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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**SEBASTIAN HALLER,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Is RCW 9.94A.660, the Drug Offender Sentencing Alternative statute, subject to a vagueness challenge?
- B. Can Haller challenge the denial of his DOSA sentence, a standard range sentence, if the trial court correctly applied the statute, alleging the DOSA statute creates a protected liberty interest for the first time on appeal?

## II. STATEMENT OF THE CASE

Haller was convicted, after a jury trial, of two counts of Delivery of a Controlled Substance – Heroin, one count of Possession with Intent to Deliver – Heroin, three counts of Possession of a Controlled Substance for Methamphetamine, Oxycodone, and Methadone, and three counts of Tampering with a Witness. CP 1-2. The charges stemmed from a confidential informant purchasing heroin from Haller. *State v. Haller*, 2016 Wash. App. LEXIS 1483 at 1-2 (COA No. 75040-2-1).<sup>1</sup> The heroin was delivered and possessed with the intent to deliver within 1000 feet of a school bus stop. *Id.* at 2.

Haller, while in custody at the Lewis County Jail, made several phone calls to his grandmother asking her to relay messages to his brother regarding his brother's testimony. *Id.* at 3-4. Haller also spoke

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<sup>1</sup> The State cites Haller's unpublished opinion from his original appeal stemming from the trial and original sentence in this case to assist in setting forth the facts and procedural history of this case.

to his grandfather during one of the phone calls, telling his grandfather what his brother needed to say when he testified for Haller to win his case. *Id.* at 4. These incidents resulted in the three convictions for Witness Tampering. *Id.* at 2-5.

Haller was sentenced in 2015 to 192 months, including the enhancements for the school bus stop. CP 6. The trial court ran the school bus stop enhancements consecutively. *Id.* Without the enhancements Haller's sentence would have been 120 months on the delivery charges and the intent to deliver charge. *Id.* At Haller's sentencing hearing his attorney told the trial court it was Haller's request to be evaluated for a prison based Drug Offender Alternative Sentence (DOSA). SRP 389.<sup>2</sup> The State opposed a DOSA. *Id.* The trial court ruled it would not consider a DOSA, set forth its reasons, and refused to order the DOSA evaluation. RP 390. Sentencing proceeded, Haller was sentenced as indicated above, and ultimately appealed his conviction and sentence.

Haller's convictions were upheld, but the trial court had impermissibly run the school bus stops consecutively. *Haller*, 2016 Wash. App. LEXIS 1483. The Court of Appeals also ruled the trial

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<sup>2</sup> The State will cite to Haller's original sentencing verbatim report of proceedings, which was transferred to this appeal, as SRP. The resentencing hearing will be cited as RP.

court needed to address the possession of controlled substance convictions and whether they were treated as one crime. *Id.* Finally, the trial court was ordered to address Haller's legal financial obligations. *Id.* Therefore, Haller's case was remanded for resentencing to correct the errors.

In November 2018, Haller's prior sentence was vacated and he was resentenced. RP; CP 37. Haller renewed his request for a prison based DOSA and the trial court again denied the request. RP 7-10. The trial court removed four years from the sentence, as required, and again sentenced Haller to the top end of the standard range. RP 10-11; CP 44-45. Haller timely appeals his sentence. CP 38-41.

The State will further supplement the facts in the argument section below.

### III. ARGUMENT

#### A. THE VAGUENESS DOCTRINE DOES NOT APPLY TO SENTENCING GUIDELINES, THEREFORE, RCW 9.94A.660, THE DRUG OFFENDER SENTENCING ALTERNATIVE STATUTE, CANNOT BE VOID FOR VAGUENESS.

Haller argues the DOSA statute, RCW 9.94A.660, violates his due process because it is vague. Brief of Appellant 3-5. Haller asserts the statute's lack of standards invites arbitrary application by

judges. *Id.* The vagueness doctrine has no application to sentencing guidelines, therefore, the DOSA statute cannot be void for vagueness and Haller's sentence should be affirmed.

