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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEVIN JOHN KONECNY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 16-1-03777-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does this appeal violate the defendant's negotiated plea agreement in which he secured a significant reduction of charges, an agreement that the State would not seek a longer sentence, and the ability to argue for a standard range sentence?

2. Did the defendant invite any error when, fully aware of his eight-year-old multiple sclerosis diagnosis, he negotiated and entered into a plea with the State to secure an agreement to argue within a sentencing range which he now contends constitutes an excessive sentence?

3. Has the defendant failed to prove that the sentencing court abused its discretion in sentencing him to 348 months, a sentence less than half as long as the longest standard range sentence he was facing at one point in this case, where the defendant has violent criminal history, some of which crimes were committed after his diagnosis for multiple sclerosis, where the defendant obtained a firearm and stockpiled ammunition, where the defendant attempted to

incite a shootout with 10 police officers in an occupied apartment building where bystanders were present, and where he fired at those officers through the walls of the building?

4. Should this court strike and modify language in the Judgment and Sentence to conform to the sentencing court's oral ruling waiving all discretionary fees?

B. STATEMENT OF THE CASE.

On September 18, 2016, eight years after he had first been diagnosed with Multiple Sclerosis, Devin Konecny, hereinafter, "the defendant," became embroiled in a gun fight with police officers which endangered the officers, innocent bystanders, his girlfriend, and himself. 116-187, 206-213. There were two active warrants for his arrest at the time, but he did not want to go to jail, so he attempted to incite the officers into killing him. CP 116-187, 189-213. The defendant was eventually taken into custody and charged with multiple counts of Assault in the First Degree, facing a sentence of over 76 to 82.5 years (56 of which would be served as flat time). CP 1-3; RCW 9.94A.533(3)(a), 9.94A.515, 9.94A.510. He attempted to dupe psychological evaluators by pretending he was incompetent to proceed to trial. CP295-310. When it was discovered that he was malingering, he presented a mitigation packet to

the State to induce the State to reduce the seriousness of his crimes, reducing his exposure from a range of 76-82.5 years to a much lesser range of 22-29 years. RP3; CP 84-90, 267-284, 295-310, 315-317. He pleaded guilty to an agreed resolution, waiving his right to an appeal. CP 91-101. He then tried to withdraw his plea, and the court denied the withdrawal. RP 23-29; CP 108-115, 239. He now appeals in contravention of his agreed resolution and his knowing, intelligent, and voluntary waiver, asking this Court to reduce his sentence below even the range he negotiated, relying on the same information he presented to the State and the sentencing court to induce the resolutions he initially sought. Br. of App. at 8. He rests his argument on the assertion that his sentence is a *de facto* life sentence in light of his medical diagnosis, an assertion unsupported by the record before this Court and contrary to federal authority and the law of the State of Washington. Br. of App. at 8.

1. FACTS

The defendant's extensive violent criminal history began long before the incident at issue here. CP 102-106. He committed the following crimes on the following dates prior to 2008: Threat to Bomb (July 25, 2000); Assault in the Fourth Degree (December 5, 2000), Rape of a Child Third Degree (May 11, 2007); Unlawful Possession of a Controlled Substance (May 15, 2007); Failure to Register as a Sex Offender (April

25, 2000); Domestic Violence Disorderly Conduct (March 14, 2007); and various traffic and other misdemeanors. CP 102-106, 116-187.

The defendant was diagnosed with Multiple Sclerosis in 2008. CP 116-187. This diagnosis did not deter him from committing new crimes, however. He committed the following crimes on the following dates beginning in 2008: Robbery in the Second Degree, committed when he punched a woman in the face and stole her money (November 5, 2008), CP 116-187; Failure to Register as a Sex Offender (November 12, 2008); Theft in the First Degree (January 18, 2011), Unlawful Possession of a Firearm in the Second Degree (April 13, 2012); Tampering with a Witness (April 13, 2012); Failure to Register as a Sex Offender (May 21, 2015); Escape from Custody (May 21, 2015); and Escape from Custody (May 21, 2015). CP 102-106, 116-187.

The defendant has abused controlled substances for most of his life. CP 116-187, 189-205. The controlled substance he has used most frequently is methamphetamine. CP 116-187. In the years leading up to September 18, 2016, he had infrequently inhaled Dust-Off and used synthetic marijuana (called, "Spice") to get high. CP 116-187. In the months leading up to that date, he was also using Sherm, a cigarette dipped in embalming fluid. CP 116-187. He was using Sherm approximately every other day to every day during that time. CP 116-187.

On September 18, 2016, two warrants were active for the defendant's arrest, and he was on the list of Washington's Most Wanted. CP 116-187, 206-213. That day, he was mourning the death of a friend and drank alcohol. CP 116-187. He also obtained a .22 caliber firearm and ample ammunition and went to this grandfather's apartment in Pierce County, Washington. CP 91-101, 206-213. Law enforcement learned he was at the apartment and armed, and Officers Bell, Russell, Henterly, Vahle, Osness, Suver, Gocha, Alfano, Criss, and Sivenko responded to the scene. CP 91-101, 206-213. During this altercation, the defendant's girlfriend was in the apartment, and civilians had gathered in the area just outside the police perimeter. CP 206-213.

When officers knocked at the door of the apartment, the defendant refused to answer the door or exit the apartment. CP 206-213. In an attempt to draw law enforcement attention away from the apartment, the defendant called 911 and made a false report of a robbery in progress at a Texaco elsewhere in Pierce County. CP 116-187, 206-213.

The officers eventually received permission from the defendant's grandfather to enter the apartment and search for the defendant. CP 206-213. As the officers moved toward the bedroom, the defendant fired four to five rounds in a few seconds at them. CP 206-213. The officers were forced to retreat from the apartment. CP 206-213. The defendant reloaded

the firearm and told the officers that he was not going back to prison and they were going to have to shoot him. CP 206-213. The defendant made multiple statements about shooting it out with the police. CP 206-213. Officers deployed gas rounds into the apartment to subdue the defendant. CP 206-213. The defendant then intentionally fired multiple rounds from inside the apartment at the officers. CP 91-101, 206-213. Officers returned the defendant's fire, hitting him in the arm with a bullet. CP 206-213. The defendant nonetheless continued to refuse to exit the apartment, forcing officers to enter and take him into custody. CP 206-213. During the standoff with police, the defendant was using methamphetamine and heroine (an opiate). CP 116-187. Prior to that day, he had never used an opiate. CP 116-187.

