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Supreme Court No. 100139-8

No. 82535-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANASTASIS MOURELATOS,

Petitioner.

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. ISSUE PRESENTED FOR REVIEW..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED 3

This Court should grant review because the Court of Appeals decision is in conflict with decisions of this Court and involves an issue of substantial public interest..... 3

1. The court must consider the mandatory sentencing criteria when determining whether to impose a DOSA 4

2. The court denied Mr. Mourelatos’s DOSA request on untenable grounds 7

3. Because the trial court abused its discretion, the Court of Appeals decision is in conflict with this Court’s opinions. Review should be granted..... 10

E. CONCLUSION 11

TABLE OF AUTHORITIES

Washington Supreme Court

In re the Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) ...4
State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005)4, 5, 6, 11
State v. Mail, 121 Wn.2d 707, 854 P.2d 1042 (1993)..... 10
State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008)..... 10
Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299,
858 P.2d 1054 (1993)..... 10

Washington Court of Appeals

Dependency of Lee, 200 Wn. App. 414, 404 P.3d 575 (2017). 11

Statutes

RCW 9.94A.535.....8
RCW 9.94A.660.....5, 6
RCW 9.94A.662.....8

Rules

RAP 13.4(b)(1), (4).....3, 4, 11

Other Authorities

DOC Policy 580.6559
<https://www.doc.wa.gov/news/2018/08242018.htm>2

A. IDENTITY OF PETITIONER

Anastasis Mourelatos asks this Court to grant review of the Court of Appeals decision affirming his sentence and finding the denial of a DOSA program did not constitute an abuse of discretion.

B. ISSUE PRESENTED FOR REVIEW

When an individual asks the sentencing court to impose a DOSA, the court must give due consideration to the request and may not deny the DOSA based on a misunderstanding of the law or by failing to consider the mandatory statutory criteria. Where Mr. Mourelatos was statutorily eligible for a DOSA and was denied it because the court incorrectly found an insufficient nexus between the crimes charged and Mr. Mourelatos's drug use, did the court deny Mr. Mourelatos a DOSA on an impermissible basis, and does the Court of Appeals decision thus merit this Court's review? RAP 13.4(b)(1), (4).

C. STATEMENT OF THE CASE

Anastasis Mourelatos pled guilty to violation of a no-contact order and two misdemeanor violations of a no-contact order, with a domestic violence designation. 6/6/19 RP 36-42. He asked for a Drug Offender Sentencing Alternative (DOSA) because he recognized his law violations

arose from his substance abuse and that he needed structured drug treatment while in prison. 9/11/19 RP 103-10.

Mr. Mourelatos had started the Reach 2 program while in custody, and he told the court he needed help with his addiction.¹ *Id.* He acknowledged that addiction had played a large part in his behavior before his arrest, in his parenting decisions, and in how he processed his discovery that his daughter was being abused by the mother's new partner. *Id.*² Mr. Mourelatos asked the court to consider his need for treatment and rehabilitation in imposing a treatment-based sentence. *Id.* at 105-06.

The prosecution argued that Mr. Mourelatos should not have the opportunity to attend a DOSA, because the complaining witness "simply feels unsafe" with that type of disposition. *Id.* at 101.³ In addition, the prosecution suggested there was an insufficient nexus between the

¹ The ReEntry And Community Health (REACH) program began at the Monroe Correctional Complex. <https://www.doc.wa.gov/news/2018/08242018.htm> (last visited Jun. 8, 2020).

² Mr. Mourelatos acknowledged that he had contacted his daughter's mother; however, he explained he was trying to protect his daughter from sexual abuse in the mother's home. 1/31/19 RP 6; 6/6/19 RP 36-42; 9/11/19 RP 107-09. He also contacted CPS about the abuse of his daughter. 1/25/19 RP 51.

³ Shortly after the sentencing hearing, the complainant moved to modify the no-contact order so that she could re-initiate the relationship and visit Mr. Mourelatos in prison with their daughter. CP __, sub. nos. 94, 95, 99.

charged crimes and Mr. Mourelatos's drug use, as there was no allegation he was "stealing to support a habit" or that he was "actually under the influence of drugs" at the time the orders were violated. *Id.* at 102.

