

66262-7

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NO. 66262-7-1

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

CHRISTINA DRESS AKA CHRISTINA LARCOM,

Respondent,

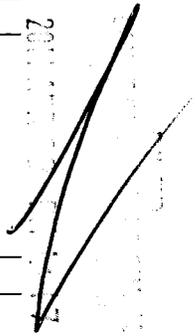
v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable David A. Kurtz, Judge

A handwritten signature in black ink is written over a vertical date stamp that reads "2011 JUN 14 10:11 AM". The signature is slanted and appears to be "David A. Kurtz".

BRIEF OF RESPONDENT

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A. ISSUES IN RESPONSE

In 2006, Christina Dress pled guilty and was sentenced for several offenses. The judgment unambiguously indicates her sentence is to be served concurrently with any other sentence. Subsequently, DOC alerted the sentencing judge that it believed the 2006 sentence should have run consecutively to another sentence. However, DOC recognized it was bound by the judgment and that it had missed the deadline to modify the sentence. Four years later, and just days before Dress' release on the 2006 sentence, DOC chose to treat the judgment as if it imposed consecutive sentences and refused to release Dress from custody. The sentencing judge issued a writ of mandamus requiring DOC to abide by his judgment.

1. By constitution and statute, a judge of the Superior Court may issue a writ of habeas corpus only if the petitioner is in custody in that judge's county. This requirement does not apply to the issuance of any other type of writ, including a writ of mandamus. Did the sentencing judge have both statutory and constitutional jurisdiction to issue a writ of mandamus in this case?

2. In light of DOC's decision on the eve of Dress' release not to obey the 2006 judgment, the only adequate way to obtain her freedom as soon as possible was through a petition for

writ of mandamus to the sentencing judge, who was already familiar with the case and could order her release quickly. Given the delays that would have necessarily resulted from filing a personal restraint petition in an appellate court, did the sentencing court properly conclude that filing a PRP would not have been an adequate substitute for mandamus?

3. Can DOC simply choose not to follow a facially valid and unambiguous judgment issued by a Superior Court judge?

B. STATEMENT OF THE CASE

In April 2006, Ms. Dress pled guilty to burglary, forgery, identity theft, and possession of stolen property. CP 70-78. The Honorable David A. Kurtz imposed a sentence of 84 months in prison, the high end of Dress' standard range. CP 17, 20. The judgment expressly indicates the sentence is to "run concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589." CP 20. The judgment refers to no other matter. CP 20.

On May 10, 2006, Rannie Vickers, a DOC representative from the Washington Corrections Center for Women, wrote a letter to Judge Kurtz and counsel noting the judgment in the 2006 case indicated Dress' sentence was to run concurrently with the

sentence in all other cases. CP 140. Ms. Vickers stated DOC's position that Dress committed her 2006 offense while "under sentence of felony" for a 2002 King County case in which she had received a DOSA, which was later revoked. CP 140. Vickers expressed her view that the sentence in the 2006 case should run consecutively to the DOSA sentence. Her letter asks that – if Judge Kurtz agreed with this interpretation – he should amend the judgment to expressly indicate the sentences were to run consecutively. CP 140. Judge Kurtz did not amend the judgment.

Several months later, on August 11, 2006, Assistant Attorney General Ronda Larson wrote Judge Kurtz and counsel again asking that the judgment be amended to indicate the two sentences would run consecutively. The letter indicates, "Due to what appears to be an oversight, the Court did not run the sentence consecutive to King County Cause No. 02-1-04273-9, which Ms. [Dress] was serving when she committed her crimes." CP 143. Larson conceded DOC was bound by the judgment "even if legally flawed," and that the period for DOC to appeal the legality of the sentence had already expired. CP 143-144 (citing RCW 9.94A.585(7); In re West, 154 Wn.2d 204, 209-210, 110 P.3d 1122 (2005)). But she expressed hope Judge Kurtz would still amend

the judgment. CP 144. Judge Kurtz did not.

Because Dress' sentences were concurrent, her release date was set at October 21, 2010. One week before that date, however, on October 14, 2010, DOC informed Dress that it was running her sentences consecutively. Therefore, she was not eligible for release until at least September 10, 2011. CP 104.

