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No. 36271-0-III  
No. 36272-8-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

BRIAN HUGHES, Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:



by: Teresa Chen, WSBA 31762  
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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

## **II. RESPONDENT'S ASSIGNMENT OF ERROR**

The State respectfully asks the court to consider the following error pursuant to RAP 2.4(a): On July 23, 2018, the standard sentencing range for methamphetamine possession with an offender score of 4 was not 6+ to 12 months as is reflected on the judgments and sentences in each case. Under Laws of 2015, ch. 291, § 9 (effective July 1, 2018), the sentencing range changed to 6+ to 18 months. RCW 9.94A.517.

## **III. RELIEF REQUESTED**

Respondent asserts there is no reviewable error in the Appellant's sentences.

## **IV. ISSUES**

1. Is there any error in the judgment and sentence where the parties agree that concurrent sentences are appropriate and concurrent sentences were imposed therein?

2. Did the Defendant waive any challenge to the interpretation/ execution of the judgment and sentence by inviting this interpretation at sentencing?
3. Should this Court accept review where the matter is moot (the Defendant has served the jail term) and where the situation is unlikely to arise again following the change in law?
4. Did the sentencing judge abuse his discretion in imposing the criminal filing where the record shows the Defendant is able to pay and does not establish the Defendant's indigency as defined in RCW 10.101.010(3)(a) through (c)?

#### **V. STATEMENT OF THE CASE**

The Defendant Brian Hughes' two cases were negotiated and sentenced together. In Walla Walla Superior Court No. 18-1-00023-5, the Defendant pled guilty to possession of methamphetamine. 1CP 14-29.<sup>1</sup> In Walla Walla Superior Court No. 18-1-00111-8, he pled guilty to another count of possessing meth and to Identity Theft in the First Degree. 2CP 18-31.

With the reduction of charges for plea, the Defendant's

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<sup>1</sup> Adopting the Appellant's notation, "1CP" refers to the clerk's papers in Cause No. 18-1-00023-5, and "2CP" refers to the clerk's papers in Cause No. 18-1-00111-8.

standard range was only 6+ to 18 months on the drug charges (RCW 9.94A.517; RCW 9.94A.518) and 15-20 months on the identity theft. 2CP 36. In addition, the prosecutor agreed, albeit “reluctantly,” to recommend a residential DOSA if the Defendant qualified. RP 12; 1CP 20; 2CP 22. In a residential DOSA, there is no jail time. Instead, an offender serves at least 24 months in community custody, of which 3-6 months is in residential (inpatient) treatment. RCW 9.94A.664(1).

It was a favorable negotiation for the Defendant. The evidence supported charges of class B felonies, possessing methamphetamine *with intent to deliver*. 1CP 6-10; 2CP 2; RCW 69.50.401(2)(b). If he had been convicted of these offenses, the Defendant would have faced standard sentencing ranges of 20+ to 60 months confinement. RCW 9.94A.517; RCW 9.94A.518.

Prior to sentencing, the Department of Corrections informed the parties that the Defendant did not qualify for the treatment alternative on the possession counts, because the standard range for each was not “a prison sentence.” RP 9. The Defendant agreed with this assessment. RP 9, ll. 20-22.

[An offender is only eligible for a DOSA if the high end of the standard sentence range is **greater than** one year. RCW

9.94A.660(1)(f). Under the former statute, the standard range for each of the possession counts had been 6+ to 12 months. 1 CP 43; 2CP 36. However, three weeks before sentencing, Laws of 2015, ch. 291, § 9 came into effect, changing the range to 6+ to 18 months, such that the Defendant was in fact eligible on each count for a DOSA. RCW 9.94A.517.]

The Department's recommendation: Defense counsel advised the court that the Department recommended consecutive sentences: six months on the first count, followed by six months on the second count, followed by the residential DOSA on the third count. RP 10. ["Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).]