2. PROCEDURE

On September 22, 2016, the Pierce County Prosecuting Attorney's Office charged the defendant with four counts of Assault in the First Degree (Counts I-IV) and one count of Unlawful Possession of a Firearm in the First Degree (Count V). CP 1-3. The Information alleged the defendant committed Counts I-IV while armed with a firearm. CP 1-3. If convicted of these crimes, the defendant would have faced a sentence of 480-558 months in custody, of which 240 months would be served in total confinement. RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533.

On February 3, 2017, the State field an Amended Information charging the defendant with 10 counts of Assault in the First Degree (Counts I-X), a count of Unlawful Possession of a Firearm in the First Degree (Count XI), and two counts of Intimidating a Public Servant (Count XII and XIII). CP 7-15. Counts I-X, Count XII, and Count XIII were all alleged to have been committed while armed with a firearm. CP 7-15. All the counts alleged aggravating circumstances which, had they been proved at trial, would have empowered a sentencing court to sentence the defendant outside the standard range. CP 7-15. If convicted of the crimes as alleged in the Amended Information, the defendant would have faced a standard range sentence of 912-990 months in custody, 672 months of which would be served in total confinement. RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533.

In February of 2017, the defendant was placed on suicide watch by the Pierce County Jail. CP 289-294. The defendant later requested to be removed from suicide watch because he wanted to visit family. CP 289-294. He admitted that he knew he was going to prison for a long time and wanted to have the visit. CP 289-294. He acknowledged to jail officials that he was manipulating his family members. CP 289-294.

In September 2017, the court ordered that the defendant undergo a competency evaluation in the Pierce County Jail in accordance with RCW

10.77, and he was evaluated by Dr. Michael Stanfill. CP 25-31, 289-294. This evaluation revealed that the defendant was refusing to treat his multiple sclerosis, failing to take his medication for extended periods of time because of perceived unpleasant side effects. RP 289-294. He had not taken his medication for several days prior to his in-patient psychiatric evaluation. CP 289-294. At that time, his symptoms were limited to bladder dysfunction, blurred vision, and neuropathic pain, but not cognitive deficits. CP 289-294.

During the evaluation, the defendant appeared disingenuous at times and minimized his "transgressions and maladaptive behaviors." CP 289-294. He was evasive about his criminal history. CP 289-294. He claimed not to know he had proceeded *pro se*, that he did not know what "*pro se*" meant, and that he simply signed documents because he was told to sign them. CP 289-294. The evaluator concluded that the defendant was exaggerating his sense of confusion. CP 289-294. The evaluator acknowledged that although people with multiple sclerosis can develop cognitive issues as the disease progresses, the defendant was reporting cognitive symptoms that were inconsistent with a diagnosis of multiple sclerosis. CP 289-294.

A second psychological evaluation report was written on January 2018. CP 295-310. Defendant's attorney was present during this

evaluation. CP 295-310. After this evaluation was concluded, the evaluator determined that the defendant had been malingering, making a grossly exaggerated attempt to feign "symptoms of a mental illness[,] including auditory and visual hallucinations and confusion." CP 295-310. During his time at Western State Hospital, the defendant was observed trying to manipulate staff members into breaking the rules of the facility. CP 295-310. Also, during his stay, he told a staff member he was "worried about going back to jail because [he was] not getting out this time." CP 295-310. He went on to say, "I'm just not going to do anything[.] I'm not playing chess, puzzles, I'm going to give them a run for [their] money." CP 295-310 (bracketed word "[their]" in original). At one point, the defendant observed another patient yelling about men being in the ceiling. CP 295-310. Referencing the behavior of the other patient, the defendant said, "Hah, I should try that." CP 295-310.

He also demonstrated the ability to walk to good motor control during this evaluation period. He could stand up from his wheelchair and walk short distances. CP 295-310. Both his gross and his fine motor skills appeared intact. CP 295-310. At one point in December 2017, he walked to the bathroom, returned to his wheelchair, unlocked the wheels, and walked the wheelchair into an interview room. CP 295-310. The court found the defendant competent to stand trial in January 2018. CP 311-312.

In accordance with pretrial negotiations with the defense, the State filed a Second Amended Information on April 6, 2018, alleging 10 counts of Assault in the Second Degree. RP 3; CP84-90. The first five counts of the Second Amended Information were firearm enhanced. RP 3; CP 84-90. The amendment reduced the standard range sentence to 243-264 months (after firearm enhancements were included). CP 84-90; 267-284, 315-317. The parties agreed to a resolution in which the defendant would argue for 264 months in custody (which included the firearm sentencing enhancements), and the State would argue for an exceptional sentence of 348 months in custody, running one count of Assault in the Second Degree without a Sentencing Enhancement consecutive to the remaining nine counts. RP 11; CP 91-101. The basis of the State's exceptional sentence was that "the defendant [had] committed multiple current offenses and the defendant's high offender score will result in some of the current offenses going unpunished…." Because the defendant's offender score was 30 points. RP 3; CP 84-90. The State also filed a Prosecutor's Statement Regarding Amended Information contemporaneously with the plea, indicating that the plea contemplated the mitigation packet provided by the defense, and defense confirmed this fact. RP 3; CP 313-314. The State entered the resolution with the understanding that the resolution would result in 15 years "flat time," a requirement that the state argue for

no more than 29 years' in custody based on the defendant's offender score of 30 points, and the ability for the defendant to argue for 22 years' custody. CP 313-314.

The defendant knowingly waived his right to appeal the sentence, even if it fell outside of the expected range to which he agreed. RP 11; CP 91-101, 239. He was not under the influence of any narcotics or medications or otherwise incompetent to plead guilty when he pleaded guilty in this matter. CP 239. The defendant entered the plea knowingly, intelligently, and voluntarily. RP 5, 15-17; CP 91-101. He understood every part of the resolution. RP 12, 15; CP 91-101, 239.

Defendant subsequently moved *pro se* to withdraw his plea, and the court denied the motion. CP 108-115, 239; RP 23, 29. He alleged that multiple physical ailments had interfered with his ability to plead knowingly, intentionally, and voluntarily, including claims he was on medication, he had a learning disability, he had blurred vision, and his attorney did not explain the agreement to him sufficiently. RP 23-24; CP 108-115. In ruling against the defendant, the court noted that it was obvious that the defendant understood his plea. RP 29. The court acknowledged that the defendant may have been regretting his plea, but that there was no legal basis for the withdrawal of the plea. RP 29. The

court specifically found the defendant's declaration in support of his motion was not credible. CP 239.

The defendant was sentenced on June 14, 2018. RP 36; CP 267-284, 315-317. Prior to sentencing, the defendant was provided the opportunity to object to any of the factual statements in the presentence investigation report. RP 37. Defense counsel indicated he only objected to some of the statements made by the victims in the case. RP 37.

