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SUPREME COURT NO. 89912-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RONALD W. MACDONALD,

Petitioner.

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

The Honorable Harry McCarthy, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED

Contrary to the plea agreement negotiated by the State and the Petitioner, the lead detective, legally an “arm” of the prosecution, argued for imposition of the statutory maximum term of imprisonment. Under the holding of the majority of Justices – but not the lead opinion – in State v. Sanchez,<sup>1</sup> did the State breach the plea agreement in violation of the petitioner’s state and federal constitutional due process rights by arguing in violation of its own promise?

B. STATEMENT OF THE CASE<sup>2</sup>

In 2011, the State charged MacDonald with first degree felony murder of Arlene Roberts, who was killed during an apparent burglary of her trailer home in 1978. CP 1-10, 76-78. Police suspected MacDonald, who was leading a quiet life in Reno, Nevada, based on their belief that his

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<sup>1</sup> 146 Wn.2d 339, 46 P.3d 774 (2002). As discussed in the petition for review, the fact that the lead opinion does not reflect the holding of the case has led to some confusion. See State v. Carreno-Maldonado, 135 Wn. App. 77, 84, 143 P.3d 343 (2006) (misstating, in dicta, the holding of the de facto Sanchez majority as to advocacy by primary investigating officer); State v. Lindahl, 114 Wn. App. 1, 11-12, 56 P.3d 589 (2002) (likewise misstating holding of majority of justices in Sanchez).

<sup>2</sup> This brief refers to the verbatim reports as follows: 1RP – 6/11/12 (CrR 3.5 hearing and motions in limine); 2RP – 6/12/12 (CrR 3.5 hearing and motions in limine); 3RP – 6/13/12 (motions in limine and jury selection); 4RP – 6/14/12 (discussion of possible resolution); and 5RP – 6/18/12 (Alford plea). The transcript of the August 8, 2012 sentencing hearing appears at CP 188-211.

fingerprints matched prints found on traveler's checks and bank documents found in Roberts's trailer. CP 52, 102-03.

Following plea negotiations, the State amended the charge to second degree manslaughter. CP 78. MacDonald entered an Alford<sup>3</sup> plea. CP 79-84; 5RP 8-13. The parties' agreed-upon recommendation was five years of incarceration suspended on the condition that MacDonald serve 16 months in the King County jail.<sup>4</sup> CP 98, 101-10, 191-92; RCW 9.92.060 (authorizing such a sentence). The primary detective on the 2011 investigation, Scott Tompkins, was party to the plea negotiations and would have sat with the prosecutor at trial as permitted by ER 615.<sup>5</sup> CP 112-13 (brief outlining Tompkins's extensive involvement in plea negotiations); CP 147-48 (State's response to motion in limine observing that the detective's presence was necessary to assist the prosecutor at

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<sup>3</sup> North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>4</sup> MacDonald argued the sentence should be suspended for one year but the State argued it should be suspended for five years. CP 98, 198.

<sup>5</sup> ER 615 provides in part that:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney . . . .

trial); 1RP 9-10 (designating Tompkins as “case officer” for prosecutor’s office).

At the sentencing hearing, the prosecutor made the agreed-upon 16-month recommendation but alerted the court that Detective Tompkins wished to address the court. The prosecutor informed the court she believed such argument was permissible because case law “tend[ed] to support”<sup>6</sup> such a recommendation. Tompkins explained he was speaking on behalf of the deceased Roberts. Over defense objection, Tompkins presented pictures of the crime scene and Roberts, suggested that the DNA evidence (which excluded MacDonald) was contaminated, opined that the crime was one a 17-year-old (MacDonald’s age in 1978) could have easily committed, and made other arguments in favor of the statutory maximum sentence. CP 192-97.

The court imposed a minimum sentence of 55 months of incarceration, with a maximum term of 60 months, the statutory maximum for the offense. CP 99-100, 144-45, 203-08.

MacDonald then moved to withdraw his plea, arguing Tompkins breached the plea agreement. CP 111-78. The superior court denied the motion and ordered the case transferred to the Court of Appeals. CP 212-

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<sup>6</sup> CP 193-94.

14. MacDonald also filed a notice of appeal of the judgment and sentence. CP 215-19.

On appeal, MacDonald argued that, under the holding of a majority of justices in this Court's Sanchez opinion, the State breached the plea agreement in violation of the petitioner's state and federal constitutional due process rights. Brief of Appellant.