Defendant's recommendation: The Defendant recommended that the court impose credit-for-time-served sentences on the drug counts, i.e. exceptional sentences downward, and then run all three counts consecutively. RP 10-11. With the incarceration terms on the drug counts effectively completed at the time of imposition, the Defendant could immediately begin to serve a residential DOSA on the remaining count. RP 11.

State's recommendation: The prosecutor did not feel that

there were substantial and compelling reasons to warrant an exceptional sentence. RP 15; RCW 9.94A.535 (exceptional sentence may be imposed if the court finds substantial and compelling reasons justify it). She recommended that the court impose the low end of the standard range on the two drug counts, i.e. 180 days. RP 14-15.

The court accepted the prosecutor's recommendation, imposing low-end, standard-range sentences on the drug counts (i.e. 6 months on each) and a residential DOSA on the identity theft. RP 17-18. The court indicated that the sentences in all three counts were to run concurrently. 1CP 45; 2CP 39, 43-44. The Defendant had 123 days credit for time already served in the first case and 110 days in the second count. RP 10. After taking into consideration credit for time served, there remained 57 days incarceration on the first count and 70 on the second. RP 19.

The defense counsel asked that those days not be converted to community service hours, but simply served out. RP 19. The community corrections officer indicated that she would move the bed [treatment] date until after the Defendant's incarceration was served. RP 22. With credit for time served and earned early release, only a month's confinement remained. The Defendant was sentenced on

July 23 and entered treatment on August 24. 2CP 35, 60.

On the matter of LFOs, defense counsel informed the court:

... because he's going to be in treatment for the next 6 months, he won't be working during that time. I am going to ask your Honor to set his payments at \$20 per month [per cause number] beginning 60 days after he is released from treatment.

If he is able to get a job – and he has worked as a nurse in the past. He's an educated man. He is a former Navy veteran attached to Seal Team II in the early part of the 90's as a medic. He has done a lot of wonderful things. But this addiction is one of those things that has really, really crushed his life.

RP 11-12. In assessing whether the Defendant's substance abuse "continued [ ] despite persistent social/interpersonal problems," the DOSA evaluator reported that the Defendant advised that he "continued use despite legal problems, having lost his job and being homeless at times." 1CP 32. The order of indigency finds that the Defendant "lacks sufficient funds to prosecute [an] appeal." 1CP 57; 2CP 57.

## **VI. ARGUMENT**

### **A. NO RELIEF IS AVAILABLE FOR THE INVITED ERROR.**

The Defendant claims on appeal that the confinement remaining in the lesser counts should have run concurrent with the

treatment sentence in the greater count, because inpatient treatment is a kind of confinement. While correct, the claim is not reviewable, (1) because it results from invited error and (2) because there is no relief which this Court can provide any longer. The jail sentence has been served.

A residential DOSA is a term of 24 months or more of community custody in which a portion of that time (3-6 months) is converted to inpatient treatment. RCW 9.94A.664(1)-(2). The Defendant argues that his inpatient residential treatment is confinement. Brief of Appellant (BOA) at 12. This is correct under RCW 9.94A.030(52) and *In re Bercier*, 178 Wn. App. 148, 313 P.3d 491 (2013).

With concurrent sentences, confinement in one count runs concurrent with confinement in another count. An offender cannot receive inpatient treatment in the jail. This occurs in a clinic setting. Therefore, the concurrent sentences with a res-DOSA can only be accomplished by decreasing the jail time by the treatment period. Where the jail time exceeds the treatment period, the difference will be served in jail. Where the treatment period exceeds or equals the jail time, the offender may simply be released to his bed date.

It would have been appropriate to release the Defendant to a bed date where his treatment would run concurrently with his jail time. It also would have been appropriate to impose the res-DOSA as to all three counts, because the Defendant was eligible following the change in law. However, none of this was raised to the court. In fact, defense counsel actively misled the court as to the proper implementation of the law.

