Supreme Court No. 102336-7
COA No. 39504-9-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

MATTHEW MITTLESTADT,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, petitioner Matthew Mittlestadt asks this Court to review the opinion of the Court of Appeals *State v. Mittlestadt*, No. 39504-9-III (attached as Appendix 1- 17).

B. ISSUE PRESENTED FOR REVIEW

1. Is the court's determination of substantial and compelling reasons for an exceptional sentence an impermissible factual finding in violation of the Sixth and Fourteenth Amendments and *Hurst v. Florida*, U.S. _, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016)? RAP 13.4(b)(3).

2. Did the trial court and the Court of Appeals misconstrue the sentencing statutes and the nature of Mr. Mittlestadt's offender score to impose an exceptional sentence based on the "free crimes" provision of RCW 9.94A.535(2)(c)? Is misaccounting for

multipliers in the offender score to invoke the free crimes doctrine an issue of substantial public importance under RAP 13.4(b)(4)?

3. A court exceeds its authority by imposing unconstitutional conditions of supervision. Did the Court of Appeals err in sua sponte applying the doctrine of invited error to bar Mr. Mittlestadt's challenges of certain unconstitutional conditions of his supervisions? RAP 13.4(b)(1),(3).

C. STATEMENT OF THE CASE

In exchange for Mr. Matthew Mittlestadt's guilty plea, the parties agreed to jointly recommend 83 months for two counts of second-degree dealing in depictions of a minor, count I, and II. CP 59-66, 80-87.

At sentencing, the prosecution addressed the court about all seven convictions. RP 34, 37-38. It expressed that the parties were jointly recommending

83 months on count I and II, and 60 months on count III and IV, and the top of the range sentence of 60 months for each count of third-degree child rape as a fair resolution of that matter. RP 34, 37-38.

Instead, of following the joint recommendation, the superior court sentenced Mr. Mittlestadt to an exceptional sentence of 96 months on count I, consecutive to 24 months on count II, for a total 120 months. CP 47. The sentencing court relied on a number judicial findings as justification for the exceptional sentence including its dissatisfaction with the standard range, and its belief that some of the offenses were going unpunished. CP 46. Mittlestadt challenged those judicial findings under *Blakely* and argued the offender score already scored each of his current offense by a score of three. Mittlestadt also

challenged the constitutionality of certain conditions of supervision.

The Court of Appeals rejected Mittlestadt's arguments and affirmed on the basis that the trial court did not misapply the free crimes aggravator. App. 7, 13-14. And despite the Blakely violation, it held the free crimes aggravator alone supported the exceptional sentence App. 11. The Court of Appeals also rejected Mittlestadt's challenges to the unconstitutional community custody conditions. App. 11.

D. ARGUMENT

1. The opinion is incorrect that "free crimes" doctrine applies. A multiplier of three for six offenses already elevated Mr. Mittlestadt's offender score.

The trial court and the opinion used the "free crimes" doctrine to justify departing from the standard range. The opinion is incorrect.

A defendant's offender score is calculated based on current and prior convictions. RCW 9.94A.525(1). The standard sentencing ranges in the SRA do not account for offender scores in excess of nine. RCW 9.94A.510; *State v. France*, 176 Wn. App. 463, 468, 308 P.3d 812 (2013). A trial court may impose a sentence outside the standard range only if there are "substantial and compelling reasons justifying an exceptional sentence," and the court sets forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. Court can impose an exceptoiinal sentence when the person's offender score his higher than nine under RCW 9.94A.535(2)(c). This is is colloquially referred to as the "free crimes aggravator." *State v. Alvarado*, 164 Wn.2d 556, 563-64, 192 P.3d 345 (2008).

When Mr. Mittlestadt was convicted, he had no scorable history. All of 18 points come from six "current" offenses. CP 35-36. Without this multiplier of three on six offenses, Mr. Mittlestadt's offender score would still be within the sentencing grid, with a range of 77-102 months. RCW 9.94A.510

The SRA contemplates that when a defendant has multiple current offenses, the court will calculate the offender score for each offense one at a time. RCW 9.94A.589(1)(a). And rather than scoring each current offense as a single point, the legislature determined Mr. Mittlestadt's sex offense convictions should be triple scored. RCW 9.94A.525(17)..

The multiplier of three means Mr. Mittlestadt was already punished for his current offenses. Six current sex offenses counted as three points each in computing the elevated offender score of 18. The

nature of his offenses was necessarily already considered in "computing the presumptive range for the offense." *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).

In an unpublished opinion, this Court recently recognized that a trial court must weigh the use of multipliers for the "free crimes" aggravating factor because the use of a multiplier to elevate a person's offender score already factors in those current underlying offenses in computing the offender score and the resultant sentencing range. *See State v. Phelps*, 2 Wn. App.2d 1051; 2018 WL 1151975, *4 (2018)[1]; *see generally France*, 176 Wn. App. at 468.

In *Phelps*, this Court reversed an exceptional sentence imposed based on the "free crimes" aggravator

[1] Unpublished opinion cited as persuasive authority under GR 14.1.

where the defendant's offender score for taking a motor vehicle without permission was elevated to 19, largely because his prior six convictions for similar offenses counted as three points each. *Phelps*, 2018 WL 1151975 at *3. Without the multiplier, he would have had an offender score of 6. This Court ruled that the current offenses were punished because it was the nature of those offenses that triggered the multiplier and left the defendant with an offender score of 19. *Id*. at *4.

The reason supplied by the trial court to justify the aggravating factor was Mr. Mittlestadt's current multiple offenses, as he had no prior criminal history, resulting in his offender score of 18. CP 35-36. However, a defendant's criminal history does not justify an exceptional sentence above the standard range unless (1) the defendant has committed multiple current offenses and all of the offenses are not

adequately accounted for in the defendant's offender score; or (2) the defendant's prior criminal history was eliminated from the calculation of the defendant's offender score and, as a result, the defendant received a sentence that was too lenient. RCW 9.94A.535(2)(c)-(d).