In response, the State argued the lead detective was merely acting as a victim advocate, which was permitted by statutes and the State constitution. Brief of Respondent.

In reply, the Petitioner reiterated that, under Sanchez, the lead detective was an arm of the prosecution, which had entered into a contract to make a specific recommendation, and therefore Tomkins was not permitted to assume that role. Petitioner explained that even if the controlling portion of Sanchez did not explicitly discuss whether the lead detective could also wear the hat of victim advocate, it was apparent from the opinion he could not. Because the victim's rights provision of the state constitution could be harmonized with state and federal due process rights, moreover, the Courts were required to interpret the provision in a manner that gives effect to both. Such an interpretation precluded a sentencing recommendation by a lead detective – a party – that undermines a plea

agreement because it violates state and federal due process rights. Reply Brief of Appellant at 3.

In its January 21, 2014 unpublished opinion, the Court of Appeals accepted the State's argument and affirmed the trial court. State v. MacDonald, 2014 WL 231981 at \*2-3 (noted at 179 Wn. App. 1006).

On April 30, this Court accepted review.

C. ARGUMENT

THE LEAD DETECTIVE'S SENTENCING RECOMMENDATION BREACHED THE BARGAINED-FOR PLEA AGREEMENT.

1. Federal and state constitutional due process protect the sanctity of plea agreements.

"Plea agreements are contracts." State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). In addition, constitutional "[d]ue process requires a prosecutor to adhere to the terms of the agreement." Id. at 839 (citing, inter alia, Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984), overruled in part on other grounds by Puckett v. United States, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)). When the State breaches a plea agreement, it "undercuts the basis for the waiver of constitutional rights implicit in the plea." State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977).

Because the accused gives up important constitutional rights by pleading guilty, the State must adhere to the terms of the agreement by recommending the agreed-upon sentence. Sledge, 133 Wn.2d at 839. The State's duty of good faith requires it not undercut the terms of the agreement either explicitly or implicitly by conduct indicating intent to circumvent its terms. Id. at 840; State v. Talley, 134 Wn.2d 176, 183-84, 949 P.2d 358 (1998); State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, review denied, 138 Wn.2d 1002 (1999).

Plea agreement breach is never harmless error. The plea bargaining process requires that both the State and the accused adhere to their promises. When this process is frustrated, the fairness of the sentencing hearing is in question. Such an error infects the entire proceeding and, as such, cannot be harmless. State v. Carreno-Maldonado, 135 Wn. App. 77, 87-88, 143 P.3d 343 (2006) (citing Santobello, 404 U.S. at 458-59; In re Personal Restraint of James, 96 Wn.2d 847, 849-50, 640 P.2d 18 (1982)).

2. This Court should follow its previous decision in *Sanchez*, as that case controls and was correctly decided.

Because certain police officers act as an investigating arm of the prosecutor's office, "principles of fairness and agency" require that, at a minimum, the investigating officer be bound to the prosecutor's bargain.

Sanchez, 146 Wn.2d at 356 (Chambers, J., concurring in part and dissenting in part) (joining four-judge “dissent” and thus reflecting a de facto majority on this issue). Sanchez consolidated two appeals: one involved an alleged plea breach through a Community Corrections Officer’s argument at sentencing; the other involved a breach by an investigating officer, Sergeant Ruffin, who argued against a proposed SSOSA at sentencing following a plea to multiple counts of child molestation. Id. at 342-44. The lead opinion holds that neither officer breached the plea agreement. Id. at 355-56.

Justice Madsen’s “dissenting” opinion on this point – joined by Justice Chambers’ opinion – holds that an investigative officer’s recommendation differing from the prosecutor’s recommendation constitutes a breach of the plea agreement. Sanchez, 146 Wn.2d at 362-63 (Madsen, J., dissenting). According to the majority of justices, the investigating officer functions as the investigating arm of the prosecutor. The prosecutor has the duty and the power to “ensure that a thorough factual investigation has been conducted before a decision to prosecute is made.” Sanchez, 146 Wn.2d at 357-58, 362 (concurrence/dissent and dissent both citing former RCW 9.94A.440(2)(b), currently codified as RCW 9.94A.411(2)(b)). With Justice Chambers’ “dissenting” vote on

this point, this portion of the dissent constitutes the opinion of the majority of justices, and is thus the holding of the case.

