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**FILED**

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

OCT 14, 2013  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

HEATHER L. MERCADO,

Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S SUPPLEMENTAL BRIEF

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Respectfully submitted:



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## **I. SUPPLEMENTAL ARGUMENT**

The Court has directed supplemental briefing on whether the Defendant's challenge to the HIV testing in her judgment and sentence "can" be raised for the first time on appeal.

RAP 2.5(a) states that an appellate court "may" refuse to hear a claim not preserved below. The Defendant argues that the rule is permissive. That is the meaning of "may." *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) (the rule gives courts discretion).

However, as the Defendant also notes, courts have narrowly construed exceptions to their issue preservation rule. Supplemental Appellant's Brief at 1 (noting the "general rule" is that a party "may not" raise an issue for the first time on appeal and citing *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). *See also State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (stating the general rule is that courts "will not" consider issues raised for the first time on appeal); *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) (noting that even an exception specifically enumerated in the rule will be narrowly construed); *State v. Talias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998) (stating unpreserved claims "will normally not" be considered for the first time on

appeal); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *State v. Fenwick*, 164 Wn. App. 392, 400, 264 P.3d 284 (2011) (stating that generally a party “must” raise an issue at the trial level for it to be preserved on appeal).

Courts of review “adopt a strict approach because trial counsel’s failure to object to the error robs the [lower] court of the opportunity to correct the error and avoid a retrial.” *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). The purpose of the general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials and appeals. *State v. Jimenez-Macias*, 171 Wn. App. 323, 332, 286 P.3d 1022 (2012) (issue preservation rule encourages the efficient use of judicial resources); *Postema v. Postema Enterprises, Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003).

It is hard to find exceptions to the rule other than those enumerated in the rule. One court permitted review because the issue would have affected a party’s ability to maintain a cause of action. *In re the Parentage of M.S.*, 128 Wn. App. 408, 412, 115 P.3d 405 (2005). And a change in law that occurs after trial but before appeal can excuse the lack of timely objection. *State v. McCormick*, 152 Wn. App. 536, 540, 216 P.3d 475 (2009). But courts routinely deny unpreserved challenges to

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suppression of the evidence, which presumably are of constitutional magnitude but would have required a proper record to be made below. *State v. Pearsall*, 156 Wn. App. 357, 360-61, 231 P.3d 849 (2010).

The Court is not obliged to review an unpreserved issue. And as the Commissioner points out, because the Defendant failed to preserve the error below, the Court of Appeals does not have a sufficient record to review. Adherence to a stricter interpretation of the rule in these circumstances preserves scarce judicial resource, encourages parties to make their objections at the proper time, and discourages the behavior we see in this case, where a provision is put forward by the Defendant only to be complained about after the test was performed, accompanied by a demand for compensation.

The question is not whether the court may review, but whether it should. In this circumstance, the court should not. This is not that case to be expansive of or permissive with a rule that is generally narrowly construed.

If there is error, it would have been the Defendant who seeded error into the record. She invited the lower court to enter the specific order in her own Statement on Plea of Guilty. CP 16. When specifically questioned on the subject, she orally agreed that the court could order the

testing. RP 6. If there is no error, the Defendant's failure to make a proper record failed to give the prosecutor notice and opportunity to respond below and to more fully develop the record. The failure also robbed the lower court of an opportunity to address the question.

The Defendant argues that the sentencing court exceeded its authority (Supplemental Appellant's Brief at 1). The State has argued that the related drug offense (possession of methamphetamine) is associated with the use of hypodermic needles; and the specific offense had evidence suggestive of actual use of hypodermic needles. Respondent's Brief 5-8. On this record, the sentencing court did not exceed its lawful authority.

The Defendant asks to be reimbursed for testing *which benefited her, which she invited, and which she did not object to*. The request is offensive. She does not explain which public agency's budget she thinks should cover her health care. Because she offers no legal authority for her compensation demand, she offers no legal authority which would illuminate the issue. Therefore, although the Court can review the challenge, it does not have to and should choose not to.

**II. CONCLUSION**

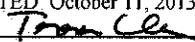
This Court may and should refuse to review the Defendant's challenge. The State respectfully requests this Court affirm the Defendant's sentence.

DATED: October 11, 2013.

Respectfully submitted:



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<p>Dennis Morgan P.O. Box 1019 Republic, WA 99166 &lt;nodblspk@rcabletv.com&gt;</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 11, 2013, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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