Natalie Tarantino, counsel for Dress in the 2006 case, filed a motion under the criminal cause number asking Judge Kurtz to compel DOC to abide by the 2006 judgment and run the two sentences concurrently. CP 105; RP 4. This prompted Ms. Larson to write a responsive letter noting DOC was not a party to the criminal action, challenging Judge Kurtz's jurisdiction to hear the matter, and challenging the motion on its merits. CP 105-107.

Larson argued that Dress' proper means to any recourse was a personal restraint petition filed in the Court of Appeals, although Larson also argued that Dress' claim could not be considered because more than a year had passed since the judgment was entered and the sentence was "valid on its face." CP 105-106 (citing RCW 10.73.090(1)).

As to the merits of Dress' motion, Larson argued that because Dress had been serving the community custody portion of

the DOSA she received in 2002 when she committed her 2006 crimes, she had been “under sentence of conviction for a felony” at that time and, therefore, RCW 9.94A.589(2)(a) required consecutive sentences. CP 105.

Whereas Larson had conceded in 2006 that Judge Kurtz ran the sentences concurrently and DOC was bound by that decision given its failure to lodge a timely appeal, Larson now took the position that the 2006 judgment “must be read in conjunction with the Sentencing Reform Act.” Larson argued that under RCW 9.94A.589(2)(a), Judge Kurtz should have ordered consecutive sentences, the judgment itself cited generally to RCW 9.94A.589, and therefore Judge Kurtz had actually ordered the sentences to run consecutively. CP 106.

Tarantino filed a Petition for Writ of Mandamus under a separate cause number and properly named DOC as respondent. CP 123-144. DOC filed a response in which it argued (1) Judge Kurtz had no jurisdiction in the matter because Dress was not incarcerated in Snohomish County [CP 7]; (2) the only proper vehicle for review was a personal restraint petition filed in the Court of Appeals, but the time for such a petition had expired [CP 7-8, 11]; and (3) the 2006 judgment “implicitly” incorporated RCW

9.94A.589(2)(a) and thereby imposed consecutive sentences [CP 8-10].

Judge Kurtz heard argument on the petition November 5, 2010. RP 1. At that hearing, Larson's "main argument" was that the Washington Constitution did not provide Judge Kurtz with jurisdiction to grant the writ because Dress was no longer being held in Snohomish County. RP 6-7, 15. Regarding the merits of Dress' claim, Larson again argued (in direct contrast to her position in 2006), that when read in conjunction with the SRA's requirements, the judgment actually required consecutive sentences despite the express statement they were concurrent. RP 7-8.

Judge Kurtz rejected every one of DOC's arguments against the writ. He found that he had jurisdiction because the language relied upon by DOC – requiring actual custody in the county – only applied to writs of habeas corpus. RP 23-25. Judge Kurtz also found that requiring Dress to file a personal restraint petition, or transferring the matter to the Court of Appeals as a personal restraint petition, was not an adequate or practical option because Dress was already beyond her release date and only he could resolve the issue with requisite dispatch. RP 25-26, 37.

Judge Kurtz rejected DOC's new interpretation of the judgment:

With all due respect, I find this blatantly incorrect. The judgment and sentence is pretty clear. It says things are to run concurrent. The Department is essentially trying to argue that the judgment and sentence says something it does not say.

RP 27. He noted even Larson had recognized this to be the case in her letter of August 2006. RP 27.

Judge Kurtz also found DOC had the timeliness argument exactly backwards. It was not Dress who was untimely; it was DOC. RP 32-33. Judge Kurtz questioned whether Dress was in fact "under sentence of felony" when she committed the 2006 offense. RP 27-30. He also raised the possibility that had he run the sentences in the two cases consecutively, he may have imposed a lesser overall sentence in the 2006 matter. RP 31-32. Ultimately, however, Judge Kurtz found that the time for addressing those questions had passed long ago when DOC missed the statutory deadline for modifying Dress' judgment four years earlier. He ruled DOC's current attempt to challenge the 2006 judgment untimely. RP 22-23, 32-36.

Summarizing the situation, Judge Kurtz said:

Ladies and gentleman, this is not a pretty picture. This does not have a good odor to it. Whatever Ms. Dress has done, whether or not in some sense she “deserves” more time in prison, it is deeply troubling that more than four years after sentencing, the Department seeks to effectively change the judgment and sentence that they had a clear avenue to change if they wished to do so. It's more than four years. And that just does not seem right.

