1984). The defendant entered a guilty plea to assaulting a federal officer. The agreement was that he would be sentenced to no longer than one year and one day. At sentencing, the court learned of Holman's history of criminal activity and mental health problems. The court informed Holman that it was rejecting the plea agreement and offered him the choice of withdrawing his guilty plea.

The *Holman* court stated in part:

“When a promise by a prosecutor induces a defendant to plead guilty that promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971). Once the court unqualifiedly accepts the agreement it too is bound by the bargain. *United States v. Blackwell*, 694 F.2d 1325, 1337-1340 (D.C. Cir. 1982)....”

United States v. Holman, at 813. (“If Holman had elected to go to trial, and received a sentence greater than one year and one day, the only appropriate remedy would be specific performance of the agreement.”) Id.⁶

The Court of Appeals in this case attempted to distinguish both *Banks* and *Holman*, when it stated in its opinion:

⁶ Holman's request for specific performance was denied by the federal district court and affirmed on appeal. Holman did not go to trial. Instead he plead guilty to a new plea agreement and was sentenced to 30 months for using an iron pipe to strike a mailman.

“ Finally, *Banks* and *Holman* do not apply because they are based on laws or rules that require a judge to either accept the plea agreement or impose a more favorable disposition. *Banks*, 56 Md. App. At 47; *Holman*, 728 F.2d at 812 (citing Fed. R. Crim. P. 11(e)(1)(c) trial court is bound by sentencing recommendation once it accepts a plea agreement)). Washington law does not impose such a requirement on the trial court. *Harrison*, 148 Wn.2d at 557.” Op. at 5.

(citing *State v. Harrison*, 148 Wn.2d 550, 61 P.3d 1104 (2003) (see also, .

RCW 9.94A.431(2) “(sentencing judge is not bound by any recommendations contained in a plea agreement)).” Op. at 4.

State v. Harrison, supra, relied upon by the Court of Appeals concerned sentencing issues relating to collateral estoppel and law of the case doctrine and is distinguishable from the case at bench.

The Trial Court is Bound by the Plea Bargain

When Mr. Barber entered his guilty plea, the trial court obligated itself to the plea bargain process and to the plea bargain agreement. The judge was the same judge that sentenced Mr. Barber originally. The court stated with regard to the Felony DUI charge:

“THE COURT: “ Given you are coming forward so early and acknowledging your guilt here, what you have worked out for a plea agreement, I will follow the plea agreement and impose 51 months to be served in the Department of Corrections, credit for time served.” 11/16/07 RP 9.

Additionally, the notions of “fair play”, “equity” and “reasonable expectations” referred to by the courts may still be preserved when a

defendant chooses specific performance and the trial court follows the plea agreement.

C. A SIGNIFICANT QUESTION OF LAW UNDER THE
CONSTITUTION OF THE STATE OF WASHINGTON
OR OF THE UNITED STATES IS INVOLVED.

This court should accept review because a significant question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(b)(3). Fundamental principles of due process embodied in the Fourteenth Amendment apply to plea agreements based on mistakes regarding sentencing consequences. *State v. Cosner*, 85 Wn.2d 45, 530 P.2d 317 (1975). See also, *Santobello v. New York*, supra: (breach of plea agreement by prosecutor).

The Court of Appeals upheld the trial court based on partial reliance on RCW 9.94A.431(2). That statute states: “The sentencing judge is not bound by any recommendations contained in an allowed plea agreement and the defendant shall be so informed at the time of the plea.”

State v. Miller

In *State v. Miller*, supra, the Supreme Court announced the rule in reference to the Sentencing Reform Act of 1981: “Defendants’ constitutional rights under plea agreements take priority over statutory provisions.” id. at 533. In *Miller*, the parties to the plea agreement were mistaken as to the relevant mandatory sentence for first degree murder.

Under the plea agreement Miller was authorized to seek a sentence of less than 20 years whereas the mandatory minimum was not less than 20 years. Miller requested withdrawal of his guilty plea instead of specific performance as the trial court ordered.

