NO. 101053-2

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TYLOR S. DONNELLY,
Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 81680-2-I
Kitsap County Superior Court No. 16-1-05024-4

ANSWER TO PETITION FOR REVIEW

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(360) 337-	Stephen A. Brandli P. O. Box 850 Friday Harbor, Wa 98250-0850 Email: steve@brandlilaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 27, 2022, Port Orchard, WA _____ **Original e-filed at the Supreme Court; Copy as at left.** **Office ID #91103** kcpa@kitsap.gov

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington.

II. COURT OF APPEALS DECISION

The State requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Donnelly*, No. 81680-2-I (Mar. 28, 2022).

III. COUNTERSTATEMENT OF THE ISSUES

1. Donnelly has failed to show that any consideration set forth in in RAP 13.4(b) justifies review.

2. Donnelly's proposed interpretation of RCW 9.94A.680(2), is contrary to established precedent, the plain language of the statute, and the rules of statutory construction.

3. Donnelly's claim of invited error takes the State's argument out of context, and his contention that the State did not seek to enforce the judgment is absurd.

4. The Court of Appeals correctly concluded that the trial court should have considered the State's motion for

revision of its letter decision.

5. The Court of Appeals correctly held Donnelly to the element of equitable relief from sentence that required him to show that he did not contribute to the situation

IV. STATEMENT OF THE CASE

Donnelly was charged in San Juan County Superior Court with the second-degree assault of David Boyle and the fourth-degree assault of Paula Cherce. CP 1.

Donnelly entered a plea agreement, admitting a third-degree assault of Boyle. CP 15, 26. On the parties' joint recommendation the trial court sentenced Donnelly to three months, two months convertible to work crew and one to 240 hours community service, with all terms to be completed by February 28, 2018. CP 18-19, 36-37.

Donnelly presented for work crew on October 3, 2017, roughly six months after sentence was imposed. CP 38; 1CP[1]

[1] "1CP" refers to the clerk's papers from *Donnelly I*.

54. He last appeared for work crew on October 20. 1CP 55. Donnelly went home to Canada, and was refused reentry on October 23, 2017. 1CP 56-57. He failed to appear for court on November 3, 2017. 1CP 57.

The State contacted the Border Patrol and determined that police could apply for a parole waiver to allow Donnelly to reenter to finish his sentence. 1CP 65. The Sheriff applied for the waiver and on November 14, 2017, the DHS authorized Donnelly to enter on December 5, 2017, to complete his sentence. 1CP 65.

On November 27, 2017, Donnelly filed a motion to amend the warrant of commitment to award him credit for time served while in Canada. 1CP 33, 43. The trial court denied the motion, but granted Donnelly credit for nine days between when Donnelly was denied entry and when the Sheriff "released" him from work release. 1CP 126, 129-30. Donnelly

appealed. *Donnelly I*, No. 77816-1-I.[2]

Donnelly appealed, and the Court of Appeals summarized its holding:

> He appeals from the trial court's denial of his motion to amend the warrant of commitment to award him credit for days during which he was unable to report for work crew. Donnelly's absence from work crew was due to his own mistake in failing to address an issue of which he had notice. As he does not meet the requirements to merit application of the equitable doctrine of credit for time spent at liberty, we affirm.

State v. Donnelly, 8 Wn. App. 2d 1061 ("*Donnelly I*," CP 78), *review denied*, 193 Wn.2d 1039 (2019) (CP 76).

After the mandate, the State filed a motion to require Donnelly to appear and complete his sentence. CP 60. At a hearing the prosecutor presented noted:

> There is -- there's no scenario where the sheriff going to apply for a parole permit and so delaying this until January, I don't even understand why effort was made to infer that this would be happening. He was told two years ago it would not be applied for again. The sheriff's office did apply for one.

[2] That opinion may be found at CP 62.

> Much more is known about that process now than was known then and it's significant, and there's a variety of reasons it won't be applied for, but I spoke with the sheriff on Friday and it's not even an option at this point.

RP (11/12/19) 120. The State further noted that Donnelly could have served his sentence when the first parole permit was obtained, but he did not, essentially "saying well, you know, it's not convenient now for me because I have Christmas plans." RP (11/12/19) 122. Part of the Sheriff's reticence was that the application would require "the sheriff to state to the Feds there's an extraordinary public benefit to this, there is great humanitary [sic] reasons to bring this person, who otherwise is not allowed here, into the country." RP (11/12/19) 125.

Donnelly then filed a motion to modify his sentence to order the Sheriff to electronically monitor him during his work crew sentence. CP 100. Alternatively, he sought to complete community service in Canada. CP 100. The State responded that the court lacked authority to modify Donnelly's sentence,

and that there was no basis for allowing community custody to occur outside of Washington. CP 103, 109.