Mr. Mittlestadt was convicted of six counts, counted as three points each, all of which elevated his offender score to 18. CP 59-60. All six of Mr. Mittlestadt's current offenses counted in his offender score, but the six offenses were counted as three points each by the multiplier. At sentencing, only his current offenses were also included in the standard range and compounded by the multiplier of three. No offense went unpunished.

The trial court misconstrued the nature of the unpunished offenses, and incorrectly believing some

offenses would go unpunished simply because Mr. Mittlestadt's offender score exceeded nine. CP 46. The court disregarded the multiplying effect of the six counts.A court must weigh the use of multipliers when relying on the "free crimes" aggravating factor because the use of a multiplier to increase a person's offender score means the offenses are being counted in a person's offender score. *See Phelps*, at *4; *France*, 176 Wn. App. at 469.

The court did not acknowledge or address the effect of the multipliers used to elevate Mr. Mittlestadt's offender score based on his current felony offenses.

The treatment of the multiplier of three presents a matter of first impression that our courts need to resolve. Mittlestadt asked the Court of Appeals to adopt the well-reasoned analysis in *Phelps*. Reply Br.

of Appellant at 10; Br. of Appellant at 21-22. The Court of Appeals avoided dealing with the merits by conclusorily declaring the trial court properly applied the free crimes aggravator. App. 13.

The court should accept review of this novel issue of statutory construction that courts are erroneously interpreting to impose unjust, lengthy punishments. Review is appropriate for this issue of continuing and substantial public interest. RAP 13.4.(b)(4).

2. A judge's factual determination that aggravating factors are substantial and compelling reasons for imposing an exceptional sentence violated Mr. Mittlestadt's rights to trial by jury and proof beyond a reasonable doubt.

The constitutional rights to due process and trial by jury guarantee a jury finding beyond a reasonable doubt for every fact essential to punishment, regardless of whether the fact is labeled an element or a sentencing factor. *Hurst*, 136 S. Ct. at 621; U.S.

Const. amend. VI, XIV; Const. Art. I, §§ 21, 22. The State must submit to a jury any fact upon which it seeks to increase punishment. *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013); *State v. Dyson*, 189 Wn. App. 215, 225, 360 P.3d 25 (2015).

"A fact can also become an element of the crime because of the consequences of its proof." *State v. Goss*, 186 Wn.2d 372, 378, 378 P.3d 154 (2016). And facts that "increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id.* (quoting *inter alia Alleyne,* 570 U.S. at 111).

A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence RCW 9.94A.535. When the

government seeks an exceptional sentence, it must provide timely notice of specified statutory aggravating circumstances. RCW 9.94A.535(3); RCW 9.94A.537(1). It must then prove the facts supporting the aggravating circumstances to a unanimous jury beyond a reasonable doubt. RCW 9.94A.537(3).

To impose an exceptional sentence above the standard range, the jury must find the existence of a statutorily authorized aggravating factor beyond a reasonable doubt. RCW 9.94A.535; RCW 9.94A.537.

But the jury's finding is advisory. It does not, in itself, authorize increased punishment. Instead, the court is required to additionally "consider[ ] the purposes" of the SRA and to find the aggravating factor constitutes "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535; RCW 9.94A.537(6).

For a court to find substantial and compelling reasons justifying an exceptional sentence, it must "take into account factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 683 (1987) (quoting *State v. Nordby,* 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)).

Courts have labelled the determination that substantial and compelling reasons justify an exceptional sentence as a legal question. *See e.g.*, *State v. Sulieman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006); *State v. Hughes*, 154 Wn.2d 118, 137 P.3d 192 (2005). But this characterization is incorrect. The court's decision weighs factual issues and no legal standard controls. As one observer noted, "trial courts remain free to liberally fashion vague substantial and compelling reasons in an unstructured ad-hoc fashion."

Darren Wu, *Exceptional Discretion in Exceptional Criminal Sentences in Washington*, 29 Gonz. L. Rev. 599, 603 (1994). The court subjectively compares the case or its perception of the gravity of the aggravating factors to decide whether to increase punishment beyond the standard range.

Moreover, the statute requires the court enter findings of fact detailing its decision. RCW 9.94A.535. Plainly the legislature intends the court to make some factual determination when it decides an exceptional sentence is appropriate.

In *Hurst*, the Supreme Court ruled that Florida's death penalty procedure violated the Sixth Amendment because the jury's findings of aggravating factors were advisory. 136 S. Ct. at 620-21. The judge retained authority to weigh the jury's recommendation

and could impose the death penalty only with its own additional fact-based determination. *Id*. at 621-22.

Similarly, the court must find substantial and compelling reasons to impose an exceptional sentence, under RCW 9.94A.535 and RCW 9.94A.537, which constitutes a mandatory fact-based judicial determination in addition to the jury's finding an aggravating factor exists. If the Legislature was merely according discretion to deny an exceptional sentence after the jury finds aggravating circumstances, it would have said so. Instead, the statute requires the judge to make the additional determination that substantial and compelling reasons justify the increased sentence, which is at least a mixed question of fact and law. This factual question must be found by a jury because it authorizes increased punishment. *Hurst*, 136 S. Ct. at 622.

Although it controls the question, the Court of Appeals opinion never even mentions *Hurst*. The Court does not explain why *Hurst* does not apply. The Court never differentiates RCW 9.94A.535 from the Florida statute. In fact, they are in all important respects the same.

The sentencing court relied on a number of other judicial findings as justification for the exceptional sentence including its dissatisfaction with the standard range, all of which were impermissible reasons for imposing an exceptional sentence under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

To comply with *Blakely,* the legislature amended the SRA in 2005. Laws of 2005, ch. 68, § 4; *In re Pers. Restraint of Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009). The amended SRA continues to require the

court to find the fact ultimately supporting imposition of the exceptional sentence: that it was justified by a substantial and compelling reason. RCW 9.94A.535.