The Court of Appeals affirmed and stated that the trial court should have “full discretion” to choose the type of relief justified by the circumstances, citing *State v. Pope*, 17 Wn.App. 609, 614-15,564 P.2d 1179, *review denied*, 89 Wn.2d 1009 (1977).⁷ Instead, the Supreme Court reversed and abolished a trial court’s “full discretion” to choose the remedy in spite of the defendant’s choice. The *Miller* court held: “To the extent that *Pope* holds the court, rather than the defendant, is entitled to the choice of remedy, it is incorrect.” *Miller* at 534.

The Supreme Court allowed Miller to withdraw his plea in spite of the trial court’s election for specific performance. The court held “...the defendant’s choice of remedy controls, unless there are compelling reasons not to allow that remedy.” *Miller*, at 535.

The *Miller* Court stated:

⁷ In *State v. Pope*, *supra*, the defendant was misinformed that the mandatory minimum sentence was 5 years instead of 20. After the Board of Prison Terms and Paroles set the minimum at 20 years, the trial court denied Pope’s request for specific performance but allowed him to withdraw his plea.

“...the integrity of the plea bargain process requires that defendants be entitled to rely on plea bargains as soon as the court has accepted the plea. *State v. Tourtellotte, supra* at 585. The trial court is required to determine the validity of the plea agreement before accepting the plea. RCW 9.94A.090. It is at this point that the defendant is entitled to rely on the benefit of the bargain, not the time of sentencing.”

State v. Miller, at 536. (See also, *United States v. Thomas*, 580 F.2d 1036 (10th Cir. 1978) *cert. denied*, 439 U.S. 1130, (1979) (treating a promise “on behalf of the judiciary” the same as a promise by the government).

According to *In re Pers. Restraint of Isadore*:

“ Where fundamental principles of due process are at stake, the terms of the plea agreement may be enforced, notwithstanding statutory language. *Miller*, 110 Wn.2d at 523.”

151 Wn.2d at 303. The *Miller* court also held:

“We have held that where fundamental principles of due process so dictate, the specific terms of a plea agreement based on mistake as to sentencing consequences may be enforced despite the explicit terms of a statute. *State v. Cosner*, 85 Wn.2d 45, 530 P.2d 317 (1975).⁸

Mr. Barber’s plea agreement did not include a period of

⁸ Petitioners Cramer and Christian were mistakenly advised that the mandatory minimum sentence was 5 years. However, because of their prior felony convictions, the mandatory minimum was 7 ½ and 8 ½ years respectively. The Supreme Court enforced the plea bargain to the lower sentence in spite of the statute. The Court ordered the Board of Prison Terms and Paroles to reduce their mandatory minimum sentences “in accordance with their understanding of the length thereof at the time of their pleas.”

community custody.

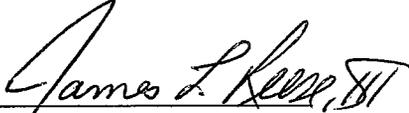
F. CONCLUSION

Under the circumstances of this case, allowing Mr. Barber to choose between specific performance and withdrawal of his guilty pleas as a remedy was a hollow choice that was short lived. The trial court should be bound by the plea agreement- just as the parties are- in order to insure fundamental fairness, the integrity of the plea bargaining system and due process of law embodied in the Fourteenth Amendment.

This Court should reverse the Court of Appeals and vacate the trial court's Order Modifying the Judgment and Sentence and remand the case with instructions to reinstate the original judgment and sentence without the requirement of community custody as originally contemplated by all the parties including the trial court.

Dated this 20th day of August 2009.

Respectfully Submitted,


James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Petitioner

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 37989-9-II

Respondent,

v.

DANNY JOE BARBER JR.,

UNPUBLISHED OPINION

Appellant.

BRIDGEWATER, P.J. — Danny Joe Barber appeals the trial court's order modifying his judgment and sentence to add a term of community custody not included in his original judgment and sentence. Concluding that the trial court had the authority to impose the term of community custody, despite the agreement between the State and Barber to ask the court not to impose community custody, we affirm the trial court.¹

On November 16, 2007, the State charged Barber by amended information with one count of felony driving under the influence of intoxicants (felony DUI). Barber entered into a plea agreement whereby he agreed to plead guilty and the State agreed to recommend 51 months of confinement and no community custody.²

¹ A commissioner of this court initially considered Barber's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

² The plea agreement listed several boxes that the parties could check indicating a community custody range. None were checked.