RP 37.

Judge Kurtz granted the writ and ordered that Dress be released, at the latest, on December 23, 2010, unless DOC obtained a stay in this Court. RP 38-39. Judge Kurtz recognized this resulted in Dress continuing to sit in custody beyond her release date, but felt he should provide DOC some opportunity to establish the necessity of a stay. RP 38-40.

Not in any particular hurry, DOC waited its full 30 days to file a Notice of Appeal. See Supp. CP ____ (sub no. 18, Notice of Appeal, filed 12/6/10). DOC also filed a Motion for Accelerated Stay of the Writ, arguing the appeal involved debatable issues and that the failure to stay Dress' release would result in DOC suffering harm. See Motion for Accelerated Stay of Superior Court Order for Release of Dress By December 23, 2010 (filed 12/7/10). The

motion was denied. See Ruling of Commissioner Verellen Denying Stay (filed 12/17/10).

The State now appeals issuance of the writ.

C. ARGUMENT

1. THE SNOHOMISH COUNTY SUPERIOR COURT HAD JURISDICTION TO ISSUE THE WRIT OF MANDAMUS.

When filing the petition for writ of mandamus for Ms. Dress, defense counsel cited to the Superior Court's statutory authority to issue the writ. See CP 123-125. The State does not discuss the statutory provisions in its brief. Instead, the State focuses exclusively on the constitutional authority found in article IV, § 6 of the Washington Constitution, which Judge Kurtz also considered. See RP 23-25. Both provisions are relevant.

RCW 2.08.010, addressing the Superior Court's "original jurisdiction," provides:

Said courts and their judges shall have the power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. . . ."¹

The constitutional provision, entitled "Jurisdiction of the Superior

¹ The procedures applicable to a statutory writ are found in RCW chapter 7.16. See generally RCW 7.16.150 through RCW

Courts,” provides:

Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties

Article IV, § 6. There is a slight difference in punctuation. Article IV, § 6 includes a comma after the term “writs of habeas corpus”; the statute does not.

In arguing Judge Kurtz was without jurisdiction to issue a writ in this case under the constitutional provision, the State relies on a corollary to the “last antecedent rule.” The last antecedent rule states that “qualifying or modifying words or phrases refer to the last antecedent” in a list. State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010) (quoting City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006)). The corollary states “the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.” Id.

Notably, under this rule and its corollary, Judge Kurtz had *statutory* authority to grant a writ because RCW 2.08.010 does not include a comma between the last antecedent and the qualifying

7.16.280.

phrase. Thus, even assuming for the sake of argument that Judge Kurtz lacked jurisdiction to issue a writ under article IV, § 6, he had authority to issue a writ under the statute's broader language. See Clark County Public Utility Dist. v. Wilkinson, 139 Wn.2d 840, 845, 991 P.2d 1161 (2000) (recognizing that constitutional writ of certiorari is available under narrower circumstances than statutory writ of certiorari).

Ultimately, however, this Court need not delve into the jurisdictional consequences of this single comma because Judge Kurtz properly determined he also had jurisdiction under article IV, § 6.

The corollary to the last antecedent rule does not apply if its application would result in an absurd or nonsensical interpretation. Bunker, 169 Wn.2d at 578. The constitutional provision's qualifying phrase "on petition by or on behalf of any person in actual custody in their respective counties" must be limited to the last antecedent – "writs of habeas corpus." Otherwise, Superior Courts could only issue writs of mandamus, quo warranto, review, certiorari, and prohibition "on petition by or on behalf of any person in actual custody." In other words, Superior Courts would be entirely without constitutional authority to issue a writ of mandamus, or any other

writ, unless the matter was filed by or for a prisoner.