The State argued consistently with the plea agreement. RP 38; CP 206-213. The State argued that a standard range sentence of 22 years would not serve the purposes of the Sentencing Reform Act because such a sentence would ignore the fact that the defendant came into this case with an offender score of 14, and a standard range sentence would result in the same sentencing range for shooting at 10 police officers as it would for shooting at a single police officer. RP 40; CP 206-213. As the State noted in its briefing, a standard range sentence in this matter would "essentially tell[] the defendant he could freely victimize nine of the ten victims in this case without any further consequence." CP 206-213.

Defense filed a sentencing memorandum in this case. CP 116-187. Defendant's brief read, "A sentence of 264 months is proportionate to the seriousness of the offense and is a fair sentence that still protects the public." CP 116-187. As evidence for his position that a 264-month

sentence was proportionate in light of the purposes of the SRA, defendant pointed to the same evidence on which he relies on appeal. CP 116-187. He noted his incredibly difficult upbringing, his father's murder, and the fact he was abused by other caregivers in his life. CP 116-187. He noted that he had been exposed to domestic violence at a young age, that he began using drugs in the fifth or sixth grade, and that he was physically and sexually abused as a child. CP 116-187. The memorandum pointed to the defendant's diagnoses of PTSD, Borderline Personality Disorder, Stimulant Use Disorder, and Multiple Sclerosis. CP 116-187. Defendant argued in his briefing that he had an impaired ability to fully appreciate the wrongfulness of his actions. CP 116-187. It focused, as defendant focuses on appeal, on the claim that the defendant had no intention to kill anyone and the victims were not physically injured by the defendant. CP 116-187. It attempted to paint the defendant as the victim, noting that he was shot in the arm by the police. CP 116-187. The memo claimed that the defendant had not been able to develop as a mature man and that he remained "stunted in perpetual childhood." CP 116-187.

A mitigation packet written by defense investigator Nancy Austring was attached to Defendant's Sentencing Memorandum. CP 116-187. It reiterated points made in the defendant's sentencing memorandum. CP 116-187. This mitigation packet contained a detailed history of the

lives of the defendant and his parents, complete with citations to studies regarding the effects of the defendant's adverse life experiences on his development. CP 116-187. The mitigation packet also took umbrage with conclusions reached in a previous PSI undergone by the defendant in which the investigator noted that "Early onset of criminal behavior is a predictive of future criminal behavior." CP 116-187. Although the mitigation packet claimed there was a "possibility that MS contributed to [the defendant's] perceptions and resultant actions" on the day he shot at the officers in this case, it failed to cite any medical records or expert opinions to support such a conclusion. CP 116-187.

The sentencing memorandum noted that the defendant demonstrated difficulty walking and needed help maintaining balance. CP 116-187. During psychological testing, the defendant tended to overinflate his symptoms and level of impairment. CP 116-187. He demonstrated a strong interpersonal drive to have others take pity on him. CP 116-187. Dr. Michael Stanfill noted that a combination of factors in the defendant's life placed him at very high risk for suicide, and due to his guardedness and negative views of others, the defendant would likely execute a suicide plan which involved harming other people. CP 116-187.

A Presentence Investigation Report (PSI) was prepared by Community Corrections Officer Joe Soffia on May 21, 2018. CP 189-

205.[1] At the time of the PSI, the defendant felt that the sentence he was facing was excessive, and he thought 15 years would be fairer. CP 189-205. The evaluator who wrote the PSI was willing to agree with the defense argument that an appropriate sentence was 22 years due to the defendant's medical issues, impairment by controlled substances, and apparent mental health problems. CP 189-205. During the interview, however, the evaluator was disturbed by the fact that the defendant was in denial about having shot at police officers during the incident because it was clear to the evaluator that the defendant was targeting the victims as the retreated from the apartment. CP 189-205. The evaluator noted that it appeared the defendant was using his medical condition, substance abuse issue, and mental health issues as an excuse to evade responsibility. CP 189-205. The evaluator aptly noted that any bullet the defendant fired through the walls of the apartment could have continued on and injured a bystander. CP 189-205. The evaluator thus concluded that the State's 348-month recommendation was more appropriate than the defendant's recommendation. CP 189-205.

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[1] The PSI written May 21, 2018, appears to have been filed twice: once on June 7, 2018, and once on June 14, 2018. Both copies of the identical PSI were designated for review. The copy filed June 7, 2018, has been designated CP 189-205. The copy filed June 14, 2018, has been designated CP 246-264. Because the documents are identical, the State will cite only to one copy for the sake of clarity. The State has chosen to cite CP 189-205.

In accordance with his plea agreement, the defendant requested a sentence of 264 months, or 22 years. RP 42. Defense argued that this sentence was justified by a number of factors, including the defendant's health condition. RP 42-43. Defense claimed that his course was set early in life by adults who neglected and abused him, leading to drug use at a young age. RP 43. Defense noted that the defendant's criminal history began at the age of 12 and that systems and support networks that should have protected him routinely failed him. RP 43. Defense counsel noted that he suffered from PTSD, borderline personality disorder, and stimulant use disorder. RP 44. He noted the defendant's lack of maturity. RP 44.

Defense counsel then turned to a discussion of the defendant's diagnosis of multiple sclerosis. RP 44. He noted that they did not know the trajectory of the progress of the defendant's condition because it affects everyone differently. RP 44. He noted that the defendant could walk two years prior to sentencing, and that at the time of sentencing he used a cane to walk. RP 44. He claimed that the defendant's mobility had decreased significantly, and he was doubtful the defendant would be able to walk after either a 22- or 29-year sentence. RP 44-45.

Defense counsel then read a statement from the defendant, which the defendant said he could not read due to his medical condition. RP 45. In the defendant's statement, he said he accepted full responsibility for his

actions. RP 46. He attributed his poor decisions to his drug addiction and family struggled. RP 46. He acknowledged that although no one was physically harmed by his crimes, his actions did cause "pain and hurt." RP 46. He asked the court "to consider [his] poor deteriorating health and [his] truly remorseful heart while [the court] impose[d] sentence." RP 46. The defendant then reiterated his apology to the officers and their families, saying, "There's nothing that can be said to make any kind of excuse for what happened. My drug use is not an excuse for anything that happened." RP 47.

Before imposing sentence, the court agreed with much of what defense counsel stated. RP 47. The court noted that the defendant had had many disadvantages, such as the fact that he grew up in an environment with drugs, abuse, and neglect. RP 47. The court agreed that the systems which should have protected him did not. RP 47. It then considered how these factors affected the appropriateness of the recommendations. RP 47. The court focused on the serious nature of the offenses the defendant had committed, noting that this case, unlike cases involving drug charges or identity theft charges, "put people's lives in danger." RP 47. The seriousness of the defendant's crimes put the case "on a different plane" for the court. RP 48. The court acknowledged that, in light of the defendant's medical condition, a sentence of 22 years or more "may in

fact end up being the equivalent of a life sentence." RP 48 (emphasis added). The court stated it did not take that fact lightly. RP 48. Having considered and weighed these concerns, the court adopted the State's recommendation, which it felt was "the only way to ensure safety to the community." RP 48-49; CP 267-284, 315-317. The court issued findings of fact and conclusions of law regarding the exceptional sentence it imposed. CP 234-236.