When a party's own action creates the error, under the invited error doctrine, the claim is waived on appeal. *In re Rushton*, 190 Wn. App. 358, 372, 359 P.3d 935 (2015) ("a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal.") Judicial review is precluded even for constitutional claims. *State v. Henderson*, 114 Wn.2d 867, 869, 792 P.2d 514 (1990).

The parties agree that the sentences in these matters should run concurrent. And this is what the judgments reflect. The judgment and sentence in 18-1-00111-8 reads that count 1 is imposed "concurrent" with count 3 – both of which "shall be concurrent with the sentence in Walla Walla County Cause No. 18-1-00023-5." 2CP 39. Likewise the judgment and sentence in 18-1-00023-5 reads that its

sentence “shall be concurrent with the sentence in Walla Walla County Cause No. 18-1-00111-8.” 1CP 45. Therefore, there is no error in the court’s orders.

Instead, the Defendant claims that there is an error in how the parties interpreted and executed the order – holding him in jail an additional 30+ days rather than releasing him to treatment. The Defendant materially contributed to that interpretation, arguing that the only way to obtain immediate release was through an exceptional sentence.

I did some research. There is no case law specifically addressing this.

So a proposal that I have for your Honor so we don’t run afoul of anything is that we sentence Mr. Hughes on both of these methamphetamine charges to a consecutive – not consecutive, but to an exceptional low and give this gentleman credit for the time he has already served.

....

... that credit really only comes into place, God forbid, if he faces a revocation and then that credit will really be applied for any sentencing when he gets resentenced. But he is doing 6 months of treatment.

RP 10-11. In the absence of substantial and compelling justification for an exceptional sentence, defense counsel then recommended to the court that the concurrent sentences be served by having the client

serve out his jail sentences in custody *before* commencing his treatment.

MS. MULHERN: So it looks like there's a combination, your Honor, of between on 23-5, there is 57 days left to serve, with 110 days credit against the 180 days. On the first count on 111-8 that looks like there's 70 days left to serve. So that would be the amount of time he has left in total in the county jail. I think Mr. Montagnino will suggest probably converting some of that to Community Custody -- or Community Service hours?

MR. MONTAGNINO: No. I think probably serving them out --

MS. MULHERN: Okay.

MR. MONTAGNINO: -- are best, unless you want to suggest Community Service, but --

MS. MULHERN: No. I would --

MR. MONTAGNINO: -- it's just one other thing to follow.

RP 19.

Another public defender (Ms. Straube) whispered to the Defendant's attorney Mr. Montagnino that she had a brief on the issue which she could share, but defense counsel did not ask for time to read the brief. RP 22, ll. 11-21. The transcript demonstrates that defense counsel could have delayed implementation of the jail

sentence while he further researched the issue. The prosecutor observed that defense could request the court convert the jail time to community service hours – which could have been served at a later date and perhaps stricken after further legal review. RP 19. The court invited a motion to continue or for “other alternatives” like “partial confinement.” RP 20-21. The Defendant did not act on any of these suggestions. And now, the jail time has been served.

Because the jail time has already been served, there is no remedy available, and the Defendant requests none. As the Defendant notes, an appeal is moot if the court can no longer provide effective relief. BOA at 17 (citing *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983)).

The Defendant asks the Court to take up the issue, although moot, because “Hughes is at risk of not receiving credit for time served if his DOSA is revoked and he is ordered to serve a standard range prison sentence.” BOA at 18. This is not reasonable to believe. In order for the Defendant to be denied credit for time served upon revocation, a series of speculative circumstances must first come to pass. That series of circumstances would necessarily include:

- Hughes violating<sup>2</sup> the conditions of his DOSA;
- The violation/s being of sufficient seriousness to result in either a sanction of incarceration or a full revocation of the DOSA;
- The attorneys and court refusing to recognize the authority of *In re Bercier*, 178 Wn. App. 148, 313 P.3d 491 (2013); and
- The DOC failing to apply the decision in *Bercier*.

