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

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STATE OF WASHINGTON,

Respondent,

v.

YENILEN \* GUZMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-01046-2

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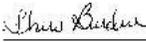
BRIEF OF RESPONDENT

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<b>SERVICE</b>	Dana M. Nelson Nielson, Broman & Koch (No. 91051) 1908 E. Madison St. Seattle, WA 98122 Email: nelsond@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 8, 2018, Port Orchard, WA  <b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b> Office ID #91103 kcpa@co.kitsap.wa.us
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether deficient performance of defense counsel requires resentencing where the deficient performance constituted invited error and did not prejudice Guzman? (State concedes deficient performance but not prejudice)

2. Whether conditions of sentence prohibiting going to bars and requiring drug abuse evaluation and treatment are appropriate conditions under conviction for major drug offenses by a person who admitted to the trial court that she is an alcoholic and drug addict.

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY AND FACTS**

Yenilen Guzman was charged by information filed in Kitsap County Superior Court with delivery of methamphetamine, with a special allegation of major violation of the Uniform Controlled Substance Act (UCSA), possession of methamphetamine with intent to manufacture or deliver, with a special allegation of major violation of the UCSA, and possession of a controlled substance (heroin) with intent to manufacture or deliver, with a special allegation of major violation of the UCSA. CP 1-5.

A first amended information latter charged two counts of delivery of methamphetamine, possession of controlled substance (heroin) with intent to manufacture or deliver, possession of methamphetamine with

intent to manufacture or deliver, and conspiracy to deliver a controlled substance. Except for the conspiracy count, each of the counts in the first amended information were appended with the major UCSA violation special allegation. CP 9-14.

Guzman pled guilty to all five counts, including the four special allegations, in the first amended information. CP 23-32 (Statement of Defendant on Plea of Guilty); RP 6-7. In the factual basis section of the guilty plea form, Guzman established the major UCSA violation special allegations by admitting on the first four counts that his delivery and possession charges “involved quantities substantially larger than for personal use.” CP 31. Guzman orally agreed to the recitation of the aggravating circumstances during the plea colloquy. RP 8-9.

The plea agreement signed by Guzman included that the state would recommend a total sentence of 180 months. CP 17-22.

At sentencing, the state called a police detective to further establish some of the facts. RP 8. Police had become aware of Guzman while investigating another suspected drug dealer. RP 9-10. It became known to police that Guzman was the girlfriend of this other drug dealer. RP 10-11. Guzman was known to have done business for the other dealer like renting cars or hotel rooms or letting him use her car. RP 11. She communicated with drug runners and “did a lot of dirty work” for the

other dealer. Id. Police believed that Guzman had a love relationship with this other dealer, who was a cautious criminal, which caused Guzman to “keep her guard down a little bit.” RP 12.

Police were aware that at some point the other dealer took Guzman to Mexico. RP 12. By post-arrest interviews with Guzman and other confidential informants, police established that in Mexico the other dealer physically abused Guzman, including forced acts of prostitution, and “left her there to die.” RP 13-14. Apparently, this cause a split between the two and police learned that Guzman was seeking to begin a drug business on her own. RP 14. She became a primary target of narcotics enforcement. RP 15. Police information was that Guzman was well connected with “higher-level” drug dealers in Los Angeles, California. RP 15. Police knew she was getting drugs in California and along the Mexico border in Arizona. RP 16.

Police began to send confidential informants to order quantities of drugs from Guzman. RP 16. They purchased 2.06 pounds of methamphetamine from her. RP 17-18. A second buy from Guzman netted approximately two more pounds of methamphetamine. RP 23. The detective opined that the four pounds received were more than a normal drug transaction in the local area, where a mid- to high-level deal may be for around a quarter pound of methamphetamine. RP 30. Guzman was

arrested in “buy/bust” in possession of .3 pounds of heroin and approximately five pounds of methamphetamine. RP 32-33. It was estimated that the total amount of methamphetamine (9.7 pounds with packaging) was enough to provide 4400 servings of methamphetamine and the heroin equaled approximately 1350 servings. RP 38. The methamphetamine was valued at around \$176,000 and the heroin at around \$20,000. RP 39.