Although the defendant submitted much information alleging he had been diagnosed with multiple sclerosis and that he had decreased mobility and vision, he did not provide a single medical document establishing his diagnosis or explaining his prognosis. The record is silent on the defendant's likely life expectancy.

C. ARGUMENT.

1. DEFENDANT RECEIVED THE BENEFIT OF THE BARGAIN HE NEGOTIATED; HIS ARGUMENT FOR A LESSER SENTENCE VIOLATES THAT BARGAIN. THE STATE MOVES TO STRIKE DEFENDANT'S ARGUMENT.

A plea agreement is a contractual agreement between the defendant and the State. RCW 9.94A.421; ***State v. Jerde***, 93 Wn. App. 774, 780, 970 P.2d 781 (1999). A party is obligated to act in good faith once the plea has been accepted by the court. ***Jerde***, 93 Wn. App. 774.

Where a party violates a plea agreement, the non-offending party may seek specific performance of the plea agreement. ***State v. Barber***, 170 Wn.2d 854, 858, 248 P.3d 494 (2011).

The defendant's actions on and before September 18, 2016, reflected a gross disregard for the safety of the community and exposed him to a justifiably high standard range of incarceration. At the outset of this case, the State opted to charge him only for half of the crimes he had actually committed on September 18, 2016, filing an Information charging five counts. CP 1-3. Even charged with only half the crimes he had actually committed, the defendant faced 480-558 months of incarceration – 240 months of which would be served in total confinement – if he were convicted of the crimes charged in that original information. CP 1-3; RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533. He was thus exposed to a potential standard range sentence of 558 months. This high range was the direct result of his significant history of violent adult offenses – many committed after he had been diagnosed with Multiple Sclerosis – and his decision to endanger 10 officers, himself, his girlfriend, and bystanders. In February 2017, the State filed an Amended Information which more accurately listed the crimes the defendant had committed. CP 7-15. Had the defendant been convicted of the crimes listed in this Amended Information, he would face a standard range sentence of 912-990 months

in custody, 672 of which would be served in total confinement. RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533. His standard range exposure under this Amended Information was thus 990 months.

The defendant tried several tactics to avoid the standard range sentence to which his actions had led him. He claimed that he was not competent to proceed to trial, and the court ordered a competency evaluation under RCW 10.77. CP 25-31. In the months that followed, he was observed attempting to manipulate and flirt with staff at Western State Hospital while also trying to pretend that he was incompetent to stand trial. CP 289-310. He appeared disingenuous and attempted to minimize his transgressions and maladaptive behaviors. CP 289-294. He observed other patients' actions and resolved to imitate them to further exaggerate his symptoms, saying of one patient's outburst, "Hah, I should try that." CP 295-310. He was ultimately diagnosed with malingering, or making a grossly exaggerated attempt to feign "symptoms of a mental illness[,] including auditory and visual hallucinations and confusion." CP 295-310.

When his attempts to mislead and manipulate mental health staff failed, the defendant turned to negotiation and was able to secure a resolution which drastically reduced his in-custody exposure. RP 91-101. His investigator Ms. Austring produced a mitigation packet designed to cast him in the best possible light, focusing on his various diagnoses,

discussing his difficult childhood, and explaining his actions on September 18, 2016. CP 116-187. This packet, among other documents, was presented to the State to secure the resolution below. RP 3-4. Notably, the defendant presents nothing to this Court which was not already presented to the State and the sentencing court to secure the drastic reduction he attained below.

Having provided every document in his arsenal to the State, the defendant succeeded in convincing the State to file a Second Amended Information which conveyed substantial benefits to the defendant. RP 3-4; CP 84-90. The crimes charged in this Second Amended Information carried a standard range of 63-84 months plus 180 months' total confinement for firearm sentencing enhancements applied to only half of the charges. CP 84-90. The bargain the defendant attained confined the State's argument to "no more than 348 months – running one count of Assault 2 consecutive of 84 months," a sentencing range lower than that afforded by the standard sentencing ranges of either of the previously filed Informations. RP 91-101. This bargain constrained the State to arguing for a sentence 62.37% of the high end of the standard range sentence reflected in the Original Information and 35.15% of the high end of the standard range sentence reflected in the Amended Information. *See* Chart, *below*.

The defendant received the benefits of the bargain he struck with the State, understanding that the sentencing court was under no obligation to follow any recommendation. CP 91-101. Having used his mitigation packet to secure a bargain and a reduction of sentence, the defendant now presented his mitigation again: this time in an attempt to persuade the sentencing court to sentence him to 264 months in custody. CP 116-187. After reviewing the mitigation packet, the court exercised its discretion and ordered the defendant to serve 348 months in custody. CP 267-284. This sentence perfectly reflected one of the possible outcomes of sentencing contained in the Statement of Defendant on Plea of Guilty: the State's recommendation. CP 91-101.

Defendant now tries to rest on his mitigation packet a third time, violating his bargain by asking for an even more favorable sentence: an

exceptionally low sentence which was never part of the bargain he initially secured. Br. of App. at 8. This argument is a clear breach of the bargain defendant accepted to induce the Second Amended Information and restrain the State's sentencing arguments at the Superior Court level. CP 91-101. The remedy for such a breach, especially where the defendant has previously and unsuccessfully moved to withdraw his plea, is specific performance. *See* ***Barber***, 170 Wn.2d at 858. The State asks for that remedy and, accordingly, affirmation of the defendant's sentence.

2. EVEN IF DEFENDANT COULD PROVE ERROR IN THIS CASE, HE INVITED THAT ERROR BY INDUCING THIS SENTENCING RESULT THROUGH PLEA NEGOTIATIONS AND NOW ARGUING THAT THE BARGAIN FOR WHICH HE NEGOTIATED IS EXCESSIVE.