The court commented that Mr. Mourelatos was "a community safety threat at this point," without further explanation of that phrase. *Id.* at 111. The court stated that although Mr. Mourelatos's drug use "doesn't help" the situation, it found an insufficient nexus between the crimes and Mr. Mourelatos's admitted drug involvement. *Id.* The court imposed a mid-range sentence, denying the prison-based DOSA. *Id.*; CP 30-44.

On appeal, Mr. Mourelatos argued the trial court had denied the DOSA based upon impermissible factors, and had thereby abused its discretion. The Court of Appeals affirmed the sentence. Slip op. at 5-8.

This Court should grant review. RAP 13.4(b)(1), (4).

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the Court of Appeals decision is in conflict with decisions of this Court and involves an issue of substantial public interest.

This Court should grant review because the court's categorical denial of Mr. Mourelatos's request for a DOSA is in conflict with this Court's decisions and raises an issue of public concern – meaningful access to substance abuse treatment within the Department of Corrections.

RAP 13.4(b)(1), (4).

1. The court must consider the mandatory sentencing criteria when determining whether to impose a DOSA.

A court's sentencing authority stems from statute. *In re the Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). When asked to consider imposing a DOSA, the sentencing statutes structure a court's authority. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). A court may never categorically refuse to consider a DOSA sentence for an eligible individual and may not deny this sentence for impermissible reasons. *Id.*

In *Grayson*, an eligible defendant asked the court to impose a DOSA sentence. *Id.* The prosecutor opposed the DOSA based on the defendant's long history of drug selling and other pending charges. *Id.* The "main reason" the court gave for denying the DOSA was that the State does not have the money to treat people in the DOSA system, which would result in the defendant being released without adequate treatment. *Id.* at 337.

The Supreme Court noted that the judge was relying on his understanding of the DOSA system's funding, even though that information was not part of the record presented at sentencing. *Id.* at 340.

Because the defendant had not objected, it considered any potential objection waived. *Id.* at 340-42.

Instead, the Court examined whether the court's refusal to impose a DOSA complied with its obligations under the sentencing statutes and principles of due process of law. *Grayson*, 154 Wn.2d at 342. The refusal to consider a DOSA for anyone, or for a class of offenders, "is effectively a failure to exercise discretion and is subject to reversal." *Id.*

The DOSA program authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. *Id.* at 337; *see generally* RCW 9.94A.660.

Under this program, the court imposes a prison sentence of one-half the midpoint of the standard range sentence. *Id.* While in prison, the individual receives chemical dependency treatment. RCW 9.94A.660(5)(a). Once the person completes the total confinement part of the sentence, he serves the rest of the sentence in closely monitored community supervision and treatment. RCW 9.94A.660(2). But if a person fails to comply with the conditions of a DOSA, even while in prison, DOC may administratively revoke the drug-treatment program and

require the person to serve the remainder of the sentence in prison. RCW 9.94A.660(8)(c); *Grayson*, 154 Wn.2d at 338.

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660.

An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

The sentencing court must evaluate an offender using the statutory criteria under RCW 9.94A.660 when determining eligibility for a DOSA.

2. *The court denied Mr. Mourelatos's DOSA request on untenable grounds.*

Mr. Mourelatos satisfied the DOSA eligibility requirements. He successfully participated in a pre-screening evaluation through the Department of Corrections, in which he scored a five out of a possible five. CP ____, sub. no. 70. The evaluation determined that Mr. Mourelatos was a good candidate for a DOSA because of his history of substance abuse, as well as his amenability to treatment. *Id.*

Moreover, the court acknowledged that Mr. Mourelatos's substance abuse contributed to his behavior in this case. 9/11/19 RP 110. The court told Mr. Mourelatos, "If you're really serious about getting treatment, you need to do that and you need to get out and follow court orders..." *Id.* at 111. Yet the court denied Mr. Mourelatos the tools he needed to obtain that treatment.

The prosecution urged the court to deny the treatment-based sentence despite Mr. Mourelatos's eligibility, because the idea of a treatment-based sentence apparently made the complaining witness feel unsafe at the time of sentencing. *Id.* at 101-02. It also told the court Mr. Mourelatos had pled guilty after receiving "a very fair offer, a very reasonable offer," and he should not be permitted to receive a DOSA. *Id.*

But this analysis is misplaced. A prison-based DOSA is a mechanism for addressing the causes of wrongful behavior; it is not a sentence imposed based on weighing mitigating factors or leniency akin to an exceptional sentence below the standard range. *See, e.g.,* RCW 9.94A.535(1) (explaining mitigating circumstances for exceptional sentence).