### **1. Standard Of Review.**

The reviewing court applies a de novo standard to questions of constitutional law, including a statute's constitutionality. *In ref Pers. Restraint of Troupe*, 4 Wn. App. 2d 715, 721, 423 P.3d 878 (2018). The court presumes a statute is constitutional. *In ref Troupe*, 4 Wn. App. 2d at 721. It is the burden of the party challenging the constitutionality of a statute to prove it is unconstitutional beyond a reasonable doubt. *Id.*

### **2. The Vagueness Doctrine Does Not Apply To Sentencing Guidelines, Therefore RCW 9.94A.660 Cannot Be Void For Vagueness.**

The DOSA statute, RCW 9.94A.660, contained within the Sentencing Reform Act, cannot be void for vagueness. *State v. Baldwin*, 150 Wn.2d 448, 458-59, 45 P.3d 1005 (2003); *State v. Jacobson*, 92 Wn. App 958, 966-965 P.2d 1140 (1998). There are two due process concerns encompassed within a vagueness analysis. *Baldwin*, 150 Wn.2d at 458. "First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of

guilt to protect against arbitrary arrest and prosecution.” *Id.* (citations omitted). Therefore, “[b]oth prongs of the vagueness doctrine focus on laws that prohibit or require conduct.” *Id.*

*Jacobson* discusses why applying the vagueness doctrine is analytically and theoretically unsound to sentencing guidelines. *Jacobson*, 92 Wn. App. at 966, *citing*, *United States v. Wivell*, 893 F.2d 156, 159-60 (8<sup>th</sup> Circuit 1990). The statutes that govern sentencing, such as RCW 9.94A.660, provide the directives for the sentencing courts rather than define what conduct is illegal. RCW 9.94A.660; *Jacobson*, 92 Wn. App. at 966 (citation omitted). The Eighth Circuit, while discussing the federal Sentencing Guidelines, noted there was no constitutional right to sentencing guidelines and the limitation placed upon a judge’s discretion by the Guidelines could not violate the due process rights of a defendant due to the Guidelines being vague. *Wivell*, 893 F.2d at 160. The Court in *Jacobson* adopted the Eighth Circuit’s reasoning, stating, “[f]or the same reason, it is difficult to imagine a case in which a Sentencing Reform Act provision that grants limited discretion to sentencing courts could be found unconstitutionally vague.” *Jacobson*, 92 Wn. App. at 966.

The DOSA statute does not define what conduct is forbidden and therefore subject to criminal prosecution. RCW 9.94A.660. The statute does not subject a person to arbitrary arrest and criminal prosecution due to its failure to define conduct. RCW 9.94A.660; *Baldwin*, 150 Wn.2d at 459. The DOSA statute does not set the penalties for the crime charged by the state. *Id.* RCW 9.94A.660 sets the criteria for when a person is eligible for a sentencing alternative and grants the trial court judge the discretion of imposing such an alternative if the person qualifies and the judge determines it is appropriate. This is not a statute that is subject to a vagueness challenge.

Therefore, Haller has not met his burden to show RCW 9.94A.660 is unconstitutional. This Court should hold Haller's vagueness challenge to RCW 9.94A.660 fails, as the statute is not subject to such a challenge. This Court should affirm the trial court's denial of Haller's request for a prison based DOSA.

**B. HALLER CANNOT CHALLENGE THE DENIAL OF HIS DOSA SENTENCE, AS THE TRIAL COURT CORRECTLY APPLIED THE STATUTE.**

Haller can only challenge a standard range sentence under limited circumstances. Haller asserts the DOSA statute creates protected liberty interest, and therefore the statute violates

procedural due process rights because there are no standards set forth in the statute guiding a judge's decision. Brief of Appellant 5-9. Haller argues this allows for a judge to deny a DOSA without justification. *Id.* Haller cannot appeal a standard range sentence, as the trial court correctly applied the law when crafting Haller's sentence. Further, Haller's procedural due process claim cannot be raised pursuant to RAP 2.5, as it is not a manifest constitutional error. Therefore, this Court should affirm Haller's sentence.