In addition to violating the bargain into which he entered knowingly, intelligently, and voluntarily, defendant's arguments are also premised on an alleged error which the defendant invited through his actions below. A party cannot set up an error at the trial level and then complain of that error on appeal. ***State v. Henderson***, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). Where a defendant agrees to the imposition of a particular sentence in exchange for reduced charges and a presumably shorter sentence, the invited error doctrine bars appeal. ***In re Breedlove***, 138 Wn.2d 298, 313, 979 P.2d 417 (1999). It does not apply where the

sentencing court exceeds its statutory authority in imposing sentence, however, because "a defendant cannot empower a sentencing court to exceed its statutory authorization." ***State v. Phelps***, 113 Wn. App. 347, 353, 57 P.3d 624 (2002) (*quoting* ***State v. Eilts***, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980), internal quotations and citations omitted). The doctrine does apply where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. ***In re Goodwin***, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Courts generally have sentencing discretion within the established parameters of the Sentencing Reform Act (SRA). ***State v. Hunter***, 102 Wn. App. 630, 636, 9 P.3d 872 (2000).

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). One such mitigating factor is the instance in which "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA], as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). The purpose of the SRA is

> to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
>
> (4) Protect the public;
>
> (5) Offer the offender an opportunity to improve himself or herself;
>
> (6) Make frugal use of the state's and local governments' resources; and
>
> (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010

Here, the defendant invited any error which he now assigns by attempting to collaterally attack a resolution he induced through his negotiations with the State. Through negotiations, the defendant secured the ability to argue for a standard range sentence which would not have otherwise been within his standard range. CP 1-3, 7-15, 84-90; RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533. He secured the ability to argue for a sentence, rather than being bound to argue for the same sentence as the State. CP 1-3, 7-15, 84-90; RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533. He bound the State to argue for a sentence

that was 210 months less than he would have faced under the Original sentence and 642 months less than he was facing under the Amended Information. CP 91-101. He also secured a reduction in the seriousness of the offenses and the amount of time he would serve in total confinement by 60 months compared to the Original Information and by 492 months compared to the Amended Information. CP1-3, 7-15, 84-90; RCW 9.94A.510, RCW 9.94A.515, RCW 9.94A.533.

Having induced a scenario in which the sentencing hearing would not contain argument for or against an exceptionally low sentence, the defendant now complains that the sentencing court did not consider the mitigating factors that he raises for the first time on appeal: that an exceptionally low sentence was compelled by the circumstances of his upbringing and that the operation of the multiple offense policy in this context is contrary to the general purposes of the SRA. Br. of App. at 8. The defendant's negotiation below precluded the presentation of these arguments. Defendant should not now be heard to argue that the sentencing court should have considered them. Such error is invited and should be rejected by this Court.

Defendant's assignments of error moreover apply to a matter within the discretion of the trial court: sentencing. Defendant concedes that the sentencing court had authority to sentence the defendant as it did.

RP 42; Br. of Appl at 5 and at FN 3. Defendant is not arguing that the sentencing court exceeded its statutory authority in sentencing the defendant, so the exception to the invited error doctrine espoused in ***Phelps***, 113 Wn. App. at 353 does not apply here. Defendant's many complaints about the topics considered by the sentencing court were invited by the defendant's actions through negotiating his plea, and this Court should affirm.

3. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED AN EXCEPTIONAL SENTENCE CONSISTENT WITH ITS SENTENCING AUTHORITY WHERE THE DEFENDANT HAD A VIOLENT CRIMINAL HISTORY, STOCKPILED AMMUNITION, ARMED HIMSELF WITH A FIREARM, ATTEMPTED TO INCITE A SHOOT OUT WITH THE POLICE, AND FIRED NUMEROUS ROUNDS THROUGH THE WALLS OF AN APARTMENT BUILDING, ENDANGERING POLICE, HIS GIRLFRIEND, BYSTANDERS, AND HIMSELF.

The defendant does not challenge the validity of his plea on appeal. Br. of App. at 1. Sentencing courts have discretion to sentence a defendant to a sentence within the established parameters of the SRA. ***Hunter***, 102 Wn. App. at 636. Sentencing ranges are determined by utilizing the table found at RCW 9.94A.510 to determine the standard range sentence in light of the defendant's offender score. RCW 9.94A.505, RCW 9.94A.510. With an offender score over 9 points, the defendant's standard range is

calculated as if he had only 9 points. RCW 9.94A.510. A defendant with an offender score of 9 who commits the crime of Assault in the Second degree, a level IV offense under RCW 9.94A.515, has a standard range sentence of 63-84 months. RCW 9.94A.510. Assault in the Second Degree is a Class B felony. RCW 9A.36.011(2)(a). Where a person commits a Class B felony while armed with a firearm, an additional three years is added to the standard range sentence, which must be served consecutive to all other sentences and enhancements in total confinement. RCW 9.94A.533(3), (3)(b), and (3)(e).

Courts have discretion to sentence a defendant outside the standard range where the court finds substantial and compelling reasons to believe that the defendant committed the crime attended by an aggravating circumstance, such as an instance in which "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). This discretion is "all but unbridled" and includes the ability to run counts consecutively. ***State v. France***, 176 Wn. App. 463, 470, 308 P.3d 812 (2013). To reverse a sentence outside the standard range, a reviewing court must find "(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range

for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585.

A sentencing court's decision to impose an exceptional sentence should not be reversed as "clearly excessive" absent an abuse of discretion. ***State v. Ritchie***, 126 Wn.2d 388, 392-93, 894 P.2d 1308 (1995); ***State v. Smith***, 124 Wn. App. 417, 435, 102 P.3d 158 (2004). To prove that an exceptional sentence constitutes an abuse of discretion, the defendant must demonstrate that no other judge, when faced with these facts, would impose the sentence imposed below. ***Smith***, 124 Wn. App. at 437-438 ("Finally, we must decide whether the court abused its discretion in sentencing the defendant too leniently. We cannot say that no other judge, when faced with these facts, would impose this sentence. Therefore, we hold the trial court did not abuse its discretion"). Where the sentencing court does not base its sentence on improper reasons, a reviewing court will only find a sentence excessive if the length "shocks the conscience." ***State v. Kolesnik***, 146 Wn. App. 790, 805, 192 P.3d 937 (2008).

a. <u>Defendant fails to prove that the sentencing court's exceptional sentence was not supported by the record before the sentencing judge, that its reasons justified an exceptional sentence, or that the sentence was clearly excessive.</u>

The defendant concedes that the sentencing court's exceptional sentence was based on reasons supported by the record before it and that

those reasons were legally adequate reasons justifying an exceptional sentence here. Br. of App. at FN 3. Defendant rests his appeal on the claim that the sentencing court's exceptional sentence was so clearly excessive as to constitute an abuse of discretion. Defendant fails, however, to carry his burden to show a clearly excessive sentence here.