A DOSA requires the court to impose a prison term of the middle of the standard range as the sentence. RCW 9.94A.662(1)(a). The offender must serve this term and engage in prison-based treatment before starting the strictly monitored community-based portion of the sentence. *Id.* The failure to comply with DOSA requirements at any point results in termination of treatment and the imposition of the entire prison term. RCW 9.94A.662(1), (3). Termination from the drug treatment program may occur long before the community-based portion of the program

begins, if a person misbehaves or fails to follow rules while in prison. *See* DOC Policy 580.655, VI (Revocation of Prison DOSA Sentence).⁴

It was clear from Mr. Mourelatos's actions and history that he needed chemical dependency treatment, and that without it, he was likely to continue his cycle of drug addiction and law violations; the court expressed and understood this at the time of sentencing. 9/11/19 RP 110 ("If you're really serious about treatment, you need to do that"). Yet the court refused to order a DOSA.

The court's analysis misapplied the DOSA criteria. It deemed the DOSA unavailable because Mr. Mourelatos had violated no-contact orders, acted impulsively or combatively, and because the complaining witness – also a drug user – had expressed that she did not want him to receive treatment. 9/11/19 RP 1009-11. This analysis is not permitted. Mr. Mourelatos was not an ineligible or inappropriate DOSA candidate because he exhibited behavior perfectly consistent with drug addiction. These factors made him an ideal candidate. This is the reason the screening evaluation found him to qualify, scoring a five out of five points. CP ____, sub. no. 70.

⁴ Available at: <http://www.doc.wa.gov/information/policies/default.aspx>.

Further, the complaining witness's personal wishes are not an appropriate factor in assessing whether Mr. Mourelatos merits regimented, structured, and highly incentivized drug treatment. It had no logical connection to Mr. Mourelatos's eligibility for a DOSA or his ability to succeed in a treatment-based program. The court denied the DOSA based on unreasonable, illogical, or inapplicable considerations untethered from the purpose of the DOSA sentence.⁵

3. Because the trial court abused its discretion, the Court of Appeals decision is in conflict with this Court's opinions. Review should be granted.

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); *see also State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal). “[T]rial judges have considerable discretion under

⁵ One of the reasons that witnesses' personal wishes should not be considered is because they are mercurial. Just five months after the sentencing hearing, the complaining witness retained an attorney and moved to modify the no-contact order in Clark County Superior Court so that she could visit Mr. Mourelatos in prison. CP ___, sub. nos. 94, 95, 99.

the SRA, [but] they are still required to act within its strictures and principles of due process of law.” *Grayson*, 154 Wn.2d at 338.

Mr. Mourelatos satisfied the DOSA statutory criteria. No one disputed that both he and the community would benefit from his engagement in structured drug treatment with significant punitive sanctions imposed should he fail to comply. Yet the court denied him a DOSA based on impermissible factors. The court’s failure to limit its consideration of a DOSA to the statutory criteria required the reversal of Mr. Mourelatos’s sentence. Because the Court of Appeals failed to do so, its opinion is in conflict with decisions of this Court, including *Grayson*. He is entitled to a resentencing hearing at which the court gives proper consideration to the guidelines for imposing a DOSA sentence.

E. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed. RAP 13.4(b)(1), (3), (4).

DATED this 25th day of August, 2021.

Respectfully submitted,

s/ Jan Trasen

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANASTASIS ANGELO
MOURELATOS,

Appellant.

No. 82535-6-I

DIVISION ONE

UNPUBLISHED OPINION

CHUN, J. — A sentencing court denied Anastasis Mourelatos’s request for a Drug Offender Sentencing Alternative (DOSA) sentence. On appeal, Mourelatos says that the court failed to consider mandatory statutory criteria and relied on untenable considerations. For the reasons discussed below, we affirm.

I. BACKGROUND

Multiple domestic violence no-contact orders (NCOs) prohibited Mourelatos from contacting his ex-girlfriend. He violated the NCOs several times.

Mourelatos pleaded guilty to felony harassment and three counts of gross misdemeanors for violating a domestic violence NCO. He requested a prison-based DOSA sentence and asserted that the NCO violations stemmed from his substance abuse issues.