The evidentiary presentation occasioned the trial court to observe that “The circumstances here are extraordinary which warrant an extraordinary sentence. The quantities here are over the top.” RP 119. Understanding that the trial court intended to impose a total sentence of 120 months, defense counsel expressed no preference as to how the various counts were broken out. RP 122.

The trial court imposed total confinement of 120 months. CP 35. The trial court found that there were substantial and compelling reasons to justify running consecutively some of the otherwise standard range time on the various counts. Id. Each count was sentenced at 60 months but counts one, two, and five were run concurrently (60 months) and counts three and four were run concurrently with each other (60 months) but consecutively to counts one, two, and five, generating the 120 month total.

The trial court entered findings of fact and conclusions of law for

an exceptional sentence. The trial court found that Guzman's pleas were voluntarily, knowingly, and intelligently entered. CP 52. The trial court found that the pleas included admission of the major violation aggravator and that there was factual basis for the pleas in all respects. Id. Conclusion of Law II. recites a break-down of the sentence that is slightly different than that found in the judgment and sentence, saying that counts 1, 2, 3, and 4 are upward departures at 60 months each and that counts 1 and 2 are to run consecutive to counts 3 and 4, resulting again in a total of 120 months. CP 53.

It was noticed that count 5 was omitted from the exceptional sentence findings and conclusions. An Order Amending Judgment and Sentence was entered ordering that count 5 be sentenced at 12 months and that that 12 months was to be concurrent with all other counts. CP 54. This changed the original judgment and sentence imposition of 60 months on count 5 to 12 months and otherwise reconciled the two documents resulting in the same 120 month sentence.

On the record, the trial court and the parties agreed that the plea agreement did not contemplate an exceptional sentence and that therefore finding and conclusions were necessary. RP 124. However, it should be noted here that the 180 month recommendation stated in the plea agreement was rather obviously an exceptional sentence given the ranges

as to the five counts that appear in that document. CP 17-22.

Guzman timely filed a notice of appeal challenging the imposition of an exceptional sentence. CP 45.

### III. ARGUMENT

**A. ALTHOUGH DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WITH REGARD TO SAME CRIMINAL CONDUCT, THE RECORD SHOWS THAT THE SENTENCING ERROR WAS INVITED AND THAT GUZMAN WAS NOT PREJUDICED BY THE ERROR.**

Guzman argues that counsel was ineffective for failing to argue that Guzman's convictions for delivery and conspiracy were the same criminal conduct. This claim is without merit because defense counsel's failure to argue same criminal conduct did not result in prejudice to Guzman.

A claim of ineffective assistance is reviewed de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Guzman must "overcome a strong presumption that counsel's performance was

reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). There is a wide range of professional competence and counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *In re Nichols*, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted). Guzman “must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel.” *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003

First, preservation must be addressed. Generally, illegal or erroneous sentences may be raised for the first time on appeal. *See State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). The present issue sounds as a claim of ineffective assistance and that constitutional issue may also be raised for the first time on appeal. But, the facts below include that when the trial court announced that it would impose a certain number of months as a total sentence, 120 months, the parties were asked how the offenses should be broken out to get to that total number. Guzman’s attorney acquiesced. RP 122. The sentence imposed was the promised 120 months. CP 35. This situation constitutes both invited error and harmless error.

“The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and

receive a new trial.” *Matter of Salinas*, 189 Wn.2d 747, 755, 408 P.3d 344 (2018) quoting *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 120, 340 P.3d 810 (2014). Even where constitutional issues or rights are involved, invited error precludes review. *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). The doctrine applies where the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *Matter of Salinas*, 189 Wn.2d at 755. Put another way, a reviewing court looks to “the totality of the circumstances, considering whether the party engaged in affirmative and voluntary action to induce or contribute to the error and whether he or she benefited from the trial court's action.” *Id.* (internal quotation omitted).