The *Blakely* Court invalidated Washington's exceptional sentencing scheme because it permitted courts to impose sentences greater than the standard range based on facts found by a judge and proven by only a preponderance of the evidence, contrary to the Sixth Amendment right to a jury trial. *Id*. at 304-05. *Blakely* pleaded guilty to a kidnapping offense with a standard range of 49 to 53 months. *Id*. at 299. The judge imposed a 90-month sentence after it decided Blakely acted with "deliberate cruelty." *Id*. at 300. The Court reversed Blakely's sentence, ruling that any fact increasing punishment beyond the standard sentencing range constitutes an element that must be proved to a jury beyond a reasonable doubt. *Id*. at 306-07. The

Blakely court held "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" must be decided by a jury beyond a reasonable doubt. 542 U.S. at 301; *see also*, *Alleyne*, 570 U.S. at 114-15 ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."). The trial judge did exactly what *Blakely* prohibits.

The trial court entered several of its own factual findings as "aggravating circumstances" justifying both exceptional sentence—the 120-months exceptional sentence. CP 47.

Under judicial finding VI, the trial court based the exceptional sentence on the similar "nature" of Mr. Mittlestadt's "sexual felonies against minors," his dangerousness to the community and because the

crimes were committed close in time to each other. CP 119, 153.

Under Judicial finding VII, the trial court weighed the "dangerousness" and "harmfulness" of Mr. Mittlestadt's "recividist conduct" as "represented by his conviction for these seven felony sex offenses." CP 119.

Under Judicial finding IX, the trial court based the exceptional sentence on the "paramout goal" of protecting the community. CP 120. Exceptional sentences violate *Blakely* when they are based on facts not stipulated to by the defendant or not found by a jury beyond a reasonable doubt. *See State v. Suleiman*, 158 Wn.2d 280, 143 P.3d 795 (2006).

Mr. Mittlestadt challenged the exceptional sentence under *Blakely*. Br. of Appellant at 34-37. The State readily concedes the trial court did exactly what

Blakely prohibits: it imposed the exceptional based on three impermissible factors that should have been submitted to the jury. Br. of Resp. at 14. The State concedes judicial findings VI, VII, and IX cannot support an upward departure from the standard range absent a "jury finding the same." Br. of Resp. at 14. But urged the Court of Appeals to overlook the *Blakely* violation if any evidence in the record could support the free-crimes aggravator.

The Court of Appeals incorrectly agreed with the State and affirmed on the basis that Mr. Mittlestadt "strained" to read findings VI, VII, and IX as if they were factors—facts that a jury must find. App. 7, 13-14. The Court of Appeals is clearly incorrect because the trial court did rely on these judicial findings as factors supporting the exceptional sentence.

Mr. Mittlestadt never stipulated to any of those additional findings. Indeed, it is debatable whether those statutes would even permit such a stipulation to remove that obligation form the court. But at the same time it is clear that additional finding by the court violates Mr. Mittlestadt's Sixth Amendment right. In the absence of any waiver by Mr. Mittlestadt, the lack of a jury finding requires reversal of the exceptional sentence. *Alleyne,* 570 U.S. at 117.

3. The opinion sua sponte, erected invited error as a bar for Mr. Mittlestadt's meritorious claims challenging unconstitutional conditions of community supervision.

A trial court abuses its discretion if it imposes an unconstitutional community custody condition. *State v. Wallmuller*, 194 Wn.2d 234, 238, 449 P.3d 619 (2019); *State v. Johnson*, 4 Wn. App. 2d 352, 358, 421 P.3d 969 (2018) ("community custody provisions must ... pass

constitutional muster"). Conditions that interfere with fundamental constitutional rights must be sensitively imposed and reasonably necessary to accomplish essential state needs and public order. *Id*. Our appellate courts do not presume that a community custody condition is constitutional. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015).

Mr. Mittlestadt challenged the constitutionality of several community custody conditions contending they violate the First and Fourteenth Amendments and Article I, section 7. Br. of Appellant at 44-50; SAG at 1.

The State only contended Mr. Mittlestadt's constitutional challenges to the three conditions of community supervision were not preserved below and cannot be brought for the first time on appeal. Br. of Resp. at 21-23. The Court of Appeals *sua sponte*,

without any argument from the State, incorrectly erected a procedural bar to Mr. Mittlestadt's constitutional challenges to conditions of supervision. The Court went to great lengths, scoured the record, researched caselaw, and developed an argument that the doctrine of invited error bars these challenges. App. 15-17. But the doctrine of invited error does not bar review of an unconstitutional conditions of supervision.

a. Requiring Mr. Mittlestadt to submit to urinalysis violates his constitutional right to privacy.

Special Condition 11 in Mr. Mittlestadt's community custody terms provides he must: "Be available for and submit to urinalysis upon request of the CCO and/or chemical dependency treatment provider." CP 100.

At sentencing, the prosecution acknowledged drugs and alcohol did not play a role in the commission

of the underlying offenses: "It's appropriate that there be a urinalysis because, as the Court's aware, whether or not drugs are involved in an offense, monitoring for things like substance use in the community during a term of probation is appropriate." RP 40.

The special condition 11 imposed an instrusive search which implicated Mr. Mittlestadt's privacy interest under Article 1 Section 7 of the Washington constitution. CP 99. The trial court did not require the State to articulate a compelling interest why this condition was necessary in addition to the standard condition 3 prohibiting Mr. Mittlestadt from possessing or consuming controlled substances. CP 99. Mr. Mittlestadt was already prohibited from possession alcohol and non-prescription drugs. RP 10.

The imposition of special condition 11 exceeded the trial court's authority. Under RCW 9.94A.703(2)(c),

all terms of community custody shall include a condition requiring the defendant to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions," unless waived by the trial court. And under RCW 9.94A.703(3)(e), the trial court has discretion to impose a condition requiring the defendant to "[r]efrain from possessing or consuming alcohol." These conditions may be imposed even if substances played no role in the underlying offense. *State v. Jones*, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003).