When accepting Barber's plea, the trial court asked if community custody was required for Barber's offense. Barber's counsel replied, "I don't believe so, Your Honor. That is surprising to me as well." RP (Nov. 16, 2007) at 4. The State did not respond. The trial court informed Barber that it was not bound by the plea agreement, accepted Barber's plea, and sentenced him to 51 months of confinement, a standard range sentence. The trial court did not impose a term of community custody.

In April 2008, the Department of Corrections (DOC) notified the trial court that under RCW 9.94A.715(1), a mandatory term of 9 to 18 months of community custody applied to Barber's crime of felony DUI. It moved to modify Barber's judgment and sentence to add that term of community custody. The State and Barber agreed that Barber had the right to either withdraw his guilty plea or seek specific performance of the plea agreement. Barber chose specific performance. The State stated that while it was bound by the plea agreement, the trial court was not.

At a May 23, 2008, hearing, the State recommended the trial court accept the plea agreement of 51 months of confinement but no community custody. The trial court again stated that it was not bound by the plea agreement and modified Barber's judgment and sentence to add a term of 9 to 18 months of community custody. Barber appeals.

Barber argues because he was not informed of a direct consequence of his plea, that a term of community custody was required for his crime, he did not knowingly and intelligently plead guilty and was entitled to a remedy. He contends that when he elected the remedy of specific performance, the trial court was bound by the plea agreement between the State and Barber. Because that plea agreement recommended no community custody, he contends the trial court erred in imposing the term of community custody.

A defendant must be informed of all direct consequences of pleading guilty, including mandatory community custody. *State v. Turley*, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003). Failure to inform a defendant that he will be subject to mandatory community custody if he pleads guilty renders a plea invalid. *Turley*, 149 Wn.2d at 398-99. Once a plea is invalid, the defendant has the initial choice of specific performance or withdrawing his plea. *Turley*, 149 Wn.2d at 399 (citing *State v. Miller*, 110 Wn.2d 528, 536, 756 P.2d 122 (1988)).

The State and Barber agree that he was not informed that the crime of felony DUI required the trial court to impose a term of community custody and thus he was not informed of a direct consequence of his plea. They also agree that Barber had his choice of remedy and that he chose specific performance. But they dispute the meaning of "specific performance."

Barber asserts that specific performance means that the trial court must impose the sentence the parties agreed upon in the plea agreement. Barber therefore argues that he was not given specific performance because the trial court did not adhere to the plea agreement. The State responds that specific performance means that it must comply with the plea agreement, by making the agreed recommendation at resentencing, but that the trial court is not required to impose the sentence agreed upon in the plea agreement. The State therefore responds that because it recommended the sentence agreed upon in the plea agreement, Barber received his requested remedy of specific performance.

Specific performance of a plea bargain requires only that the prosecutor recommend what he or she agreed to recommend. *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 199, 814 P.2d 635 (1991). The trial court is not bound by any recommendations contained in the plea agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003); *State v. Henderson*, 99 Wn. App. 369, 376, 993 P.2d 928 (2000) (citing RCW 9.94A.090(2), recodified as RCW

9.94A.431(2) by LAWS OF 2001, ch. 10, § 6 (sentencing judge is not bound by any recommendations contained in a plea agreement)). Specific performance entitles Barber only to the State's recommendation, not to the sentence he and the State agreed upon. *Harrison*, 148 Wn.2d at 557; *Henderson*, 99 Wn. App. at 376-77. Because the State honored the plea agreement and recommended 51 months of confinement and no community custody, Barber received specific performance.

Barber cites several cases claiming that they stand for the proposition that a remedy of specific performance binds the trial court to the plea agreement. *United States v. Holman*, 728 F.2d 809 (6th Cir.), cert. denied 469 U.S. 983 (1984), abrogation recognized by *United States v. Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), superseded by statute, *United States v. Ritsema*, 89 F.3d 392, 399 (7th Cir. 1996); *Banks v. State*, 56 Md. App. 38, 466 A.2d 69 (1983); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004); *Turley*, 149 Wn.2d at 399; *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996); *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001); *State v. Schaupp*, 111 Wn.2d 34, 757 P.2d 970 (1988); *Miller*, 110 Wn.2d 528; *State v. Tourtellotte*, 88 Wn.2d 579, 564 P.2d 799 (1977)). None of these cases provides a foundation for Barber's argument.