The State opposed the DOSA request, asserting the lack of a nexus between the charged crimes and Mourelatos’s substance abuse. The State also

pointed out that the victim said that she felt unsafe with the possibility that Mourelatos could receive a DOSA sentence, which would involve less prison time than the standard range.

The sentencing court noted that Mourelatos had repeatedly violated an NCO in a previous relationship and that he was engaging in similar behavior with the victim in this case. It noted that, here, during the victim's call to 911, Mourelatos said in the background, "I'm going to shoot this bitch." The court stated, "[N]o wonder [the victim] is terrified of [you]." Mourelatos agreed, saying that "it makes sense." The court concluded that Mourelatos posed a "community safety threat."

The court acknowledged Mourelatos's substance abuse, but did not find a significant nexus between it and the charged crimes, and denied a DOSA sentence. The court said

If you're really serious about getting treatment, you need to do that and you need to get out and follow court orders and not engage in this kind of behavior. But one of the things they tell us when they train us as judges is that a person who stalks and repeatedly violates court orders is one of the riskiest to the victim, and I believe you are. You ran your mouth at the officer and threatened him when you were being arrested.

The State recommended a low-end standard range sentence of 43 months. The sentencing court imposed a 48-month sentence and denied Mourelatos's DOSA request. Mourelatos appeals.

II. ANALYSIS

Mourelatos says the sentencing court erred in denying his DOSA request by failing to consider the statutory criteria set forth in RCW 9.94A.660 and

considering untenable factors. We conclude the sentencing court acted within its discretion in denying Mourelatos's DOSA request.

Generally, a sentencing judge's decision whether to order a DOSA sentence is unreviewable. State v. Hender, 180 Wn. App. 895, 900, 324 P.3d 780 (2014). "The legislature entrusted sentencing courts with considerable discretion under the [Sentencing Reform Act of 1981, ch. 9.96A RCW], including the discretion to determine if the offender is eligible for an alternative sentence and, significantly, whether the alternative is appropriate." Id. at 900–01. "Nevertheless, a defendant can always seek review of the trial court's procedure in implementing the sentence." State v. Williams, 199 Wn. App. 99, 112, 398 P.3d 1150 (2017). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A court abuses its discretion if it categorically refuses to consider a DOSA request or if it exercises its discretion on an impermissible basis. Williams, 199 Wn. App. at 112. A court exercises its discretion impermissibly if it denies a DOSA request based on the defendant's sex, race, or religion, or based on the court's personal animus against the defendant. Id.; State v. Lemke, 7 Wn. App. 2d 23, 27–28, 434 P.3d 551 (2018).

RCW 9.94A.660(1) sets forth seven criteria that a defendant must meet to be eligible for a DOSA sentence.¹ But eligibility under the statute does not mean automatic entitlement to a DOSA sentence. Instead, upon a determination of eligibility, the sentencing court must address whether a DOSA sentence is appropriate in the particular case. State v. Smith, 142 Wn. App. 122, 129, 173 P.3d 973 (2007).

The DOSA sentencing scheme allows a sentencing court to grant eligible offenders a reduced sentence, treatment, and post-release supervision to try to

¹ Former RCW 9.94A.660 (2016)—which was in effect during Mourelatos’s sentencing—provided:

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the uniform controlled substances act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

The current statutory criteria under RCW 9.94A.660 differ in some respects, but those differences do not affect our analysis here.

address underlying substance abuse issues. RCW 9.94A.660; Grayson, 154 Wn.2d at 337. “[T]he purpose of DOSA is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community.” Grayson, 154 Wn.2d at 343.

1. Statutory criteria

Mourelatos says that a sentencing court must consider the statutory criteria set forth in RCW 9.94A.660(1) and suggests that, because he was eligible under the criteria and the court denied his request, the court failed to consider the criteria. But the record appears to show that the court considered Mourelatos’s request yet still denied it based on factors beyond the criteria. And as discussed above, eligibility does not mean automatic entitlement to a DOSA sentence. See Hender, 180 Wn. App. at 900 (rejecting the defendant’s claim that he met the statutory eligibility criteria and that the court denied his DOSA request without considering those criteria because “eligibility does not automatically lead to a DOSA sentence”).