This clearly is not the case because historically writs of mandamus have been issued in civil cases having nothing to do with prisoners. See, e.g., State ex rel. Stephens v. Odell, 61 Wn.2d 476, 477-480, 378 P.2d 932 (1963) (ordering county board to process petition for incorporation); Fuller v. Ostruske, 48 Wn.2d 802, 809, 296 P.2d 996 (1956) (compelling registration of stock transfer); Thompson v. Wilson, 142 Wn. App. 803, 815-816, 175 P.3d 1149 (2008) (ordering coroner to meet with victim's mother); Euster v. City of Spokane, 118 Wn. App. 383, 402-422, 76 P.3d 741 (2003) (directing City of Spokane to honor ordinance regarding parking meter revenue), review denied, 151 Wn.2d 1027 (2004); Hern v. Looney, 90 Wn. App. 519, 525-530, 959 P.2d 1116 (1998) (ordering transfer of stock).

Indeed, the Supreme Court has repeatedly expressed its clear preference in civil cases that application for writ of mandamus be made to the Superior Court rather than the Supreme Court since that court also has jurisdiction to hear these matters and is the better forum for most issues. See State ex rel. Malmo v. Case, 25 Wn.2d 118, 122-124, 169 P.2d 623 (1946) (to compel marking of timber for cutting); State ex rel. Goodwin v. Savidge, 133 Wash. 532, 234 P. 1

(1925) (to compel issuance of mining lease); State ex rel. Ottesen v. Clausen, 124 Wash. 389, 214 P. 635 (1923) (to compel payment on contract). None of these cases involved individuals in custody in the county in which the action was filed.

Similarly, Superior Courts have issued writs of certiorari under the authority of article IV, § 6 in civil cases that obviously did not involve a prisoner. See Saldin Securities, Inc. v. Snohomish County, 134 Wn.2d 288, 949 P.2d 370 (1998) (litigation over environmental impact statements; superior court has inherent constitutional authority to review lower court determination through writ of certiorari); Bridle Trails Community Club v. City of Bellevue, 45 Wn. App. 248, 252-254, 724 P.2d 1110 (1986) (building permit dispute; outside of statutory authority to grant writ of certiorari, superior courts always possess jurisdiction to issue writ under article IV, § 6).

Under the State's interpretation of article IV, § 6, not even a writ of quo warranto – used to determine an individual's entitlement to public office – could be issued unless a petition was filed “by or on behalf of any person in actual custody” See generally State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 893-900, 969 P.2d 64 (1998) (discussing nature of writ); BLACK'S LAW DICTIONARY 1264 (7th ed. 1999). This Court should reject such

an absurd interpretation, which would relegate the authority to issue such writs practically useless. See Duke v. Johnson, 123 Wash. 43, 50, 211 P. 710 (1923) (if proposed interpretation of Constitution “would produce results unfitted to the condition to which the provision was manifestly addressed, then it would seem that the other interpretation should be accepted”).

The Supreme Court of Washington has never interpreted article IV, § 6 in the manner DOC proposes. Rather, that court has only applied article IV, § 6’s final clause to petitions for writs of habeas corpus. See Conway v. Cranor, 37 Wn.2d 303, 304, 223 P.2d 452 (under final clause, only superior court for county where defendant serving his sentence – as opposed to county where defendant convicted and sentenced – has original jurisdiction to hear petition for writ of habeas corpus), cert. denied, 340 U.S. 915 (1951); see also Toliver v. Olson, 109 Wn.2d 607, 609, 746 P.2d 809 (1987) (“If a habeas corpus petition is filed . . . in the superior court of the county in which the petitioner is incarcerated, that court may itself handle and determine the matter.”).²

² The location restriction for writs of habeas corpus makes sense because, under Washington law, the writ requires that the person under restraint be brought before the issuing court. See RCW 7.36.050. In theory, the Superior Court of the county in

The only contrary authority cited by the State is Division Three's opinion in State v. Epler, 93 Wn. App. 520, 969 P.2d 498 (1999). See Brief of Appellant, at 10-11. Epler moved the district court to dismiss a DUI charge against him. When the motion was denied, he successfully petitioned the Superior Court for a writ of certiorari. Epler, 93 Wn. App. at 522. In addressing the propriety of that writ, Division Three indicated:

Writs are two varieties: the constitutional common law writ and the statutory writ. *Bridle Trails Community Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986). The Washington Constitution empowers the superior court to issue a writ of review on a petition by a person in actual custody, and other appellate power as prescribed by statute. Wash. Const. art. IV, § 6 . Mr. Epler was not in custody. The writ at issue, therefore, is statutory.

Id. at 523.