The majority of justices ruled the State had breached the plea agreement even in light of former RCW 9.94A.110, currently codified as RCW 9.94A.500,<sup>7</sup> which permits an “investigative officer” to address the court at sentencing. Sanchez, 146 Wn.2d at 363 (dissent). As this Court reasoned, that statute also allows the prosecutor to address the sentencing court, for example, but obviously does not permit the prosecutor to undercut a plea agreement. Id.

The State’s argument in this case, accepted by the Court of Appeals, was that Tompkins’s advocacy was permissible because he was acting as the victim’s representative. But, as stated, Sanchez rejected an analogous argument that RCW 9.94A.110 permitted the sergeant’s advocacy. Id. at 358-59, 364 (concurrence/dissent and dissent). Notably, that statute requires the court to hear from *both* a victim’s representative *and* an investigating law enforcement officer. See RCW 9.94A.500(1)

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<sup>7</sup> RCW 9.94A.500 provides in pertinent part that:

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.

(current codification). Thus, Sanchez considered and rejected an argument that such a statute may circumscribe due process rights. In any event, as explained below, there is no indication the Legislature envisioned, much less wanted, a single individual to share these roles for sentencing following a plea.

The Court of Appeals purported to distinguish Sanchez by asserting that unlike Tompkins the sergeant in that case did not explicitly offer his statements on the victim's behalf. MacDonald, 2014 WL 231981 at \*3.

This makes little sense. Tomkins is one man and, as a matter of law, acted as an arm of the prosecution. He even participated in plea negotiations. He cannot shed his identity, or his role, simply by labeling himself a victim's advocate. RCW 9.94A.500, while permitting argument from individuals including an "investigative law enforcement officer" at sentencing, must be read in conjunction with the United States Supreme Court authority, which holds that a party's recommendation that undermines a plea agreement violates constitutional due process. Sanchez, 146 Wn.2d at 367 (dissent) (citing, *inter alia*, Santobello, 404 U.S. 257); Sanchez, 146 Wn.2d at 358 (concurrency/dissent). Contrary to the Court of Appeals' attempt to distinguish Sanchez, the holding of the Sanchez majority applies to the facts of this case with equal force.

In summary, in Sanchez this Court considered and rejected RCW 9.94A.500, which also permits advocacy by a representative of the victim, as a basis for a disparate recommendation. Accordingly, that case controls the result here, and this Court should follow it. See Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (stare decisis ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned’”) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

3. Harmonizing victims’ rights with the due process rights of the accused also precludes the State’s actions in this case.

The controlling portion of Sanchez does not, however, discuss Article 1, section 35 of our state constitution. Under that provision, in the event the victim is unable to address the court, the “prosecuting attorney *may* identify a representative to exercise the victim’s rights.” Const. art. 1, § 35 (amend. 84) (emphasis added); see also RCW 7.69.030 (victim’s rights statute).

But if constitutional victim’s rights may be harmonized with state and federal due process rights, this Court must interpret the provision in a manner that gives effect to both. State v. Gentry, 125 Wn.2d 570, 625, 888 P.2d 1105 (1995) (citing Port of Longview v. Taxpayers, 85 Wn.2d 216, 232-33, 533 P.2d 128 (1974)). Gentry concluded, in the context of

the penalty phase of a capital murder case, the Legislature and the voters intended that a crime victim or victim's representative should be allowed to make a statement "unless there is a direct constitutional impediment" to such action. 125 Wn.2d at 628-29.

As of filing, the State has cited no authority for the proposition that in order to protect victim's rights a victim's representative *must* be the lead detective – in this case, a man involved in plea negotiations – nor any policy in favor a party to the plea agreement being permitted to wear two hats as Tompkins clearly did here. Victim's rights *and* the rights of the accused may be protected in a manner that is consistent with Article 1, section 35, RCW 9.94A.500, RCW 7.69.030, as well as due process. That is not what happened here.

The State did not uphold its end of the bargain and the petitioner is entitled to relief. Mabry, 467 U.S. at 509.

D. CONCLUSION

For the reasons stated, MacDonald respectfully requests that this Court reverse the Court of Appeals and remand so that he may elect whether to withdraw his plea or seek specific performance of the plea agreement. Jerde, 93 Wn. App. at 782-83.

DATED this 27<sup>TH</sup> day of June, 2014.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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v.

RONALD MACDONALD,

Petitioner.

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27<sup>TH</sup> DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF PETITIONER TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONALD MACDONALD  
DOC NO. 902835  
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CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF JUNE 2014.

x Patrick Mayovsky

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State v. Ronald MacDonald

No. 89912-6

Supplemental Brief of Petitioner

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