Defendant has failed to prove that that sentence imposed here was clearly excessive such that no judge would impose it. Separate and apart from the incident facts, the defendant has an extensive violent criminal history which demonstrates extreme disregard for the safety of others, for authority figures, for legal principles, and for the justice system as a whole; this criminal history includes convictions for robbery, assault, child rape, domestic violence, witness tampering, and escape from custody. CP 102-106, 116-187. He committed some of these violent crimes prior to his diagnosis of multiple sclerosis in 2008, but rather than committing fewer or less dangerous crimes since his diagnosis, the defendant's criminality and disregard for the safety of others has escalated since he was diagnosed. CP 102-106, 116-187.

In the same year he was diagnosed, he committed Robbery in the Second Degree by punching a woman in the face and stealing her money and failed to register as a sex offender for the second time. CP 102-106, 116-187. After that year, he committed first degree theft (2011), possessed

a firearm unlawfully and tampered with a witness (2012), failed to register for a third time (2015), and escaped from custody on two occasions (2015). CP 102-106, 116-187. And, of course, over 8 years after he was diagnosed with multiple sclerosis, he was on active warrant status and the list of Washington's Most Wanted when he shot at officers multiple times through the walls of an apartment in Pierce County, endangering innocent bystanders, 10 law enforcement officers, his girlfriend, and himself. CP 91-101, 116-187, 206-213. He spent the shootout doing drugs with his girlfriend, calling 911 and making a false report in an attempt to create a distraction and evade accountability, and attempting to violently coerce officers into shooting him because he did not want to face the consequences of his actions. CP 91-101, 116-187. The fact that he was living with a multiple sclerosis diagnosis did nothing to deter his actions from 2008 until September 2016. His diagnosis has never prevented him from physically possessing, loading, firing, or aiming a firearm, and nothing in the record below suggests that his diagnosis has such a physically deterrent effect or that it will in the future. His diagnosis has also not imparted upon him any additional perspective or reflection which might lead him to conclude that he should forego violent crimes. His diagnosis has not made him any less of a threat to the community; he appears to have become more dangerous, not less, since 2008.

After his arrest, the defendant continued to try to manipulate and evade responsibility for his actions by pretending to be incompetent: feigning symptoms of mental illness, attempting to encourage medical staff to violate the rules of Western State Hospital, and observing other patients in an attempt to mimic their illnesses and bolster his pretense of incompetence. CP 295-310. At the time – and prior to his plea in this case – he noted that he was facing a significant amount of jail time in this case and that he was "not getting out this time," so he was going to "give them a run for their money." CP 295-310 (internal brackets omitted).

Faced with these facts, defendant cannot claim that no reasonable judge would have sentenced him as did the sentencing court here. A sentencing judge could reasonably be concerned about the threat the defendant posed to community safety, the fact that his multiple sclerosis did nothing to reduce that threat, the fact that nothing in the record indicates that his multiple sclerosis will ever prevent him from firing a gun, and the defendant's willingness to do anything to avoid responsibility, including shooting at law enforcement officers, tying up public safety resources, endangering innocent bystanders, tampering with witnesses, and misleading mental health workers in order to deceive the court and secure a dismissal. Defendant simply cannot prove that no other judge, when faced with these facts, would impose this sentence. *See*

Smith, 124 Wn. App. at 437-438. The sentencing court did not abuse its discretion, and the sentence was not excessive.

In ***State v. Mann***, 157 Wn. App. 428, 237 P.3d 966 (2010), a defendant with less criminal history and fewer victims than the defendant received a comparable sentence which was upheld. Mr. Mann was stopped by a police officer and fled. *Id.* at 433-34. He ran from the vehicle with a handgun because he had an active warrant and did not want to go to jail. *Id.* at 434. During the pursuit, he aimed the gun at an officer, who fired on him. *Id.* Later in the pursuit, the defendant pretended to surrender, then fired on the officer, who returned fire. *Id.* at 434-35. The defendant then surrendered. *Id.* at 435. The bullets from the defendant's gun did not hit anyone. *Id.* The defendant was found guilty of Assault in the First Degree while armed with a deadly weapon, unlawful possession of a firearm in the second degree, unlawful possession of a controlled substance, and a dangerous weapon violation. *Id.* The jury found an aggravating circumstance. *Id.* at 435. The defendant had an offender score of 7 and was sentenced to an exceptional sentence of 344 months. *Id.* at 435-36. The Court of Appeals found that this sentence was not clearly excessive because, given the circumstances, the defendant failed to prove that the court abused its discretion in sentencing the defendant to the exceptional sentence.

Here, the defendant fails to prove his sentence was excessive because his history and the facts of his crime were more egregious than those committed by Mr. Mann, yet the defendant received a sentence that was only 4 months longer than the one Mr. Mann received. Whereas there was no suggestion that Mr. Mann armed himself in anticipation of a confrontation with police, the defendant here stockpiled ammunition and armed himself with a handgun after authorities issued two warrants for his arrest. CP 91-101, 206-213. Mr. Mann ran from the police because he did not want to go to jail; the defendant lay in wait for the police, and when officers entered the apartment with the owner's permission, fired on them unprovoked in an attempt to get them to shoot him because he did not want to go to jail. CP 91-101, 116-187, 206-213. Whereas Mr. Mann pretended to surrender and then fired at a single police officer, the defendant made a false report to 911 to try to reroute public safety resources and fired multiple shots at 10 officers through the walls of the apartment, endangering the officers, innocent bystanders, his girlfriend, and himself. CP 116-187, 206-213. Mr. Mann committed 4 crimes, one an Assault in the First Degree; the defendant was at one point charged with 10 counts of Assault in the First Degree and three additional counts, which he later negotiated downward. CP 7-15, 91-101. Mr. Mann entered the case with an offender score of 7; the defendant entered his with an

offender score of 14. CP 102-106. In spite of all the ways in which the defendant's crimes were committed in a more violent and dangerous fashion than Mr. Mann's, the defendant received a sentence only 4 months longer than the one received by Mr. Mann. CP 267-284. Under the facts before this Court, the defendant's sentence cannot be said to be so excessive as to represent an abuse of discretion by the sentencing court.

Defendant's use of ***State v. Kolesnik***, 146 Wn. App. 790, 192 P.3d 937 (2008) is unpersuasive because the facts of the case are wildly different from those presented here. There, the defendant was initially charged with Attempted Murder Second Degree and Assault in the First Degree. *Id.* at 797. After a jury trial, the defendant was convicted of a single count of assault in the first degree with an aggravating circumstance. *Id.* at 796, 799. The defendant got into an altercation with one officer during a random encounter and hit the officer with a screwdriver several times. *Id.* at 797. The defendant argued diminished capacity at trial. *Id.* at 799. Mr. Kolesnik was sentenced to an exceptional sentence of 240 months, approximately twice the standard range. *Id.* at 799, 806. Mr. Kolesnik argued that the sentence was clearly excessive; the Court of Appeals disagreed and affirmed. *Id.* at 806.