Division Three provided no citation to authority for its conclusion that because Epler was not in custody, his only remedy was statutory. Ironically, the only opinion the Epler court cites is Bridle Trails, a case emphasizing the constitutional authority to grant a writ in a case where the petitioning party was not in custody. See

which the prisoner is being held can comply with this directive with the least cost and delay. There is no similar requirement for a writ of mandamus, which can be issued based on an affidavit. See RCW 7.16.170.

Bridle Trails, 45 Wn. App. at 252-254. This very brief discussion in Epler is not supported by any authority, undermined by the very authority it cites, and contrary to article IV, § 6.

Under both the constitutional and statutory provisions, Judge Kurtz properly found he had jurisdiction to enter the writ.

2. A PERSONAL RESTRAINT PETITION WAS NOT AN ADEQUATE SUBSTITUTE FOR THE WRIT OF MANDAMUS.

Citing the general rule that a petition for mandamus will not be granted “if there is a plain, speedy, and adequate remedy at law,” the State argues that a personal restraint petition provided such a remedy.³ See Brief of Appellant, at 11 (quoting Council of County & City Employees v. Hahn, 151 Wn.2d 163, 167, 86 P.3d 774 (2004)).

Notably, “[w]hat constitutes a plain, speedy, and adequate remedy depends on the facts of the case and rests within the sound discretion of the court in which the writ is sought.” City of Olympia v. Thurston Cty. Bd. Of Com’rs., 131 Wn. App. 85, 100, 125 P.3d 997 (2005), review denied, 158 Wn.2d 1003 (2006). DOC has not demonstrated an abuse of discretion.

³ It appears that DOC has abandoned its argument, made below, that the time for a PRP has passed. See CP 11.

The State does not appear to argue that a PRP is always a substitute for a petition for writ of mandamus. Nor could it. Any such rule would improperly divest the superior court of its constitutional jurisdiction. See Toliver, 109 Wn.2d at 610 (PRP provisions provide for relief in appellate courts and do not replace superior courts' constitutional authority to issue writs under article IV, § 6).

A PRP was not a plain, speedy, or adequate remedy for Dress. It was DOC that provided Dress with only one week's notice that she would not be released on October 21, 2010 despite the fact she had been in custody on the matter since 2006. CP 104. Under these circumstances, not choosing the quickest method to obtain Dress' release meant more time in prison beyond the sentence Judge Kurtz had imposed.

Litigation of a PRP is not a quick process. A PRP must be prepared in its proper form, including a statement of finances for an indigent petitioner and notarized oath. RAP 16.7. There is no right to the assistance of counsel in preparing a PRP. See RCW 10.73.150(3). After the petition is filed, the responding party has 60 days to file a response. The petitioner then has 30 additional days to file a reply. RAP 16.9-16.10. After the time has expired for a reply, the Chief Judge makes an initial determination on the merits of the

petition. If the petition is not frivolous, it is then referred to a panel of judges or transferred to the Superior Court for a decision or reference hearing. RAP 16.11-16.12. If there is a reference hearing, the matter then returns to the Court of Appeals for decision. RAP 16.13.

DOC points to the possibility of accelerated review. Brief of Appellant, at 12. This Court may accelerate review under RAP 18.12. But even under an accelerated schedule, this Court could not act as quickly as Judge Kurtz, who was already familiar with the case and the facts necessary to grant the writ. No need to have the matter screened by a chief judge, no need to refer the matter to a three judge panel, and no need to send the matter to another court for a reference hearing. As Judge Kurtz recognized, filing a PRP was not a suitable way to obtain a quick decision under the circumstances. RP 25-26, 37. DOC has not demonstrated that a PRP was a plain, speedy, or adequate substitute to deal with the urgent situation it created.

One last point on this issue. That DOC took its full 30 days to file its Notice of Appeal following issuance of the writ of mandamus demonstrates it was in no hurry to have the matter resolved in this Court. See Supp. CP ____ (sub no. 18, Notice of Appeal, filed

12/6/10); see also Ruling of Commissioner Verellen Denying Stay, at 1 (noting DOC had not explained the delay in filing its notice). DOC knew that under the terms of Judge Kurtz's order, Dress continued to sit in prison during this period despite the fact Judge Kurtz had ruled in her favor. It seems DOC was intent on using to its advantage delays inherent in the appellate process, further underscoring the fact a PRP would have been a poor substitute for quick resolution of the matter by Judge Kurtz.