But where alcohol or controlled substances played no role in the underlying offense, the trial court may not enforce the discretionary abstention conditions by requiring urinalysis and/or breathalyzer. *State v.*

Greer, 11 Wn. App. 2d 1023,2019 WL 6134568, at *8-*9.[2]

In *Greer*, the Court of Appeals explained that such testing infringes on article I, section 7, privacy interests and must therefore be "reasonably necessary to achieve a compelling state interest." *Id.* at *8-*9. And it concluded the State has no compelling interest in monitoring a defendant's compliance with a non-crime-related abstention requirement imposed under RCW 9.94A.703(2) or (3). *Id.*

There is no evidence that alcohol or other substances played any role in any of Mr. Mittlestadt's offenses; and the State acknowledged as much. RP 40. The condition requiring random urinalysis testing must be stricken.

[2] Unpublished opinion cited for persuasive authority under GR 14.1.

b. Compelling Mr. Mittlestadt to disclose his sexual offender status to an intimate partner violates his right to free speech and infringes on his right to privacy. Prohibiting his sexual contact with other adults also violates his right to privacy.

Community custody special condition 5 requires Mr. Mittlestadt to "[d]isclose [his] sex offender status prior to any sexual contact" with a prospective intimate partner. CP 99. This implicates both First Amendment protections against compelled speech and Fourteenth Amendment rights to privacy and liberty. *People v. Jensen*, 231 Mich. App. 439, 460-61, 462-64, 586 N.W.2d 748 (1998) (statute requiring persons to inform potential sexual partners of their HIV status infringed both First Amendment right against compelled speech and "constitutional guarantees that include privacy considerations," and was valid only because state had "undeniably overwhelming" interest in protecting public health); *State v. Gamberella*, 633 So.2d 595, 603-

04 (1993) (strict scrutiny applied to HIV disclosure law because law infringed "right of personal privacy" protected under article I, § 5 of the Louisiana Constitution).

As noted, crime-related prohibitions may be imposed in a term of community custody if there is a direct connection between the underlying offense and the activity prohibited. RCW 9.94A.703(3); RCW 9.94A.030(10); *State v. Padilla*, 190 Wn.2d 672, 682, 416 P.3d 712 (2018). Where a community custody condition implicates fundamental constitutional rights, the court's discretion is even more limited. *State v. Warren*, 165 Wn. 2d 17, 32-34, 195 P.3d 940 (2008). The First Amendment to the United States Constitution requires that any condition implicating free speech be narrowly tailored to serve a legitimate government interest. *Padilla*, 190 Wn.2d at 684-85.

And the Fourteenth Amendment requires narrow tailoring for any condition limiting a fundamental liberty interest, such as the right to parent or enter into intimate personal relationships. *See United States v. Reeves*, 591 F.3d 77, 82-83 (2d Cir. 2010) (*citing United States v. Meyes*, 426 F.3d 117, 126 (2d Cir. 2005)); *State v. Ancira*, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001). Thus, a court may impose a community custody condition that limit constitutionally protected activities only to the extent necessary to further the state's legitimate and statutorily authorized interests. *Padilla*, 190 Wn.2d at 684; *Anicra*, 107 Wn. App. at 653-56. Such a condition is permissible only if narrowly tailored. *Padilla*, 190 Wn.2d at 684-85; *Warren*, 165 Wn.2d at 32.

The state has a legitimate interest in preventing sex offenses against minors. Thus, the courts have

approved of conditions limiting the defendant's contact with children. *See, e.g., Wallmuller*, 194 Wn.2d at 234. These may include conditions restricting the defendant's adult relationships, but only to the extent necessary to prevent offending against children. For instance, in *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), the Court of Appeals upheld a condition restricting relationships with families of minor children where the offense "involved children with whom [Kinzle] came into contact through a social relationship with their parents."

In *State v. Autrey*, 136 Wn. App. 460, 468, 150 P.3d 580 (2006), the sentencing court was permitted to place limits on consensual sexual contact with other adults because they served to protect "the safety of live-in or visiting minors."

However, the Court of Appeals has correctly recognized that although adult contact may be limited where a social relationship existed between the defendant and the parents of a child he victimized, a condition requiring the CCO's approval for any dating relationship was overbroad in violation of the fundamental right to marry. *State v. Miller*, 8 Wn. App. 2d 1051, 2019 WL 1902709, at *8 (Apr. 29, 2019).

The trial court lacks authority to impose the condition requiring Mr. Mittlestadt to disclose his sex offender status prior to any sexual contact. CP 99. Now the court already prohibited him from having contact with minors who are not his biological children under special condition 14. CP 99. Such a community custody condition is appropriate and will ensure he will never be in proximity to children. Thus, there is simply no compelling state interest to further restrict any of Mr.

Mittlestadt's other fundamental rights especially where there is no allegation of inappropriate contact with other adults. *Ancira*, 107 Wn. App. at 653-56.

Because the condition compels Mr. Mittlestadt's speech and infringes on his privacy interests, it must be "reasonably necessary to accomplish the essential needs of the state and public order." *Padilla*, 190 Wn.2d at 684. The State did not articulate any compelling interest to authorize such sweeping restrictions on consensual intimate association. More importantly, this restriction is unnecessary to accomplish any stated interest because other special conditions (like special condition 14) have already imposed narrowly tailored prohibition on contact with minors.

Special condition 5 also provides: "Sexual contact in a relationship is prohibited until the treatment

provider approves of such, with the exception of defendant's current wife, Elizabeth Mittlestadt." CP 99. As the trial court noted, Mr. Mittlestadt's convictions involved sex with minors. CP 46. The State has not articulated a compelling reason how prohibiting Mr. Mittlestadt from having sexual contact with other adults furthers its legitimate interest in protecting the safety of minors. *Autrey*, 136 Wn. App. at 468.

