NO. 97139-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MCINTYRE, JOSHUA DEAN

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that discretionary review be denied.

II. STATEMENT OF THE CASE

A detailed statement of facts is set out in the Brief of Respondent at pages 1-7. Briefly, the defendant (petitioner), Joshua McIntyre, had sexual intercourse with a 15-year-old girl on two occasions between January and May, 2015. 1 CP 192-94. On October 29, 2015, an information was filed charging him with third degree rape of a child. 1 CP 310. He was released on condition that he have no contact with minors. 2 CP 385. Despite this requirement, on October 6, 2016, he took a 12-year-old girl to a motel room and had sexual intercourse with her. 1 CP 265-66.

As a result of these actions, the defendant was convicted at a stipulated trial of one count of second degree rape of a child and one count of third degree rape of a child. 1 CP 269-88. The stipulation specifically indicates that the State would object to imposition of a sentence under the Special Sex Offender Sentencing Alternative (SSOSA). 1 CP 280.

Prior to sentencing, the defendant obtained a report from a sex offender treatment provider, Dr. Michael O'Connell (Ph.D). 1

CP 139-63. The report referred to an automobile accident that had occurred in June, 2010 (over six years before). 1 CP 153. The defendant was experiencing "a variety of cognitive and emotional effects." Dr. O'Connell thought that these were "likely symptoms of an undiagnosed and untreated traumatic brain injury." He "suspect[ed]" that this injury was still treatable. There had not, however, been any thorough neurological workup. 1 CP 162.

Dr. O'Connell noted that the defendant would have to serve a prison sentence of more than two years before being released on a SSOSA. This was "far from ideal for therapeutic purposes." He was, however, "willing to provide treatment to [the defendant] or make a referral to another provider and coordinate a transfer of care." 1 CP 162.

At sentencing, the court pointed out that Dr. O'Connell never actually said that the defendant was amenable to treatment. 3 RP 65-66. Defense counsel claimed that this was "implicit" in the report. He also said that Dr. O'Connell had told him that the defendant was amenable. 3 RP 68-69. He said that if further information was necessary, "I'm sure that Dr. O'Connell could offer some supplement or some addendum or whatever." 3 RP 71.

The sentencing court explained in detail why it considered the defendant unsuitable for SSOSA. The defendant had lied to the victims, the police, and Dr. O'Connell. Even after he admitted the crimes, Dr. O'Connell only concluded that the defendant might be amenable to treatment. Given the defendant's violation of conditions of release, the risk of leaving the defendant in the community was too high. The court therefore imposed a standard range sentence. 3 RP 82-86.

III. ARGUMENT

THE APPLICATION OF ESTABLISHED LAW RELATING TO CONTINUANCES DOES NOT WARRANT REVIEW BY THIS COURT.

The defendant claims that he was denied his due process right to present information at sentencing. As the defendant acknowledges, the existence of a constitutional violation requires a case-by-case inquiry. PRV at 8. The defendant does not criticize the legal test applied by the Court of Appeals. Rather, he claims that the court applied that test incorrectly. The application of an established legal standard does not constitute a "significant question of constitutional law warranting review under RAP 13.4(b)(3).

In any event, the analysis of the Court of Appeals was correct. The court determined that the defendant had failed to show either an abuse of discretion or prejudice. Slip op. at 6. With regard to abuse of discretion, the procedure for imposing a SSOSA sentence is set out in RCW 9.94A.670. Under that statute, an examiner is to "assess and report regarding the offender's amenability to treatment and relative risk to the community." RCW 9.94A.670(3)(b). The court may then order a second examination on its own motion or that of the States. RCW 9.94A.670(3)(c). On considering the reports, the court will then determine whether SSOSA is appropriate. RCW 9.94A.670(4).

This statute clearly contemplates that the examiner submit a written report be provided prior to sentencing. Only then can the court and the State determine whether a second examination is necessary. The statute would be undercut the failure of a report to address amenability to treatment provided an automatic basis for continuance.

Furthermore, the report in this case did address amenability to treatment. The examiner thought it "likely" that the defendant was experiencing symptoms of an undiagnosed traumatic brain injury. But there had not been a "thorough neurological and neuro-

psychological workup." The examiner "suspected" that the injury was still treatable — even though it had occurred over six years before, and sex offender treatment could not begin for another two years. He wanted to attempt treatment because "chances for treatment mitigating of underlying neurological problems may well have passed if he were to serve a much longer prison sentence." 1 CP 162. Without the "workup," however, the examiner did not know whether any brain injury existed at all, let alone whether it was still treatable. There was no reason for the sentencing court to believe that a short continuance would resolve this problem.

Nor has there been any showing of prejudice. The sentencing court did say at one point that it would grant the SSOSA "if I thought it would help." 3 RP 83. The court never said, however, that it would accept the examiner's conclusion in this regard. The court was aware of counsel's assertion that the examiner "said that he would be amenable." 3 RP 68. The court nevertheless explained why the defendant's pattern of lying and failure to obey court orders rendered community treatment an excessive risk. 1 RP 84-86. There is no reason to believe that further information would have changed the court's decision. This case does not present any issues that warrant review.

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on June 13, 2019.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: Kathleen Webber 16040 for
SETH A FINE, WSBA #10937
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, JOSHUA DEAN McINTYRE, Petitioner.	No. 97139-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

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ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Nielsen, Broman & Koch; Sloanej@nwattorney.net; nelsond@nwattorney.net

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 13th day of June, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

June 13, 2019 - 11:34 AM

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