3. MANDAMUS WAS APPROPRIATE BECAUSE DOC HAD A LEGAL DUTY TO RELEASE DRESS IN ACCORDANCE WITH THE 2006 JUDGMENT AND SENTENCE.

"Mandamus is an appropriate action to compel a state official to comply with law when the claim is clear and there is a duty to act." In re Dyer, 143 Wn.2d 384, 398, 20 P.3d 907 (2001). The Department of Corrections has a legal duty to release an offender upon expiration of her sentence or, earlier, based on earned early release time. See RCW 9.94A.728(1).

Under the terms of Dress' 2006 judgment and sentence, the maximum period DOC could hold her was 84 months, minus any earned early release time, because her sentence was to be served "concurrently to any other felony cause not referred to in this

Judgment” and the judgment referred to no other. CP 20. That period ended on October 21, 2010. CP 104.

DOC (and Ms. Larson specifically) recognized this in 2006. In her letter to Judge Kurtz, she acknowledged he had not run the 2006 sentence consecutively to the revoked DOSA sentence in the 2002 case. CP 143. DOC also recognized it was bound to follow the judgment even if it believed the judgment to be legally flawed because the time to modify the sentence had already passed. CP 143-144.

This concession was correct. DOC is not authorized to modify a judgment and sentence it believes to be incorrect. State v. Broadaway, 133 Wn.2d 118, 135, 942 P.2d 363 (1997). Rather, it is duty bound to follow the sentence imposed unless and until the court modifies the sentence. In re Davis, 67 Wn. App. 1, 4-10, 834 P.2d 92 (1992); see also In re Chapman, 105 Wn.2d 211, 216, 713 P.2d 106 (1986) (parole board cannot unilaterally run sentences consecutively when court has ordered concurrent sentences).

RCW 9.94A.585 provides:

The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the

department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

RCW 9.94A.585(7) (emphasis added). The rules of appellate procedure contain a similar opportunity and time limitation. See RAP 16.18(a)-(b). DOC correctly recognized that the time for seeking modification of the 2006 judgment had already lapsed. CP 144.

After Ms. Larson's letter of August 2006, DOC made no further attempt to seek modification of the 2006 judgment. As previously discussed, not until October 2010 – just as Dress was completing her sentence – did DOC claim for the first time the judgment was ambiguous and “used its discretion to interpret the ambiguity in a way that is most consistent with what the law requires, which is consecutiveness.” Brief of Appellant, at 6.

Judge Kurtz saw DOC's conduct for what it was – a tardy and unlawful attempt to modify the plain language of the judgment. Not only was DOC without authority to unilaterally modify the 2006 judgment, as defense counsel pointed out below, permitting DOC to do so would violate Dress' double jeopardy rights. See CP 116-117. Double jeopardy protections prevent sentence modification where the defendant has a reasonable expectation of finality. And there is

a reasonable expectation of finality where, as here, the sentence has been substantially or fully served, significant time has passed since the judgment was entered, there was no pending appeal, and the sentence did not involve fraud. See State v. Hardesty, 129 Wn.2d 303, 311-316, 915 P.2d 1080 (1996).

Despite its concessions in 2006, DOC now makes a number of contrary arguments.

First, DOC argues it cannot be compelled to enforce a judgment that is inconsistent with the law. Brief of Appellant, at 13-14. The 2006 judgment, however, is not inconsistent with the law. It is facially valid, fully enforceable, and final given DOC's failure to lodge a timely challenge. Whatever arguments it could have once made regarding the legal necessity of consecutive sentences, it is far too late now. Moreover, the State's new position that the judgment is ambiguous fails for lack of any factual support. The judgment expressly indicates a concurrent sentence. CP 20.

Second, in a related argument, the State argues that mandamus cannot be used to compel DOC to perform a discretionary act. It defines the discretionary act as the interpretation of an ambiguous judgment. Brief of Appellant, at 14-16. Again – as DOC recognized in 2006 – there is nothing ambiguous about the

2006 judgment. The judgment clearly imposed a sentence that was to run concurrently with any other sentence, and DOC was duty bound to abide by its terms.