Special condition 5 restricts Mr. Mittlestadt's fundamental liberty interest to enter into intimate personal relationships without narrowly tailoring itself into a crime-related provision and without articulating how the prohibition is narrowly-tailored to the State's legitimate interest in protecting minors.

Mr. Mittlestadt challenged the constitutionality of several community custody conditions contending

they violate the First and Fourteenth Amendments and Article I, section 7. Br. of Appellant at 44-50; SAG at 1.

The State only contends Mr. Mittlestadt's constitutional challenges to the three conditions of community supervision were not preserved below and cannot be brought for the first time on appeal. Br. of Resp. at 21-23.

The Court of Appeals summarily rejected Mittlestadt's challenges and sua sponte developed an argument the State did not present. App. 15-17. The Court reasoned that Mittlestadt's lawyer made a tactically sound decision to agree to those "significant supervision" conditions in Appendix H. and held it had no "hesitancy" in affirming the challenged conditions as invited error. App. 15-17.

Mr. Mittlestadt clearly did not invite the court to violate his constitutional rights. A defendant couldn't affirmatively agree to impose an unconstitutional and an unlawful sentence.

Moreover, the State bears the burden to prove error was invited. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The State offered no argument or proof. And yet the the Court of Appeals sua sponte labored to developed arguments and a basis to find invited error.

But even arguendo. Mr. Mittlestadt invited error, he can raise his assignment for the first time on appeal. *State v. Mercado*, 181 Wn. App. 624, 631, 326 P.3d 154, 158 (2014) Our state high court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function. *Mercado*, 181 Wn. App. at 631 *citing State v. Ammons*, 105

Wn.2d 175, 180, 718 P.2d 796 (1986). A defendant cannot agree to punishment in excess of that which the legislature has established. *In re Pers. Restraint of West*, 154 Wn.2d 204, 214, 110 P.3d 1122 (2005); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002). Even where a defendant clearly invited the challenged sentence by participating in a plea agreement, to the extent that he can show that the sentencing court exceeded its statutory authority, the invited error doctrine will not preclude appellate review. *Goodwin*, 146 Wn.2d at 872, 50 P.3d 618. Therefore, the invited error doctrine does not apply to illegally imposed sentences, even if a defendant agrees to the sentence. *In re Pers. Restraint of Green*, 170 Wn.App. 328, 332, 283 P.3d 606 (2012).

A sentencing court exceeds its authority by entering an unconstitutional condition. *Mercado*, 181

Wn. App. at 636 (holding that the trial court exceeded its authority in illegally ordering a defendant to undergo HIV testing.) At the very least review is appropriate to correct the unconstitutional conditions of sentencing.

E. CONCLUSION

Mr. Mittlestadt's sentence is unconstitutional. The Court of Appeals' failure to follow the Supreme Court's opinions in *Alleyne* and *Hurst* and warrants review by this Court. This court should also correct the unconstitional community conditions.

This brief complies with RAP 18.7 and contains 4,881 words.

DATED this 31st day of August 2023.

Respectfully submitted,

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APPENDICES

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CASE # 395049
State of Washington v. Matthew C. Mittlestadt
KITSAP COUNTY SUPERIOR COURT No. 2110084218

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please see word count rule change at https://www.courts.wa.gov/wordcount, effective September 1, 2021. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jab
Attachment

c: **E-mail**—Hon. Jennifer A. Forbes

c: Matthew C. Mittlestadt, #432443
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WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MATTHEW C. MITTLESTADT, Appellant.	))))))))))	No. 39504-9-III UNPUBLISHED OPINION

SIDDOWAY, J.P.T.* — Matthew Mittlestadt appeals the sentence imposed after the court accepted his guilty plea to four sex offenses charged in this matter. The sentencing court rejected the parties' joint recommendation of a standard range sentence, imposing exceptional consecutive sentencing on two of the counts. Mr. Mittlestadt contends that the "free crimes" aggravator is the only basis that could possibly support the exceptional sentence, and that it does not apply. Also, and for the first time on appeal, he challenges three conditions of community custody. In a pro se statement of additional grounds, Mr. Mittlestadt challenges a fourth community custody condition.

We reject all of the challenges and affirm the judgment and sentence.

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* Judge Laurel H. Siddoway was a member of the Court of Appeals at the time argument was held on this matter. She is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

FACTS AND PROCEDURAL BACKGROUND

In December 2019, the State charged Matthew Mittlestadt with two counts of rape of a child in the second degree and one count of rape of a child in the third degree in cause No. 19-1-01633-18 (the "2019 case"). The offense conduct was alleged to have occurred between September 2012 and September 2015. The charges were later amended to three counts of rape of a child in the third degree.

In December 2021, the State filed the charges in this case. Mr. Mittlestadt was charged with two counts of dealing in depictions of minors engaged in sexually explicit conduct in the second degree, one count of attempt to sexually exploit a minor, and one count of communication with a minor for immoral purposes. The offense conduct for these charges was alleged to have occurred on or between July 1 and July 9, 2021.

Mr. Mittlestadt reached an agreement to plead guilty to the charges in both cases. Section 6 of his statement on plea of guilty in this case stated in relevant part, "**In Considering the Consequences of My Guilty Plea, I Understand That: . . .**

(b) Each crime with which I am charged carries a maximum sentence, a fine, and a ***Standard Sentence Range*** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1 & 2	18	72 to 96 mos		36 mos	10yrs $20K
3	18	60 mos		/	5yrs. $10K
4	18	51-60 mos.		/	5yrs - $10K

Clerk's Papers (CP) at 24.

In exchange for guilty pleas in the 2019 case and this case, the parties agreed that they would jointly recommend that in this case, Mr. Mittlestadt would serve concurrent sentences of 83 months on each of count I and count II, and 60 months on each of count III and count IV, to run concurrent to 60 months on each of the three counts in the 2019 case. The parties jointly agreed to recommend that the court order 36 months of community custody.