Here, the defendant was at one point charged with 10 counts of Assault in the First Degree while armed with a firearm, a count of

Unlawful Possession of a Firearm in the First Degree, and two counts of Intimidating a Public Servant, all counts enhanced with aggravating circumstances. CP 7-15. Rather than proceeding to trial, the defendant negotiated a plea, induced the state to drastically reduce the charges, limit itself to a less stringent sentencing argument, and inviting any error he now claims on appeal. CP 84-90, 91-101. The defendant armed himself, stockpiled ammunition, attempted to incite a shootout in an apartment building, and fired at police officers. CP 91-101, 206-213. He utilized a weapon which, unlike a screwdriver, can injure any number of multiple victims outside of the defendant's reach and sight, and he fired that weapon indiscriminately through walls, endangering the 10 named victims, himself, his girlfriend, and any bystander who was outside the building. CP 91-101, 206-213. These differences between this case and ***Kolesnik*** are striking, and certainly make comparison to ***Kolesnik*** uninstructive. At most, ***Kolesnik*** stands for the proposition that a court may properly impose a post-trial sentence twice as long as the standard range imposed to punish the short-range attack of a single officer in a random encounter. It certainly does not invalidate a sentence, like the one before this Court, in which a defendant negotiates for a sentence which is *less* than the total exposure the defendant was facing, and which contemplates the fact that the defendant endangered at least 10, and likely

more, individuals by indiscriminately firing a long-range weapon through the walls of an apartment building.

State v. Ferrer, 195 Wn. App. 1044 (2016 UNPUBLISHED) is similarly uninstructive as it involved Domestic Violence Assault in the Second Degree and Domestic Violence Felony Harassment. *Id.* at 1-2. This is another case in which the defendant opted for trial rather than negotiating a reduction in charges with the State. *Id.* at 2. The defendant inflicted a short-range attack on his wife: punching her in the head and face and threatening to kill her. *Id.* at 1. The court the sentence was not clearly excessive where the defendant parked away from the scene to avoid detection, committed the crime within the sight or sound of his minor children, and blamed the victim to minimize his role. *Id.* at 5. Under such facts, a sentence of 50 months did not shock the conscience. *Id.* Again, the facts here are substantially different from the long range and dangerous attacks the defendant perpetrated in the present matter, so different as to render ***Ferrer*** uninstructive. At most this case is an example of a case in which a sentencing court ordered an exceptional sentence and was within its discretion to do so. Beyond that fact, it does nothing to illuminate the drastically different matter before this Court here.

b. Defendant's misplaced and unproved claim of a *de facto* life sentenced does not save his failure to prove an excessive sentence here; this Court should decline defendant's invitation to defy Washington case law and misapply juvenile sentencing jurisprudence for the benefit of 30-year-old violent offender with extensive criminal history who endangered numerous people by attempting to instigate a shootout with police in an occupied apartment building around which bystanders were situated.

Defendant seeks to prove his excessiveness claim by inaccurately claiming that his sentence is a *de facto* life sentence; a claim that fails for three reasons: (1) the defendant's argument misappropriates and defies the jurisprudence of juvenile sentencing for the benefit of an adult with a substantial history of violent crime who endangered multiple people by attempting to incite a shootout with police in an apartment building, (2) the record doesn't support his claim that he will spend the rest of his life in prison if his sentence is affirmed, and (3) his claim ignores the realities of medical furlough law, a remedy which he has not pursued and which is nonetheless available to him.

The concept of a *de facto* life sentences has been confined to the analysis of the sentences of *juvenile* offenders; defendant's attempt to utilize such concepts to benefit a 30-year-old violent offender misappropriates the concepts of juvenile justice enshrined in the Eighth Amendment of the Federal Constitution and violates the law of

Washington State. ***State v. Ronquillo***, 190 Wn. App. 765, 361 P.3d 779 (2015); ***State v. Witherspoon***, 180 Wn.2d 875, 329 P.3d 888 (2014). The U.S. Supreme Court has prohibited sentencing juvenile offenders to life without parole because the Eighth Amendment, pursuant to ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), "forbids a sentencing scheme that mandates life in prison without possibility of parole for *juvenile* offenders." ***Miller***, 567 U.S. at 479-480 (emphasis added). In ***Ronquillo***, the Washington Supreme Court found that such prohibitions apply to juveniles who are sentenced to *de facto* life sentences as well as those sentenced to explicit life sentences. But ***Ronquillo*** does not stand for the proposition that such restrictions apply to sentencing adult offenders. ***Miller*** and its progeny take pains to limit their analyses to the unique circumstances facing juvenile offenders *qua* juvenile offenders. *See e.g.*, ***Montgomery v. Louisiana***, 136 S. Ct. 718, 724, 193 L. Ed. 599 (2016) (noting that Miller's "central intuition" was that "**children** who commit even heinous crimes are capable of change." (emphasis added)). The defendant seeks to undo this central intuition, proposing an extraordinarily expansive reading of ***Miller*** which contorts it beyond all recognition: a reading which posits that a *de facto* life sentence is unconstitutional for any offender. The Washington Supreme Court has specifically prohibited this application of ***Miller*** and related cases, holding

Miller "unmistakably rest[s] on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release…." ***Miller*** does "not support [the] argument that all sentencing systems that mandate life in prison without the possibility of release for second degree robbery[2] are *per se* invalid under the Eighth Amendment." ***Witherspoon***, 180 Wn.2d at 890-91. Defendant's attempt to apply the rationale of ***Miller*** and its progeny to his case has already been rejected by the Washington State Supreme Court; this Court declined defendant's invitation to violate that precedent.[3]

Even if the defendant could find authority to support the claim that sentencing an adult to a *de facto* life sentence was *per se* excessive, the record before this court does not support the conclusion that the defendant is facing a *de facto* life sentence. To establish such a claim, the defendant

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[2] Robbery in the second degree and Assault in the Second Degree are both Level IV Offenses under the SRA. RCW 9.94A.515.

[3] Defendant further suggests that this Court should consider the quality of the sentences he received for his juvenile convictions and, concluding those adjudications were inadequate, sentence him at the age of 30 as if he were a juvenile offender. *See* Br. of App. at 12-13. The appropriateness of defendant's juvenile convictions is not properly before this court, there is no record from which this Court could possibly review defendant's bald assertion that the defendant's access to rehabilitative programs was "glaringly absent," and attempts to collaterally attack those prior convictions and the resulting sentences are time-barred under RCW 10.73.090(1). The holdings in ***Miller*** and ***Ronquillo*** do not contemplate this kind of analysis, and the court should decline Defendant's invitation to so expand those decisions here. A 30-year-old defendant cannot point to an unsubstantiated claim of past unfair treatment as a juvenile offender and thereby induce a court to abandon the legislatively enacted SRA, fundamentally altering the structure under which the defendant is sentenced for his adult violent crimes.

would have to establish that his medical condition will make it impossible to survive a sentence which will last less than 348 months, which is approximately 29 years. Defendant's own briefing reveals that he simply cannot prove such a claim, noting that "the trajectory of his disease was unknown" at the time of sentencing. Br. of App. at 16.