At the hearing, the State noted that Donnelly's actions in 2017 had put the Sheriff in an awkward position with Homeland Security:

> At this stage, you know, we're in a repeat of a cycle that we were in back in 2017. In 2017, Mr. Donnelly said he wants to come in to serve this -- his sentence. He was told what the sentence was.
>
> And the sequence here's kind of interesting to follow, because the application to the border patrol or Homeland Security occurred in mid November, and then there were motions made to the judge to change the sentence, and the judge issued a ruling on December 4th.
>
> And Mr. Donnelly -- and the judge got his ruling out knowing that December 5th was the date fixed by the Department of Homeland Security for the date Mr. Donnelly must cross the border into the United States to serve the sentence.
>
> So prior to him crossing the border, he knew full well what the sentence was. Judge Eaton had issued his rule the day before, and so he knew he had to come across and serve that sentence.
>
> THE COURT,· But there was also a stay, wasn't there?
>
> MR. GAYLORD: Later.
>
> THE COURT: Oh, that was later. Okay.

> MR. GAYLORD: After that. So he crossed the border here and then applied for the stay.
>
> THE COURT: Okay.
>
> MR. GAYLORD: And so there you see that -- and then went home, and without finishing the -- the reason why he came here in the first place.
>
> And so all of that would have to be any application would have made -- all that would have to be explained to the Department of Homeland Security, and that's -- the sheriff doesn't want to do that. That's why he's not.
>
> I don't know all the reasons why he doesn't want to do it. He hasn't placed them in writing. But he said he's not going to apply and he's exercising his discretion. And there's a sound basis for that.

CP 188-89.

Donnelly then withdrew his motion to amend the sentence, CP 211-12, and in January 2020, filed a motion to amend the warrant of commitment, renewing the argument that was rejected on appeal, that equity required the court to consider his sentence as served. CP 121-23. The State responded that the relief requested was foreclosed by this Court's mandate, and that the court lacked authority to modify

Donnelly's sentence. CP 133-46.

The State noted that Donnelly had been properly terminated from work crew in 2017, and as such his sentence was automatically converted back to one of total confinement under RCW 9.94A.731. CP 138. In reply, Donnelly asserted that he was *not* seeking to modify his sentence, but was seeking equitable relief. CP 242.

At the hearing, the State pointed argued that the Sheriff had originally obtained the waiver after representation that Donnelly would enter to finish his sentence. RP (2/28/20) 194. Instead, he sought to be relieved of the obligation of serving that sentence. RP (2/28/20) 195. After the motion was denied, he sought a stay pending appeal, and again returned to Canada. RP (2/28/20) 195. He did this without any inquiry if he would be able to return if he lost his appeal. RP (2/28/20) 196.

At the court's request, RP (2/28/20) 218-20, both parties filed supplemental memoranda regarding RCW 9.94A.6333. CP 248, 252.

On April 20, 2020, the court issued a letter decision, noting the Court's ruling in *Donnelly I*, but concluded that a different situation was presented because the Sheriff was refusing to apply for a parole waiver. CP 341. The court granted Donnelly credit for time served at liberty for the remaining 44 days of his sentence. CP 343.

The State moved for revision of the letter decision on May 8. CP 260. The State argued that the decision letter was based on a number of incorrect assumptions. CP 261. In his attached declaration, the Sheriff explained that not willing to apply for a second waiver after Donnelly had violated the terms of the first one. The Sheriff was willing to apply for a second waiver if Donnelly's sentence was converted to all jail time. CP 261-71.

The court amended the warrant of commitment, relieving him of any responsibility for serving any further time or community service. CP 300. The order further rejected the State's motion for revision but indicated it would hear a motion

for reconsideration if the State filed one. CP 301; *see also* RP (5/11/20) 275-76. The State duly filed a motion for reconsideration, which was denied. CP 307, 330.

The State appealed. The Court of Appeals reversed. On cross-appeal, it affirmed the denial of Donnelly's motion for writ of mandamus.[3]

V. ARGUMENT

A. DONNELLY HAS FAILED TO ADDRESS ANY OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(B). NONE OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(B) SUPPORT ACCEPTANCE OF REVIEW.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published

[3] Donnelly does not appear to challenge the latter ruling.

> decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because Donnelly has failed to address any of these considerations. Moreover, he issues in this case are fairly unique, and Donnelly fails to show any conflict between the decision below and existing precedent. Nor does he argue any legal constitutional question.

B. DONNELLY'S PROPOSED INTERPRETATION OF RCW 9.94A.680(2), IS CONTRARY TO ESTABLISHED PRECEDENT, THE PLAIN LANGUAGE OF THE STATUTE, AND THE RULES OF STATUTORY CONSTRUCTION.

Donnelly first argues that the Court of Appeals erred because the time limit in RCW 9.94A.680(2) was not a condition of his sentence. He is incorrect.