The plea agreement identified as "[o]ther agreement[s]," a handful of conditions of supervision, and that:

> The prosecution will recommend other crime related conditions of supervision as indicated by DOC [the Department of Corrections] in the PreSentence Investigation report (PSI). Defendant may object to conditions proposed by DOC or recommended by the State, except that the Defendant may not object and instead agrees to specifically recommend and support the conditions of supervision enumerated herein.

CP at 62.

In April 2022, the parties filed the plea agreement and statement on plea of guilty and appeared in court for the entry of a change of plea in this case. The court reviewed the terms of the agreement and factual basis for the plea, and accepted the plea. Sentencing was scheduled to occur in a month. A PSI was ordered.

The PSI proved critical of the parties' recommended sentences. DOC evidently advocated for a longer sentence because it viewed Mr. Mittlestadt as refusing to accept accountability and as engaged in victim-blaming.[1]

Sentencing of the guilty pleas in the 2019 case and this case were addressed at a joint hearing. The prosecutor asked the court to follow the joint recommendations. He represented that in the 2019 case there were significant proof issues. He characterized the State's case on the charges in this case as stronger, but said the State's primary concern was that Mr. Mittlestadt get the full 36 months' community custody following his release, given its concern about his risk of reoffending. The prosecutor acknowledged the reservations expressed in the PSI, but told the court, "I think what we've negotiated is fair. It is just. I think it holds the Defendant accountable, gives him a chance to rehabilitate." Rep. of Proc. (RP) at 37.

The prosecutor pointed out that "[t]here are a lot of conditions we're asking you to put into the community custody" in this case, and that he and defense counsel had agreed to the appendix H conditions with only a couple of revisions. RP at 38. He explained that one change had been made to condition 5, which had been revised to provide that Mr. Mittlestadt would not need treatment provider approval for sexual contact with his

[1] The PSI was not designated for inclusion in the record on appeal. We infer that its objections must have been fairly strong from the sentencing court's comments and the prosecutor's and defense counsels' acknowledgments of its tenor.

current wife. Another change had been made to condition 11, which was revised to require Mr. Mittlestadt to submit to urinalysis, but not breath analysis.

After hearing from an advocate who presented a victim impact statement from the minor in the 2019 case, the court posed a question to the prosecutor about exceptional sentencing options. The prosecutor answered the question, at the same time standing by his recommendation:

> THE COURT: I do have a question [addressing the prosecutor]. I'm not saying this is what I'm going to do, but I do have a question about whether or not there's a legal issue with it. But if I was to—because of the offender score, I can sentence him to consecutive time, and I could build in community custody time in one of the consecutive sentences. Right?
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> [PROSECUTOR]: Your Honor, I support the plea agreement. I think, to answer Your Honor's legal question, my understanding is that, if the Court has a legal basis to run crimes consecutive, the statutory maxes are also consecutive, so the answer would be yes.
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> THE COURT: That's my understanding as well. I'm not saying I'm going to do that, but I want that to be something everybody has a chance to respond to, and so that's why I asked the question.

RP at 45-46.

The court then heard from Mr. Mittlestadt's counsel in this case. He zealously advocated for the agreed recommendation, while at the same time acknowledging the objections raised in the PSI and the sentencing court's concerns. Addressing the community custody, he said:

> I've reviewed appendix H with Mr. Mittlestadt. I've addressed the issues that I saw from a legal perspective with that appendix. I think what [the prosecutor] and I have crafted now is legally sufficient, and it is also

> sufficient in the sense that it's going to provide proper supervision of Mr. Mittlestadt.

RP at 49.

The court then heard from Mr. Mittlestadt's counsel in the 2019 case, who also advocated strenuously for the jointly recommended sentence. It heard from Mr. Mittlestadt.

In announcing its sentencing decision, the court began by stating, "I do my very best to follow plea agreements. I believe in plea agreements. I believe in the purpose of plea agreements." RP at 56. But after brief elaboration, the court quickly turned to Mr. Mittlestadt's statements to DOC in connection with the PSI, which it characterized as "borderline offensive in the sense that he essentially blames the victims, tries to make himself out to be the victim." RP at 57. It rejected the defense lawyers' arguments that Mr. Mittlestadt was a changed man. It announced it would follow the parties' recommendation for the 2019 case, including that the sentences in that case would run concurrent to the sentences in this case. But in this case, the court said it would impose an exceptional sentence by running counts I and II consecutively, imposing 96 months' confinement for count I and 24 months (a downward deviation) for count II, for a total term of confinement of 120 months. Those sentences would run concurrent to the concurrent 60 month sentences on counts III and IV. It imposed the 24 months' community custody on count I that would take that sentence up to the 120 month

statutory maximum, and 36 months' community custody on count II, for a total of 60 months' community custody. It accepted the appendix H conditions as modified by the parties.

The court later entered findings of fact and conclusions of law in support of the exceptional sentence. Among its findings were the following:

> IV.
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> That the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).
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> V.
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> That in balancing the multiple purposes of RCW 9.94A, the Sentencing Reform Act, the interests of justice are best served by an exceptional sentence as to counts I and II.
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> VI.
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> That the defendant appears to remain a danger to the community, as evidenced by the time passed between dates of offense as between cause 19-1-01633-18 and this cause and as evidenced by the similar nature of the charges, that is, sexual felonies against minors, including rape and sexual exploitation.
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> VII.
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> That the defendant's statements to the court at sentencing through the Pretrial Sentencing Investigation report are disturbing and indicative of someone who does not understand his impact on his victims and on the community and who, though attesting to guilt and shame, does not appreciate the dangerousness and harmfulness of his recidivist conduct as represented by his convictions for these seven felony sex offenses.
>
> . . . .

IX.

> That a paramount goal of the Court in ordering the sentence in this cause is to protect the community and community safety is the focus of the Court's sentence in this case.