### **1. Standard Of Review.**

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012). Questions of law, such as constitutional questions and questions of statutory interpretation, are reviewed de novo. *State v. Hand*, 192 Wn.2d 289, 294, 429 P.3d 502 (2018); *State v. Sandholm*, 184 Wn.2d 726, 736, 364 P.3d 87 (2015).

### **2. Standard Range Sentence Not Appealable Except Under Limited Circumstances.**

Standard range sentences are not appealable as a matter of right, except under limited circumstances. RCW 9.94A.585; *State v. Onefrey*, 119 Wn.2d 572, 574 n.1, 835 P.2d 213 (1992). "A sentence within the standard range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed." RCW 9.94A.585(1). The statute

further explains a first-time offender sentence is to be considered a standard range sentence. *Id.* Then the statute plainly states a sentence outside the standard range may be appealed and sets forth the procedure and what the reviewing court must find to reverse an exceptional sentence. RCW 9.94A.585.

A trial court judge's discretionary decision whether to grant an offender a DOSA sentence falls into the category of standard range sentences generally not appealable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A standard range sentence may not be appealed on the basis of the length of sentence. *Onefrey*, 119 Wn.2d at 574 n.1. A challenge to a standard range sentence may only be brought upon a claim that the trial court erred by misapplying the statute, thereby employing improper procedure during the sentencing of the offender. *Grayson*, 154 Wn.2d at 338; *Onefrey*, 119 Wn.2d at 574 n.1. "The central issues involves a matter of statutory construction, not a claim that the trial court abused its discretion." *Onefrey*, 119 Wn.2d at 574 n.1.

Haller does not argue the trial judge improperly applied RCW 9.94A.660. Brief of Appellant 5-9. Without an allegation the trial court erred procedurally by misconstruing the DOSA statute, Haller does not have a right to challenge the trial court's denial of Haller's request

for a prison based DOSA. RCW 9.94A.585; *Grayson*, 154 Wn.2d at 338; *Onefrey*, 119 Wn.2d at 574 n.1; RP 10-11. Therefore, Haller can only challenge the denial of his DOSA under some alternative theory.

**3. Haller’s Challenge To The Trial Court’s Denial Of His DOSA, Claiming The DOSA Statute Violates Procedural Due Process After It Creates A Protected Liberty Interest Is Not A Manifest Constitutional Error.**

Haller attempts to assert, for the first time on appeal, that the DOSA statute creates a protected liberty interest. Brief of Appellant 5-9. Haller argues this protected liberty interest demands constitutional protections, specifically procedural due process, that are not afforded Haller in the DOSA statute. *Id.* These arguments were never raised in the trial court. See RP. Haller does not address the standards pursuant to RAP 2.5 and requirements that must be met to raise an issue a party failed to address in the trial court.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O’Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O’Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error

affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333.

An error is manifest if the appellant can show actual prejudice. *O’Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

**a. The DOSA statute does not create a protected liberty interest, therefore there is no constitutional error.**

The DOSA statute, RCW 9.94A.660, does not create a constitutionally protected liberty interest. The basic principle of the creation of a protected liberty interest is when a statute or law dictates a particular decision that must occur given particular facts. *Baldwin*, 150 Wn.2d at 460. There must be a limitation on the decision maker's discretion, not simply procedural limitations, but substantive limitations. *Id.* (citations omitted). "[B]efore a state law can create a liberty interest, it must contain 'substantive predicates' to the exercise of discretion and the 'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" *Id.*, citing *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994) (quoting *Ky. Dept of Corr. V. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

Haller acknowledges that there is no constitutional right for a person to be sentenced under the drug offender sentencing alternative. Brief of Appellant 5. Haller's argument regarding the DOSA statute is self-defeating. Haller begins by stating he has protected liberty interest because offenders seeking a DOSA

sentence have an expectation or interest created by state laws or policies that is beyond an abstract need or unilateral hope, but an interest with real substance. Brief of Appellant 6. Then Haller goes on to state the DOSA statute gives the judge plenary authority to determine if the sentence is appropriate if an offender meets the guidelines. Brief of Appellant 7. A statute that grants such authority and discretion does not create a protected liberty interest. *Baldwin*, 150 Wn.2d at 460-61.