Mourelatos asserts that the court’s failure to limit its consideration of his request to the statutory criteria requires reversal. But again, a DOSA analysis does not end upon consideration of the statutory criteria. The next step is to ask whether a DOSA sentence is appropriate based on the circumstances. See Hender, 180 Wn. App. at 900 (“[T]he sentencing court must still determine that ‘the alternative sentence is appropriate.’” (quoting State v. Barton, 121 Wn. App.

792, 795, 90 P.3d 1138 (2004))). The court did not abuse its discretion by considering factors beyond the statutory requirements.

2. Untenable grounds

Mourelatos also contends that the sentencing court erred by basing its decision on untenable grounds. Mourelatos says the court conducted an impermissible analysis by considering his multiple NCO violations. But he cites no law establishing that such consideration is impermissible. And it makes sense to consider an offender's repeated offenses—for example, in connection with assessing community safety—when considering a DOSA request. See State v. Wardlaw, No. 35366-4-III, slip op. at 6–7 (Wash. Ct. App. Jul. 31, 2018) (unpublished) http://www.courts.wa.gov/opinions/pdf/353664_unp.pdf (affirming the denial of a DOSA request where the sentencing court considered a defendant's repeated crimes and community safety);² Grayson, 154 Wn.2d at 343 (noting that a DOSA sentence is appropriate when the court “concludes it would be in the best interests of the individual and the community”).

Mourelatos next says the court impermissibly considered that he “acted impulsively or combatively” in connection with his crimes. Again, he cites no law prohibiting such consideration. And a defendant's behavior is a proper factor for a sentencing court to consider in deciding whether a DOSA sentence is appropriate. See Wardlaw, No. 35366-4-III, slip op. at 6–7 (affirming the denial

² See GR 14.1(c) (“Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.”).

of a DOSA request where the sentencing court considered a defendant's lack of remorse); see GR 14.1(c).

Mourelatos also says the court improperly considered the victim's personal wishes—i.e., her desire that he not receive a DOSA sentence because of her fear of him. He cites no law prohibiting such consideration. And the law permits victims of a crime to provide their opinion at sentencing, and courts to consider such opinions. CONST. art. I, § 35 (granting victims the right “to make a statement at sentencing”); RCW 7.69.030 (same); RCW 9.94A.500 (“[t]he court shall consider . . . any victim impact statement . . . and allow arguments from . . . the victim, the survivor of the victim, or a representative of the victim . . . as to the sentence to be imposed.”); State v. Shoemaker, No. 35483-1-III, slip op. at 10 (Wash. Ct. App. Jan. 8, 2019) (unpublished) http://www.courts.wa.gov/opinions/pdf/354831_unp.pdf, review denied, 193 Wn.2d 1010, 439 P.3d 1066 (2019) (rejecting defendant's argument that the sentencing court improperly denied her DOSA request based on statements made by victim representatives); see GR 14.1(c). Also, the court reasonably considered the potential threat Mourelatos posed to the community, including the victim, if he received a reduced sentence. See Wardlaw, No. 35366-4-III, slip op. at 6 (affirming the denial of a DOSA request where the sentencing court expressed “a concern for community safety”); see GR 14.1(c).

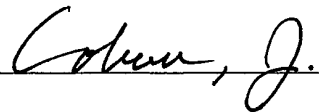
Finally, Mourelatos says the court incorrectly found an insufficient nexus between the charged crimes and his substance abuse. He claims that the court's comment—“If you're really serious about getting treatment, you need to do that

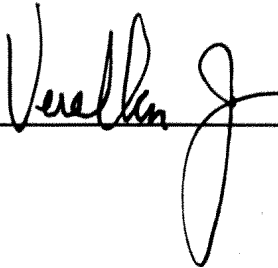
and you need to get out and follow court orders”—shows that the court recognized that his substance abuse contributed to his behavior in this case. But the comment does not go that far. Mourelatos says his actions and history show a need for addiction treatment but cites no law saying that a need for such treatment automatically leads to a DOSA sentence or that a court cannot consider the nexus between the addiction and the charged crime. See Grayson, 154 Wn.2d at 343 (“[T]he purpose of DOSA is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes”).

We affirm.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 82535-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Clark County Prosecutor's Office
- petitioner
- Attorney for other party



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Date: August 25, 2021

WASHINGTON APPELLATE PROJECT

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