CP at 46-47. The court's judgment and sentence in this case identified only the crimes charged in this case as "current offenses," identifying the three convictions for crimes charged in the 2019 case as "criminal history," and identifying each as "pending but counted." CP at 34-35 (some capitalization omitted).

Mr. Mittlestadt appealed to Division Two of this court. In February 2023, the case was administratively transferred to this division. A panel considered the appeal without oral argument.

ANALYSIS

Mr. Mittlestadt makes five assignments of error on appeal. In the first two, he contends that the trial court's exceptional sentence is either based on misconstruing the "free crimes" aggravator authorized by RCW 9.94A.535(2)(c) or relies on its findings VI, VII or IX in violation of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The remaining three assignments of error challenge conditions of his community custody to which he made no objection at sentencing. We address the assigned errors in the order presented.[2]

[2] In his reply brief, Mr. Mittlestadt raises a further argument that the State's response brief advocates for an exceptional sentence, thereby breaching the plea

I. THE "FREE CRIMES" AGGRAVATOR WAS PROPERLY APPLIED

In *Apprendi v. New Jersey*, the United States Supreme Court held that the due process clause of the Fourteenth Amendment and Sixth Amendment, taken together, require that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Blakely*, the Supreme Court clarified that the "statutory maximum" did not refer to the maximum sentence authorized by the legislature for the crime but meant, instead, the maximum sentence a trial judge was authorized to give without finding additional facts—in the case of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the top of the standard sentencing range. *State v. Evans*, 154 Wn.2d 438, 441-42, 114 P.3d 627 (2005).

In response to the Court's decision in *Blakely*, the Washington Legislature amended the SRA. In keeping with the rule articulated in *Blakely*, the 2005 amendments provided that most of the aggravating factors that a sentencing court previously could have cited as the basis for imposing an exceptional sentence henceforth either must be

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agreement and entitling him to specific performance. He does not point to the language from the State's brief on which he relies, or the terms of the plea agreement that it allegedly breaches. If a trial court imposes a sentence different from what was contemplated by a plea agreement, the prosecutor may defend the sentence on appeal and argue against resentencing. *State v. Gleim*, 200 Wn. App. 40, 44-45, 401 P.3d 316 (2017) (citing *State v. Arko*, 52 Wn. App. 130, 132, 758 P.2d 522 (1988)). Mr. Mittlestadt's argument is too factually vague and legally unsound to warrant further consideration.

admitted by the defendant or found by a jury in order to provide the basis for an upward departure from the standard sentence range. *State v. Newlun*, 142 Wn. App. 730, 739, 176 P.3d 529 (2008) (citing LAWS OF 2005, ch. 68, §§ 3-4, *codified as* RCW 9.94A.535-.537). It also identified a few instances in which a trial court could depart upward based on its own findings, one being RCW 9.94A.535(2)(c), the "free crimes" aggravator.

RCW 9.94A.535(2)(c) provides:

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
> . . . .
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

Stated differently in *Newlun*, "If the number of current offenses, when applied to the sentencing grid, results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed." 142 Wn. App. at 743.

In its findings and conclusions in support of Mr. Mittlestadt's exceptional sentence, finding of fact IV cites RCW 9.94A.535(2)(c) as the statutory basis for its exceptional sentence. Mr. Mittlestadt contends that the court misapplied the statute and/or violated *Blakely* in imposing his sentence.

Turning first to *Blakely*, Mr. Mittlestadt does not demonstrate a constitutional violation, because the terms of confinement imposed on count I and count II are each

within the standard range. His sentences for the two counts are exceptional only by running consecutively. The reasoning of *Apprendi* and *Blakely* does not extend to exceptional consecutive sentencing. *Oregon v. Ice*, 555 U.S. 160, 168, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). "The decision to impose sentences consecutively is not within the jury function that 'extends down centuries into common law.'" *Id.* (quoting *Apprendi*, 530 U.S. at 477). Relying on *Ice*, the Washington Supreme Court reached the same result where the trial court imposed exceptional consecutive sentences under RCW 9.94A.589(1)(a), recognizing that *Ice* "squarely overrule[d]" its own, earlier decision to the contrary. *State v. Vance*, 168 Wn.2d 754, 762, 230 P.3d 1055 (2010).

In arguing that the trial court erroneously relied on RCW 9.94A.589(1)(a) and RCW 9.94A.535(2)(c) as its statutory basis for imposing an exceptional sentence, Mr. Mittlestadt makes an obscure argument that in arriving at his offender score of 18, "[s]ix current sex offenses counted as three points each," and "[t]he nature of his offenses was necessarily already considered in 'computing the presumptive range for the offense.'" Br. of Appellant at 20 (quoting *State v. Norby*, 106 Wn.2d 514, 723 P.2d 1117 (1986)). He cites as support *Norby*, and an unpublished decision in *State v. Phelps*, 2 Wn. App. 2d 1051, 2018 WL 1151975 (2018).

At issue in *Norby* was whether a trial court's reasons justified its imposition of an exceptional sentence outside the standard range. The Court of Appeals held that two of its three reasons did, but one did not, because the third was a factor necessarily

considered in computing the presumptive range for the offense. 106 Wn.2d at 518-19. The requirement that the trial court's reasons "justify a sentence outside the standard range for that offense" appeared at the time at former RCW 9.94A.210(4) (1981); the same requirement is now codified at RCW 9.94A.585(4). *Id*. at 517. Norby was convicted of vehicular assault. The reason given for the upward departure that the Court of Appeals held did *not* justify it was the seriousness of the victim's injuries. *Id.* at 516-17. The Supreme Court agreed with this court that because infliction of "serious bodily injury" was a prerequisite for vehicular assault, the severity of Norby's victim's injuries had been considered in setting the presumptive range.

Here, the basis for the exceptional sentence was that Mr. Mittlestadt's presumptive sentence for his four offenses was identical to that which would be imposed if he had committed only count I or count II. That crimes would go unpunished is not something that had been taken into consideration in setting the presumptive range.