In *Baldwin*, the Supreme Court considered if the statutes, former RCW 9.94A.120(2) and former RCW 9.94A.390, governing imposition of standard range sentences unless a sentencing court finds substantial and compelling reasons justifying an exceptional sentence, created a protected liberty interest. *Baldwin*, 150 Wn.2d at 459-61. The Supreme Court held the sentencing guidelines did not require the trial court to sentence an offender to a specific outcome. *Id.* at 460-61. The guidelines were intended “only to structure discretionary decisions affecting sentences[.]” *Id.* at 461. “Since nothing in these guidelines requires a certain outcome, the statutes create no constitutionally protected liberty interest.” *Id.*

Similarly, RCW 9.94A.660, does not require a specific outcome if certain conditions are met. The DOSA statute is merely a

guideline, outlining who is eligible to receive an alternative sentence and the procedures regarding what a trial court may employ when sentencing a person to a drug offender sentencing alternative. RCW 9.94A.660. Therefore, RCW 9.94A.660, the DOSA statute, does not create a constitutionally protected liberty interest that may be raised first time on appeal. Haller's attempt to raise this issue should be denied by this Court pursuant to RAP 2.5.

**b. If the DOSA statute did create a protected liberty interest, the error is not manifest as the trial court would have given the same sentence.**

Arguendo, if RCW 9.94A.660 does create a constitutionally protected liberty interest, Haller still may not raise this issue for the first time on appeal because the issue is not manifest. Haller must show that the error, failure of the statute to require the trial court to state the basis for denying the DOSA request, including whether Haller was statutorily eligible, factors favoring DOSA, and articulate reasons why a DOSA is not appropriate, had identifiable and practical consequences at his sentencing hearing. *O'Hara*, 167 Wn.2d at 99. Haller has not, and cannot, meet this burden.

Haller requested a DOSA sentence at his resentencing, a request he made at his initial sentencing hearing as well. RP 7-10; SRP 389. At Haller's first sentence he balked at the amount of time,

telling the judge, "You're talking about 16 years for getting high." SRP 396. The sentencing judge (who was the same judge at resentencing), told Haller that was not what was happening, that Haller's incredibly high offender score left crimes going unpunished, there were multiple counts that occurred within a school zone, and the judge was taking all of that into account when fashioning Haller's sentence. SRP 396. At Haller's resentencing hearing, the judge stated:

I am not imposing the DOSA sentence.

I am impressed and glad to hear that you have grown up finally and come to an awareness of where your life was going and maybe now you have a glimpse of what your life can be. But given the deliveries, given the criminal history here, there is punishment that is required for that and that is what I'm going to order here.

RP 10.

Haller would have received the same sentence from the trial court judge regardless of new requirements to articulate and draft findings stating why he denied the DOSA request. The trial court judge twice denied Haller's request, and made it clear a DOSA was not a sentence he believed was appropriate given the charges Haller was being sentenced for and Haller's past criminal history. There has been no prejudice shown, the error is therefore not manifest, and this

Court should not review it for the first time on appeal Haller's sentence should be affirmed.

#### **IV. CONCLUSION**

The vagueness doctrine does not apply to RCW 9.94A.660, the DOSA statute, therefore Haller's challenge that the statute is void for vagueness fails. The trial court correctly applied the law when determining Haller's standard range sentence, therefore the trial court's denial of Haller's request of a DOSA is not appealable. Haller is barred, pursuant to RAP 2.5, from this Court considering his challenge of his sentencing by arguing his procedural due process rights were violated by RCW 9.94A.660 which also creates a protected liberty interest. Haller does not show his protected liberty interest challenge is a manifest constitutional error, therefore this Court should not consider the challenge. Haller's sentence should be affirmed.

RESPECTFULLY submitted this 27<sup>th</sup> day of September, 2019.

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