Walsh and *Ross* do not apply because the defendants in those cases sought to withdraw their guilty pleas and did not seek specific performance. *Walsh*, 143 Wn.2d at 9; *Ross*, 129 Wn.2d at 288. *Isadore* and *Miller* held that a defendant is entitled to choose a remedy when his guilty plea is rendered involuntary. *In re Isadore*, 151 Wn.2d at 303; *Miller*, 110 Wn.2d at 531-32. Barber chose the remedy of specific performance. *Turley* addressed the issue of whether a defendant is entitled to withdraw a guilty plea to each count separately when he pleaded guilty to multiple counts on the same day. *Turley*, 149 Wn.2d at 398. *Schaupp* did not hold that the trial

court was bound by the plea agreement. Instead, the *Schaupp* court held that the defendant was entitled to the benefit of his original bargain. *Schaupp*, 111 Wn.2d at 41. Even if *Schaupp* had held that the trial court was bound by the plea agreement, it was superseded by RCW 9.94A.431(2) and *Harrison*, 148 Wn.2d at 557. Finally, *Banks* and *Holman* do not apply because they are based on laws or rules that require a judge to either accept the plea agreement or impose a more favorable disposition. *Banks*, 56 Md. App. at 47; *Holman*, 728 F.2d at 812 (citing FED. R. CRIM. P. 11(e)(1)(c) (trial court is bound by sentencing recommendation once it accepts a plea agreement)). Washington law does not impose such a requirement on the trial court. *Harrison*, 148 Wn.2d at 557.

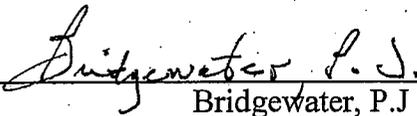
Barber also argues that the trial court violated his due process rights when it imposed community custody. He supports this argument by citing to *Miller* for the proposition that a defendant has the right to elect his choice of remedy. The trial court gave Barber the choice of remedy and he chose specific performance. But due process does not require the trial court to impose the sentence agreed upon by the parties.

In his statement of additional grounds, Barber argues that he should be entitled to the plea bargain he negotiated. As described above, he did receive the benefit of that bargain. Barber also argues that DOC, as a part of the State, should not have been allowed to move to modify his judgment and sentence. But only the prosecutor is bound by the plea agreement. *See also In re Powell*, 117 Wn.2d at 199 (Indeterminate Sentence Review Board is not bound by a plea agreement). Finally, Barber argues that the State tricked him into pleading guilty on this count on the promise of no community custody so that he would also plead guilty on a second count. This allegation involves facts outside the record; therefore we cannot address those issues. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

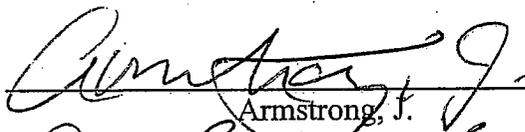
In conclusion, Barber was entitled to choose specific performance. But that meant only that the State was bound by the plea agreement to recommend a sentence with no community custody. The State adhered to the plea agreement. The trial court was not bound by the plea agreement. And RCW 9.94A.715(1) requires the trial court to impose a term of community custody for Barber's crime. We affirm the trial court's order modifying Barber's judgment and sentence to add that term of community custody.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.


Bridgewater, P.J.

We concur:


Armstrong, J.


Quinn-Brintnall, J.

AMENDMENT (XIV)

ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 9.94A.030
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.
- (2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.
- (3) "Commission" means the sentencing guidelines commission.
- (4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.
- (5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to RCW 9.94A.505(2)(b), 9.94A.650 through 9.94A.670, 9.94A.690, 9.94A.700 through 9.94A.715, or 9.94A.545, served in the community subject to controls placed on the offender's movement and activities by the department. For offenders placed on community custody for crimes committed on or after July 1, 2000, the department shall assess the offender's risk of reoffense and may establish and modify conditions of community custody, in addition to those imposed by the court, based upon the risk to community safety.
- (6) "Community custody range" means the minimum and maximum period of community custody included as part of a sentence under RCW 9.94A.715, as established by the commission or the legislature under RCW 9.94A.850, for crimes committed on or after July 1, 2000.
- (7) "Community placement" means that period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.
- (8) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.
- (9) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.
- (10) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court pursuant to this chapter or RCW 16.52.200(6) or 46.61.524. Where the court finds that any offender has a chemical dependency that has contributed to his or her offense, the conditions of supervision may, subject to available resources, include treatment. For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.
- (11) "Confinement" means total or partial confinement.
- (12) "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.
- (13) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.
- (14) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.
 - (a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof, and (ii) whether the defendant has been incarcerated and the length of incarceration.
 - (b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060,

RCW 9.94A.715

Community custody for specified offenders — Conditions (as amended by 2008 c 276).