Herein, defense counsel affirmatively assented to the trial court’s sentencing procedure. Moreover, that assent materially contributed to the trial court’s decision which is assailed on this review. Counsel knew that the trial court was aiming at 120 months. She allowed the state and the trial court to crunch the numbers and arrive at that number. The totality of the circumstances demonstrates that under circumstances where Guzman entered pleas to aggravating circumstances, it was intended that those pleas would serve to support an exceptional sentence.<sup>1</sup>

Given that state of affairs, it is also appears that counsel’s

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<sup>1</sup> As noted above, the state’s recommendation of 180 months found in the plea agreement

acquiescence was harmless. Or, a sentiment in the same vein, that counsel's performance caused no prejudice. As argued, the procedure in the trial court shows that it was always intended that Guzman receive a sentence above the standard range. And the sentencing arguments made resulted in the trial court imposing a sentence that was 40 months shorter than the sentence recommended by the state. The exceptional sentence was justified by the major violation of UCSA aggravator, not criminal history points. This is the type of circumstance where it is manifest that the trial court would do the same thing if the matter is remanded.

But on the slight chance that a change in the offender score may change the trial court's decision, the underlying issue of same criminal conduct is addressed. Crimes encompass the same criminal conduct if they involve the same criminal intent and were committed against the same victim at the same time and place. RCW 9.94A.400(1). Here, on drug delivery, the victim is the public at large. *State v. Deharo*, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998) (citing predecessor.....). In *Deharo*, the record showed that the crimes of conspiracy and delivery happened at the same time and place. It was held that the same objective intent applied to the conspiracy—"to deliver heroin in one or both conspirators' possession"—that a substantial step in the conspiracy was

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was clearly an exceptional sentence recommendation.

possessing the drugs, and that it was the same heroin in both crimes. *Id.* at 859. There was no evidence supporting an argument that the two crimes were based on objective intent to deliver some drugs now and some drugs later. *Id.*

The present case is not as clear on the questions of time and place. The witness at sentencing provided details of these crimes. Also, facts are presented in the Certificate of Probable Cause attached to the original information. CP 7. There were two deliveries in June of 2017. CP 1; RP 17. The first delivery did not involve her co-conspirator one Peter Abraca. RP 20-21. There is not information in the record identifying this other person. There is no information that that other person ever possessed the drugs or took any other action in the first delivery. Thus there is insufficient evidence to allow an inference that this other person was engaged with Guzman in conspiracy to deliver those drugs. On the first June delivery, then, it is not established that the conspiracy and the delivery occurred at the same time and place.

The second time, Peter Abraca was in attendance. RP 24-25. In fact, it is clear that Abraca was involved in the entire transaction. RP 24-28. The state cannot distinguish this situation from that in *Deharo*. The situation seems to meet the Washington Supreme Court's recent move away from objective intent analysis in favor of a straightforward view of

statutory intent. *State v. Chenoweth*, 185 Wn.2d 218, 224, 370 P.3d 6 (2016). Here, the conspiracy count alleges that Guzman knowingly conspired to deliver controlled substance. The deliveries were charged as knowingly delivering essentially the same controlled substance. Thus the same intent element of the same criminal conduct rule is met. An argument on same criminal conduct should have been advanced. Counsel was deficient for failing to argue the claim.

As argued above, however, this omission can be seen as invited error under the circumstances. But it also appears in this record that counsel's deficiency caused no prejudice. The trial court was going to sentence Guzman to 120 months regardless of the particular offender score. Guzman suffered no prejudice from counsel's deficiency and the matter need not be remanded.

**B. THE IMPOSITION OF CONDITIONS OF SENTENCE REQUIRING A HIGH-LEVEL DRUG OFFENDER WHO SUFFERS FROM DRUG ADDICTION AND ALCOHOLISM TO NOT GO TO BARS AND TO PROCURE A SUBSTANCE ABUSE EVALUATION AND COMPLY WITH TREATMENT ARE LAWFUL, CRIME-RELATED CONDITIONS.**

Guzman next claims that there was no authority for two of the conditions of her sentence. In particular, she argues that a condition

prohibiting her from going to a bar or place where alcohol is sold is unauthorized because not crime-related in this case. Brief at 13. And, a condition requiring a substances abuse evaluation and treatment as directed by her community corrections officer was unauthorized because the trial court made no finding that chemical dependency contributed to the crimes. *Id.* This claim is without merit because the conditions imposed were crime-related and were factually supported in the record.