He claims that he is unlikely to be able to walk upon his release, a claim that does not establish terminal illness and seems to inaccurately equate disability with death. Br. of App. at 16. Moreover, this claim relies on RP 44-45, which is not evidence submitted to the sentencing court but rather the argument of his sentencing attorney, who said, "And we don't know how long he has, and would I submit that it's unlikely he's going to be able to walk out of prison, whether that's 22 years or 29 years." RP 44-45.

Defendant points to the fact that the sentencing court said, "I certainly also have very real concerns that whatever the sentence is, even if I were to do the defendant's request, that this may in fact end up being the equivalent a life sentence." Br. of App at 16, RP 48. Such as statement, however, is not a finding that the defendant's sentence constitutes a *de facto* life sentence. It is rather a record of the court's deliberative process, as demonstrated by the next sentence in which the court indicated it did not impose such a sentence "lightly." RP 48. A sentencing court's job is to

demonstrate that it is exercising its discretion judiciously on the record. The court did so here.

Defendant finally makes a claim that is simply unsupported in the record: stating that the sentencing court "imposed a sentence that it knew and acknowledged to be greater than a sentence that could be the equivalent to life imprisonment." Br. of App. at 17 (emphasis in original). Defendant fails to cite to a place in the record which would support such a bold claim, and indeed the words "greater than" do not appear in the entirety of the verbatim report of proceedings provided by the defendant. This is simply a claim without basis and should be disregarded by this Court.

There was no evidence that the defendant at sentencing to establish his current claim that he has received a *de facto* life sentence. He provided no medical records to establish his prognosis. He provided no testimony from medical witnesses. He did not offer actuarial tables to establish his life expectancy or studies which may establish the life expectancy of individuals living with the same diagnosis. Defense counsel below acknowledged that multiple sclerosis affects everyone differently, but there is nothing in this record specifying the way in which it will affect the defendant during his sentence. RP 44. Defendant bears the burden to show an abuse of discretion here, and he fails to meet that burden.

To the contrary, the defendant's actions since his diagnosis indicate he has at least the physical capability necessary to commit several crimes. At the time he committed his crime here, he was at least capable of stockpiling ammunition, obtaining and loading a firearm, and fire the weapon at officers and successfully hold them at bay despite his diagnosis. CP 7-15. His diagnosis has not prevented him from punching a woman in the face to rob her, committing theft, or tampering with witnesses. CP 102-106, 116-187.

Moreover, several factors affected the perception and the reality of the defendant's health through the proceedings below, making it impossible to draw any reliable conclusions from this record about the trajectory of the defendant's health in the future. The defendant was a regular drug user after his diagnosis, up to and including the time of his arrest. CP 91-101, 116-187, 189-205, 206-213. During the pendency of the case, he inflated mental health symptoms in an attempt to falsify a mental health condition. CP 295-310. When he was in the hospital pending a mental health evaluation, he falsely reported symptoms and indicated he was thinking of mimicking the symptoms of some of the patients around him. CP 295-310. While he was in custody pending trial and competency evaluation, he stopped taking his medications. CP 289-294. If the defendant more faithfully took his medication, more honestly reported his

medical symptoms, or abstained more reliably from controlled substances, it is possible such alterations could improve his health and undermine his claim that he is serving a *de facto* life sentence. Without the testimony of an expert and a consistently reliable medical history, this record doesn't provide this Court with sufficient information to draw the conclusions about the defendant's health that the defendant asks it to draw.

Had the defendant proved his claim that his medical condition will lead to his death in prison, this sentence would still not constitute a *de facto* life imprisonment because Washington law provides a remedy for inmates with debilitating medical conditions. RCW 9.94A.728(c)(i)(A)-(C) authorizes the Department of Corrections to place an inmate on extraordinary medical placement where the offender has a medical condition which is serious and expected to require costly care or treatment, the offender poses low risk to the community because he is physically incapacitated due to age or the medical condition, and extraordinary medical leave results in a cost savings to the State. Even if the defendant had proved that his medical condition would decline to the point that he could not, RCW 9.94A.728 would provide the proper remedy to that situation. Where the defendant is living with a medical condition which, should it progress, will trigger a remedy for release, he should not be

heard to complain that that medical condition converts his sentence to a *de facto* life sentence.

4. THE STATE CONCEDES THAT THE SAME LANGUAGE REGARDING LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN OR MODIFIED IN THE JUDGMENT AND SENTENCE TO COMPLY WITH THE SENTENCING COURT'S ORAL ORDER.

The sentencing court found the defendant indigent and waived all costs except the crime victim penalty assessment and restitution, if any. RP 49. Section 4.1 of the Judgment and Sentence indicates that the defendant must pay interest on financial obligations. CP 267-284. Pursuant to RCW 10.82.090, the State concedes that this should read, "INTEREST The restitution financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090."

Section 4.1 of the Judgment and Sentence reads, "COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute RCW 36.18.190, 9.94A.780 and 19.16.500." CP 267-284. RCW 36.18.190, 9.94A.780, and 19.16.500 each indicate that these costs may be imposed, indicating they are discretionary. It appears the sentencing court intended to waive these fees, and the State concedes this language is error. It should be stricken.

Section 4.6 of the Judgment and Sentence reads that the defendant shall "[p]ay supervision fees as determined by DOC." CP 267-284. Pursuant to ***State v. Lundstrom***, 6 Wn. App.2d 388, FN 3, 429 P.3d 1116 (2018) and RCW 9.94A.703(2)(d), the State concedes that this should be stricken from the Judgment and Sentence.

D. CONCLUSION.

This Court should affirm the defendant' sentence. The defendant received a significant benefit for his bargain, which he now seeks to violate. He has invited any error he now alleges. The court did not abuse its discretion because there were ample reasons justifying the sentence imposed here and because the defendant has failed to carry his burden to show that de facto life sentences are prohibited or that he is actually facing such a sentence here. Furthermore, the defendant invites this court to misapply ***Miller*** and ***Ronquillo*** in violation of ***Witherspoon***. This Court should affirm.

DATED: March 15, 2019

MARY E. ROBNETT
Pierce County Prosecuting Attorney

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WSB # 40505

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ Efile or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/15/19 _____
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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