*** CHANGE IN 2009 *** (SEE 5190-S.SL) ***

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under *RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), an offense involving the unlawful possession of a firearm under RCW 9.41.040, where the offender is a criminal street gang member or associate, or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of RCW 9A.44.130(~~(10)~~) (11)(a) committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws. The department may impose electronic monitoring as a condition of community custody for an offender sentenced to a term of community custody under this section pursuant to a conviction for a sex offense. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring imposed under this section using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

[2008 c.276 § 305. Prior: 2006 c 130 § 2; 2006 c 128 § 5; 2003 c 379 § 6; 2001 2nd sp.s. c 12 § 302; 2001 c 10 § 5; 2000 c 28 § 25.]

Notes:

Reviser's note: *(1) RCW 9.94A.712 was recodified as RCW 9.94A.507 pursuant to the direction found in section 56(4), chapter 231, Laws of 2008, effective August 1, 2009.

(2) RCW 9.94A.715 was amended by 2008 c.276 § 305 without cognizance of its repeal by 2008 c 231 § 57, effective August 1, 2009. For rule of construction concerning sections amended and repealed in the same legislative session, see RCW 1.12.025.

Severability -- Part headings, subheadings not law -- 2008 c 276: See notes following RCW 36.28A.200.

Severability -- Effective dates -- 2003 c 379: See notes following RCW 9.94A.728.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Intent -- Effective date -- 2001 c 10: See notes following RCW 9.94A.505.

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

RCW 9.94A.715

Community custody for specified offenders — Conditions.

***** CHANGE IN 2009 *** (SEE 5190-S.SL) *****

[2006 c 130 § 2; 2006 c 128 § 5; 2003 c 379 § 6; 2001 2nd sp.s. c 12 § 302; 2001 c 10 § 5; 2000 c 28 § 25.] Repealed by 2008 c 231 § 57, effective August 1, 2009.

Notes:

Reviser's note: RCW 9.94A.715 was amended by 2008 c 276 § 305 without cognizance of its repeal by 2008 c 231 § 57, effective August 1, 2009. For rule of construction concerning sections amended and repealed in the same legislative session, see RCW 1.12.025.

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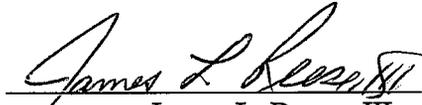
PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 20th day of August, 2009, he hand delivered for filing the original Petition for Review in State of Washington v. Danny Joe Barber, Jr., Court of Appeals Cause No. 37989-9-II to the office of David C. Ponzoha, Clerk, Court of Appeals at 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, Washington 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address: Danny Joe Barber, Jr., DOC #934431-Cascade, Cedar Creek Correction Center, P.O. Box 37, Littlerock, WA 98556-0037.


James L. Reese, III

Signed and Attested to before me this 20th day of August, 2009 by
James L. Reese, III.


Notary Public in and for the State of
Washington, residing at Port Orchard.
My Appointment Expires: 4/04/13

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANNY JOE BARBER JR.,

Appellant.

No. 37989-9-II

ORDER GRANTING MOTION
TO PUBLISH OPINION

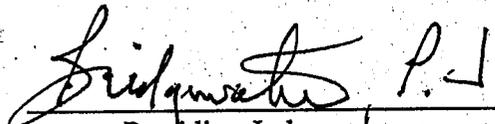
THIS MATTER came before the court on the motion of a third party, the Washington Association of Prosecuting Attorneys, and on the motion of the respondent, State of Washington, requesting publication of the opinion filed in this court on July 21, 2009. The appellant was asked to respond to the motion to publish and has agreed to publication.

Upon consideration of the motion and response, it is hereby

ORDERED that the final paragraph, reading "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will be published.

DATED this 15TH day of SEPTEMBER, 2009.


Presiding Judge