First, Guzman did not have the benefit of the Washington Supreme Court's most recent case on conditions of sentence. *State v. Nguyen* \_\_ Wn.2d \_\_, 425 P.3d 847 (September 13, 2018) was published a bit less than a month after Guzman filed her brief in the present case. There, two cases involving challenges to various conditions of sentence were consolidated. Nguyen had been convicted of first degree child rape, first degree child molestation, second degree child rape, and second degree child molestation. 425 P.3d at 849. He argued on appeal that a condition of his sentence was unconstitutionally vague and not crime-related; the condition provided

Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

425 P.3d at 850.

The consolidated case of *State v. Norris* involved convictions for

three counts of second degree child molestation. *Nguyen*, 425 P.3d at 850. Norris received a special sex offender sentencing alternative sentence (SSOSA), which was later revoked because she failed to take required medication and because she ingested marijuana. *Id.* She challenged various sentence conditions on appeal. The Supreme Court considered Norris's argument that a condition requiring Norris to inform her CCO of any "dating relationship" was unconstitutionally vague. *Id.* at 850-51. Further, on the state's cross petition, the Supreme Court considered whether a condition prohibiting Norris from going to a sex-related businesses was crime related. 425 P.3d at 851.

The Supreme Court applied an abuse of discretion standard of review. *Id.* De novo review was not addressed, but the Supreme Court did note that the imposition of an unconstitutional condition is manifestly unreasonable and thus an abuse of discretion. *Id.*

Unconstitutional vagueness results if a condition either "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Id.* But the terms used are to be considered in the context they are used and if a person of ordinary intelligence can understand what is proscribed, the provision is sufficiently definite. 425 P.3d at 851. The constitution

does not require complete certainty: “A community custody condition “is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Id.*, quoting *City of Seattle v. Eze*, 111 Wn.2d 22,27, 759 P.2d 366 (1988).

Applying these principles, it was held that Nguyens’s prohibition against accessing “sexually explicit material” (as laid out above) was not unconstitutionally vague. 425 P.3d at 852. A person of ordinary intelligence could distinguish between “sexually explicit material” and “works of art and anthropological significance.” *Id.*

Similarly, with regard to Norris’s complaint about the vagueness of the term “dating relationship,” it was held that “a person of ordinary intelligence can distinguish a “dating relationship” from other types of relationships.” 425 P.3d at 853. Driving this analysis are the rules that “impossible standards of specificity are not required” and “that a convicted person is not entitled to complete certainty as to the exact point at which his actions would be classified as prohibited conduct.” *Id.* at 852. The test is, rather, objective asking whether or not “the proscribed conduct is sufficiently definite in the eyes of an ordinary person.” *Id.*

Each of the allegedly improper conditions was then considered with regard to whether or not they were sufficiently crime-related. Citing

RCW 9.94A.703(3)(f), the Supreme Court noted that “a sentencing court may, in its discretion, impose any crime-related prohibition.” *Id.* (internal quotation omitted). Further, “a ‘crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” *Id.*, quoting RCW 9.94A.030(10) (alteration omitted).

Nguyen argued that it was not shown that viewing sexually explicit materials was directly related to his crime. The argument was rejected because such conditions need be only “reasonably related” to the crime. Thus, “[a] court does not abuse its discretion if a “reasonable relationship” between the crime of conviction and the community custody condition exists.” 425 P.3d at 853 (alteration added). There need only be “some basis for the connection.” *Id.* The condition prohibiting sexually explicit material was “certainly” crime related to Nguyen’s crimes of child rape and molestation. *Id.* at 854.

Importantly, the Supreme Court rebuffed the argument that its analysis would allow such a condition in all sex offenses by noting that such would be no different from requiring all drunk drivers to refrain from using alcohol or drug offenders from using drugs. Moreover, the state need not prove that a condition addresses behavior that “*directly caused*” the crime. *Id.* at 854 (italics by the court). In the end, “It is both logical

and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing “sexually explicit materials,” the only purpose of which is to invoke sexual stimulation.” *Id.* The sexually explicit material condition was held to be sufficiently crime-related.