Turning to *Phelps*, Mr. Mittlestadt would apparently like us to read that unpublished decision as precluding application of the "free crimes" aggravator whenever some points are multiplied in calculating the offender score, and the result is a high offender score. But the decision in *Phelps* was specific to its facts. Phelps was being sentenced for two offenses: hit and run injury accident, and taking a motor vehicle without permission in the second degree (TMVWOP). In arriving at his offender score for TMVWOP, each of Phelps's prior convictions for TMVWOP and theft of a motor

vehicle were counted as three points. He had six priors, contributing 18 points to his score. Adding a point for the hit and run injury accident conviction resulted in a total offender score of 19.

His offender score for the hit and run injury accident count was only 6, however, and it carried the longer standard range sentence: 33 to 43 months, whereas the standard range sentence for the TMVWOP charge was 22 to 29 months. As pointed out by the State, there was no free crime, because the hit and run injury accident charge carried the longer standard range, and the TMVWOP conviction increased his offender score on that count by a point. The appellate court agreed, explaining:

> The current conviction of TMVWOP in the second degree increased the offender score and standard sentence range for the conviction of hit and run injury accident. Therefore, Phelps' presumptive sentence was greater than it would have been if he had committed fewer current offenses.

2018 WL 1151975 at *4.

By contrast, Mr. Mittlestadt's charges for dealing in depictions of minors engaged in sexually explicit conduct in the second degree carried the longest standard range of his convictions, and his sentence for each of those convictions would remain unchanged whether his offender score was 9 or 18. Had he been sentenced for only count I or count II, his sentencing range would be the same. Because his presumptive sentence was identical to what it would have been if he had committed fewer current offenses, the "free crimes aggravator" was properly applied.

RCW 9.94A.535(2)(c) is the aggravating factor explicitly relied on by the sentencing court's finding IV, and it applies. Accordingly, there is no reason for Mr. Mittlestadt's strained reading of findings VI, VII and IX as if *they* were the factors supporting an upward departure, yet were not found beyond a reasonable doubt by a jury. Instead, as argued by the State, those findings are reasonably read as complying with the statutory command that the sentencing court consider the purposes of the SRA in finding that substantial and compelling reasons justify an exceptional sentence. *See* RCW 9.94A.535.

II. THE CHALLENGED COMMUNITY CUSTODY CONDITIONS, IF ERROR, WERE INVITED

For an objection to a community custody condition to be entitled to review for the first time on appeal, (1) it must be manifest constitutional error or a sentencing condition that, as explained in *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015), is "illegal or erroneous" as a matter of law, and (2) it must be ripe. *State v. Peters*, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019). And courts never need consider claims of error—even constitutional error—that were invited or waived. *Id.* at 582 (citing *State v. Casimiro*, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019)); *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) ("[E]ven if error was committed, of whatever kind, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error.").

Mr. Mittlestadt challenges three of the conditions reflected in appendix H to his judgment and sentence, including the two conditions that were modified at his request. The State defends the challenged community custody conditions on their merits, but it also argues that we can affirm any alleged error as invited. We find that invited error is a cogent reason for affirming the challenged conditions without further analysis.

The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). To be invited, the error must be the result of an affirmative, knowing, and voluntary act. *State v. Lucero*, 152 Wn. App. 287, 292, 217 P.3d 369 (2009), *rev'd on other grounds*, 168 Wn.2d 785, 230 P.3d 165 (2010); *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014).

Error was not invited by the plea agreement. While Mr. Mittlestadt acknowledged that the State could recommend other crime-related conditions of supervision based on the PSI, he only agreed to *support* the conditions of supervision specifically "enumerated herein." CP at 62. The conditions he challenges are in appendix H, but were not among those enumerated in the plea agreement.

By the time of the sentencing hearing, however, Mr. Mittlestadt had good reason to endorse additional conditions. In attempting to persuade the sentencing court to accept the joint sentencing recommendation despite objections raised in the PSI, Mr. Mittlestadt's lawyer silently acquiesced as the prosecutor told the court, referring to

appendix H, that "in that appendix, I talk to [Mr. Mittlestadt's lawyer], and we are asking for, essentially, a few minor revisions. *And we agree on the revisions and agree on the remainder of the appendix*." RP at 38 (emphasis added).

When it was his turn to speak, Mr. Mittlestadt's attorney endorsed the importance of supervision, stating (as we recounted earlier):

> I've reviewed appendix H with Mr. Mittlestadt. I've addressed the issues that I saw from a legal perspective with that appendix. I think what [the prosecutor] and I have crafted now is legally sufficient, and it is also sufficient in the sense that it's going to provide proper supervision of Mr. Mittlestadt.

RP at 49. He argued that the sentence proposed "is a significant sentence . . . [a]nd he's going to have significant supervision." *Id.*

It was an affirmative, knowing, voluntary and tactically sound decision for Mr. Mittlestadt's lawyer to present his best case for the joint recommendation by emphasizing Mr. Mittlestadt's agreement to "significant supervision." *If* any of the challenged conditions are erroneous, we have no hesitancy in affirming them as invited error.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds, Mr. Mittlestadt challenges condition 22 from appendix H, which provides:

> Obtain mental health treatment assessment, and follow through with all recommendations of the provider, including taking medication as prescribed. Should mental health treatment be currently in progress, remain in treatment and abide by all program rules, regulations, and requirements.

> Sign all necessary releases of information and complete the recommended programming.

Mr. Mittlestadt contends the condition violates his constitutional right to privacy by requiring him to take prescribed medications.

During the sentencing hearing, the lawyer defending Mr. Mittlestadt in the 2019 case emphasized the mental health treatment condition as something that would "further protect the community," and a reason the court should adopt the jointly recommended sentence. RP at 51. For the same reason we reject the challenges to community custody conditions raised in the opening brief, we reject this challenge. If error, it is invited error.

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.

Siddoway, J.P.T.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Pennell, J.

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 of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 57963-4-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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