Not only are these circumstances highly conjectural, but the last two are practically impossible. *Bercier* is a Walla Walla County case in which the Walla Walla prosecutor's office was a party and the Walla Walla superior court received the mandate. The opinion specifically directs that inpatient treatment shall be credited in the event of a DOSA revocation. The opinion also notes that the department could have circumvented the petition and simply applied RCW 9.94A.030(52), which defines inpatient treatment as confinement. *In re Bercier*, 178 Wn. App. at 150, n.2. It is not reasonable to expect these parties, so advised, would change course and ignore the law under circumstances identical to *Bercier*.

The Defendant argues that despite the mootness of the claim, the issue involves matters of continuing and substantial public interest. BOA at 18 (citing *In re Mattson*, 166 Wn.2d 730, 736, 214

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<sup>2</sup> He has already completed his inpatient treatment.

P.3d 141 (2009)). The fact that the matter has not arisen before demonstrates that this is not a common or “continuing” matter of interest. It involves a highly uncommon fact pattern. And with the change in law, it cannot recur. As the Defendant notes, drug possession charges are often seen together with related crimes. BOA at 19. With the change in law, these possession offenses are now DOSA-eligible.

Nor does this case present a matter of substantial public interest. The Defendant Hughes obtained an excellent outcome. He faced a possible five years in prison on three class B felonies. But he received a mere month in jail while waiting for his bed date, because his attorney recommended it. This does not command public attention.

There is no relief the Court can give the Defendant, and there is no justification to take review in the face of the mootness.

**B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING THE CRIMINAL FILING FEE.**

The Defendant claims that, under Laws of 2018, ch. 269, § 17, the sentencing court could not impose the criminal filing fee. Under revised RCW 36.18.020(2)(h), the presumption is for the court to

impose the filing fee. An adult defendant in a criminal case “shall” be liable for the \$200 criminal filing fee unless the record establishes the defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h). A record that overcomes the presumption would reasonably include a sworn financial declaration. Here the record is that the Defendant is educated, skilled, and employable as a medical professional. At sentencing, he was in custody and therefore not working – a transitory circumstance only. A conversation with a DOSA evaluator in which the Defendant stated that addiction has cost him employment in the past does not establish indigency under the statute.

Appellate courts review a decision on whether to impose LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). On the record in this case, the superior court could tenably have found insufficient record to satisfy the definition of indigency. It was not an abuse of discretion to impose the criminal filing fee.

The Defendant asks this Court to strike this language from the judgments:

[ X ] The defendant shall pay the costs of services to

collect unpaid legal financial obligations. RCW 36.18.190.

1CP 44; 2CP 37. This language has been removed from the most recent judgment and sentence form. WPF CR 84.0400 DOSA. However, RCW 36.18.190 was not amended by Laws of 2018, ch. 269, § 17, and insofar as the court found the Defendant has the ability to pay the \$1500 in LFOs imposed in two cases, it is consistent for the court to have entered this provision.

It bears noting that a defendant may seek to remit both the criminal filing fee and collection costs at any time under RCW 10.01.160(4) with a proper showing of indigency.

Finally, the Defendant asks this Court to strike this language from the judgments:

**... Per RCW 10.82.090, Financial Obligations imposed shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.**

1CP 44; 2CP 37. There is no cause to do so.

RCW 10.82.090 was amended by Laws of 2018, ch. 269, § 17, Under the revised law, financial obligations of a certain type (restitution) shall bear interest from the date of judgment. Other LFOS (non-restitution) do not. Because the court's order references

the statute, there should be no ambiguity about its meaning. There is no error and no cause to amend this language. This standard form language preserves a victim's statutory right to interest.

There is no error as to the LFO portion of the judgments.

### VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: March 27, 2019.

Respectfully submitted:



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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 March 27, 2019, Pasco, WA



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