A very similar analysis led to holding that Norris’s prohibition against attending “sex-related businesses” was also crime-related. 425 P.3d at 855. This even though Norris argued that there was no evidence that any such business played any part in her crimes. The Supreme Court once again focused on the type of crimes involved and in conjunction with considerations of rehabilitation found that “it is reasonable to conclude that Norris will struggle to rehabilitate from her sexual deviance so long as she frequents “sex-related businesses.”” *Id.*

In the present case, Guzman complains that the conditions were not crime-related. But our Supreme Court by the *Nguyen* decision has held that the universe of appropriate crime-related conditions is quite large. That decision undercuts analysis in cases like *State v. O’Cain*, 144 Wn. App. 772, 184 P.3d 1262 (2008) where the court viewed crime-relatedness in a cause and effect manner, asking whether the prohibited behavior “contributed in any way to the crime.” *Id.* at 775. And, *State v. Zimmer*, 146 Wn. App. 405, 190 P.3d 121 (2008), is similarly infirm under

*Nguyen*. There the fact that electronic devices are commonly used in drug dealing was not enough to overcome a lack of evidence that such a device was actually used in the crime. But under *Nguyen* such a ground is tenable if by the lights of the sentencing judge the condition serves a rehabilitative or anti-recidivism purpose; no “factual nexus” seems to be required.

The conditions imposed here at minimum served such societal interests. This is a case where the defendant was completely immersed in the drug culture at a very high level. She admits that her crimes were committed while she was under the influence of drugs. RP 108. She admits that in California she “became an alcoholic and cocaine addict.” *Id.* Because she was not sober, she turned to prostitution and drug delivery. *Id.* She ends her allocution by emphatically declaring that she “became an addict” and spoke of her need for mental health treatment. RP 109.

Prohibiting an admitted alcoholic from going where alcohol is served is not an abuse of discretion. The admitted alcoholism and drug addiction provide tenable grounds for the condition. Moreover, the prohibition is at minimum reasonably related to crimes involving massive amounts of controlled substance. This condition is appropriately directed both at the needs of the particular defendant and society in general.

Similarly, ordering substance abuse evaluation and treatment for such a person is also clearly crime-related for the same reasons. Pursuant to RCW 9.94B.050(5)(c), the trial court may sentence an offender to “participate in crime-related treatment or counseling services.” The present condition does not therefore constitute an unlawful sentence. Further, the condition works in conjunction the RCW 9.94B.050(4)(c) prohibition on the possession or consumption of controlled substances, which the trial court “shall” impose unless waived.

But Guzman argues that the condition is not lawful because pursuant to RCW 9.94A.607 the trial court must make a finding of chemical dependency that contributed to the offense before imposing a condition requiring evaluation and treatment for chemical dependency. This provision seems on its face to be at odds with RCW 9.94B.505(5)(c), which does not require a specific finding for the imposition of crime-related treatment or counseling. But the two can be harmonized in recognition that they address different situations.

RCW 9.94B.505, addresses “crime-related” conditions such as alcohol treatment for a DUI conviction or drug treatment for a drug conviction. On the other hand, RCW 9.94A.607 may be used when the crime-relatedness is not so obvious—a burglary done for drug money. In the latter case a burglary is not on its face a crime that needs to be

addressed by ordering treatment, but if the trial court finds that the burglary was for drug money, the statute allows the treatment order.

Moreover, it too far stretches procedure over substance to require a specific finding in the present case. In *State v. Powell*, 139 Wn. App. 808, 162 P.3d 1180 (2007) *reversed on other grounds* 166 Wn.2d 73, 206 P.3d 321 (2009), the trial court imposed a drug treatment condition in a burglary case without an express finding of chemical dependency under RCW 9.94A.607. Powell claimed that the condition was unlawful because his drug use was not related to his offense. 166 Wn. App. at 819. But the evidence at trial included that Powell had used methamphetamine before the burglary. 166 Wn. App. at 820. Further, both parties asked the court to impose treatment. *Id.* Even though the trial court failed to check a box finding the chemical dependency, “the record amply supports the decision.” *Id.*

In the present case the record similarly supports the trial court’s decision. The facts above listed, massive amounts of drugs delivered, multiple claims of drug addiction, and a claim of alcoholism, more than adequately support the trial court’s discretion. And, finally, the parties agreed to treatment in the plea agreement. CP 20.

The conditions here are crime-related. There was no abuse of discretion in imposing them.

#### IV. CONCLUSION

For the foregoing reasons, Guzman's conviction and sentence should be affirmed.

DATED October 8, 2018.

Respectfully submitted,

TINA R. ROBINSON  
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A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name below.

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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