Third, the State argues that Dress is not entitled to equitable relief. Brief of Appellant, at 16-19. Judge Kurtz's issuance of the writ did not turn on equitable principles. It is based in law. However, one of the State's arguments on this subject warrants a response. The State contends that Dress "does not have clean hands" because she failed to tell Judge Kurtz he should run the 2006 sentence and revoked 2002 DOSA sentence concurrently. Brief of Appellant, at 17-19.

Dress is not the villain here. The transcript and documents from the 2006 plea and sentencing hearing reveal that she and her counsel were up front with the prosecution and the court on all matters. Dress admitted to the charged conduct. CP 76. The defense disclosed Dress' entire criminal history and conceded her offender score was "astronomical" and, in Dress' own words "embarrassing." CP 71, 83-84, 97. Notably, Judge Kurtz also was informed that the DOSA in the 2002 case had been revoked. CP 93. The matter of consecutive versus concurrent sentencing simply did not come up. See CP 92-103.

Yet, the State accuses Dress of unclean hands because “[c]learly Dress knew that she was still serving the DOSA sentence for the 2002 King County conviction when she committed her 2006 crime” yet she “failed to uphold her responsibility to the court” to bring this to Judge Kurtz’s attention. Brief of Appellant, at 18-19; see also Brief of Appellant, at 2 (“she profited from her lack of full disclosure at sentencing and from her silence”).

There is no reason to believe that Dress knew – or even knew to contemplate – the requirements of Washington law regarding the relationship between her revoked DOSA and her new offenses. She is not an attorney. Even after expressly considering the issue four years later, Judge Kurtz is not convinced that he was required to run the two sentences consecutively. See RP 27-30. Dress had no responsibility to even think about this issue, much less say anything about it at sentencing.

DOC also accuses defense counsel of unclean hands. DOC notes that it sent two letters to Judge Kurtz and counsel in 2006, “[b]ut nobody took the time to respond; Dress (and her defense attorney) continued to remain silent, perhaps believing she would profit from inaction.” Brief of Appellant, at 1; see also Brief of Appellant, at 6 (similar accusation). If DOC wanted something other

than silence, it could have noted a timely motion before Judge Kurtz. If DOC wanted something other than silence, it could have timely filed a petition for modification of the sentence under either RCW 9.94A.585(7) or RAP 16.18. It did neither. Unfairly blaming Dress and her attorney does not change this.

Finally, the State challenges Judge Kurtz's decision "that the DOC does not have the legal authority to correct a sentence structure on the eve of an inmate's release." Brief of Appellant, at 20 (citing RP 17). DOC appears to take aim at the following comment:

What I have not heard in the response from the Department of Corrections is why in 2006 they didn't inform Ms. Dress they were going to interpret this their own way, why in 2007, '08, '09, early 2010? All of these years, they waited till just about the eve of her release to change their minds, and I don't think under the statute that allows them to address the judgment and sentence is incorrect or any of the case law that that's okay.

RP 17.

Ms. Tarantino, not Judge Kurtz, made this comment. RP 17. But Judge Kurtz also was understandably upset that DOC decided not to follow the 2006 judgment on the eve of Dress' release. What DOC now calls "correcting a sentence structure," Judge Kurtz accurately called ignoring the judgment and interpreting it to say something it does not. RP 27, 37.

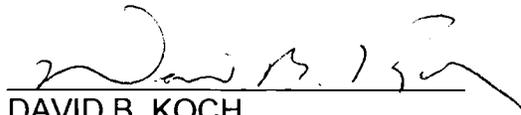
D. CONCLUSION

The Snohomish County Superior Court had jurisdiction to issue a Writ of Mandamus requiring DOC to abide by the judgment in Dress' case. Judge Kurtz properly found the writ warranted and necessary. This Court should affirm.

DATED this 29th day of April, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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Attorneys for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

CHRISTINA DRESS,

Respondent,

vs.

WASHINGTON STATE
DEPARTMENT OF CORRECTIONS,

Appellant.

COA NO. 66262-7-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONDA LARSON
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812 123RD AVENUE NE
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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL, 2011.

x Patrick Mayovsky

2011 APR 29 PM 4:18
FILED
CLERK OF COURT
SUPERIOR COURT
SEATTLE, WA