1. The conclusion of the Court of Appeals does not conflict with, and indeed, is consistent with prior precedent.

In *State v. Zabroski*, 56 Wn. App. 263, 783 P.2d 127 (1989), The Court of Appeals specifically held "that community service is a condition of sentence, and reject[ed] Zabroski's argument that it is a condition of community supervision." *Zabroski*, 56 Wn. App. at 266. The court recently reaffirmed that reading of the statute. *State v. Gates*, 13 Wn. App. 2d 1089, 2020 WL 3058229, *5 (2020)[4] ("Community restitution 'is a "sentence condition" that the trial court may order as a substitute for total confinement,' not a form of community custody or supervision." (*quoting Zabroski*, 56 Wn. App. at 265-66)).

2. RCW 9.94A.680 is not ambiguous and even if it were, under rules of statutory construction, the 24-month time limit would apply both to the period of community custody and to any period ordered by the court.

RCW 9.9A.680(2) provides in part that "Community

[4] Unpublished. *See* GR 14.1(a).

restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months." Donnelly argues that the 24-month period only applies to "a time period specified by the court" and not the preceding clause regarding the period of community supervision. However, Donnelly fails to show that the statute is ambiguous.

The court's objective when interpreting a statute is to determine the Legislature's intent. *State v. Marjama*, 14 Wash. App. 2d 803, 806, 473 P.3d 1246 (2020). If the meaning of a statute is plain on its face, the interpreting court "give[s] effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation marks omitted).

Donnelly argues that the provision is ambiguous because other provisions in the subsection[5] govern the court's

[5] Donnelly refers to both the "section" and the "subsection" in this argument, Petition, at 13, but he does not address language in any subsection other than RCW 9.94A.680(2) so the State assumes he meant to say "subsection" in both references.

discretion, not the time under which a defendant must complete their obligations. He fails to explain, however, how that dichotomy renders the statute ambiguous. There is nothing ambiguous about putting a maximum time for performance on an action that may be completed within alternatively determined time frames.

Moreover, the language of the statute does not support Donnelly's underlying premise that "[a]ll the other terms in the second subsection are clearly instructions to the sentencing court, providing discretion to the court with limitations on that discretion." Petition, at 13. He fails to explain how the requirement in the subsection that "[c]ommunity restitution hours must be completed within the period of community supervision" is in any way an instruction to the sentencing court.

Donnelly also claims that the statute is ambiguous because the Legislature likely did not contemplate a situation created by a stay of the confinement portion of the sentence.

This contention fails for several reasons. First, legislative intent is considered only *after* a statute has been determined to be ambiguous.

Secondly, Donnelly offers no basis for this conclusion. And, to the contrary, shorter sentences are often stayed pending appeal, so as not to render a successful appeal nugatory. *See*, *e.g.*, *State v. Greenfield*, ___ Wn. App. 2d ___, 508 P.3d 1029 (2022); *State v. E.C.V.*, 21 Wn. App. 2d 1042 (2022); *City of Seattle v. Sharma*, 15 Wn. App. 2d 1049 (2020); *State v. McGrew*, 13 Wn. App. 2d 1132 (2020); *State v. Wright*, 184 Wn. App. 1024 (2014); *City of Olympia v. Hulet*, 180 Wn. App. 1026 (2014); *State v. Reisman*, 172 Wn. App. 1024 (2012); *State v. Barge*, 167 Wn. App. 1002 (2012); [6] *see also* RCW 9.95.062(1) (explicitly providing discretion to stay sentence pending appeal); RAP 7.2(f) (same).

Finally, as the court noted in its opinion, the community

[6] The cases cited after *Greenfield* are unpublished. *See* GR 14.1(a).

restitution portion of the sentence was not in fact stayed in this case. Opinion, at 10 n.6. Donnelly fails to show that the statute was ambiguous.

Finally, even were the statute ambiguous, Donnelly's reading is contrary to rules of statutory construction:

> The last antecedent rule provides that, unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. *Boeing Co. v. Department of Licensing,* 103 Wn.2d 581, 587, 693 P.2d 104 (1985). However, 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. *Judson v. Associated Meats & Seafoods,* 32 Wn. App. 794, 801, 651 P.2d 222 (1982); 2A Norman J. Singer, *Statutory Construction* § 47.33 (5th ed. 1992).

In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 781–82, 903 P.2d 443 (1995). Here, the comma preceding "which shall not exceed twenty-four months" clearly indicates that the time limit applies both to any period specified by the court or the period of community supervision. Because this rule of statutory construction resolves any ambiguity, the rule of lenity does not come into play. *State v. Manuel*, 14 Wash. App. 2d 455, 461,

471 P.3d 265 (2020).

C. DONNELLY'S CLAIM OF INVITED ERROR TAKES THE STATE'S ARGUMENT OUT OF CONTEXT, AND HIS CONTENTION THAT THE STATE DID NOT SEEK TO ENFORCE THE JUDGMENT IS ABSURD.

Donnelly next argues that the opinion of this Court was incorrect because the SRA's violation procedures in RCW 9.94A.6333 were not followed because "the State argued to the trial court that RCW 9.94A.6333 does not apply and that therefore the trial court lacked the authority to modify Mr. Donnelly's community restitution requirements under that statute." Petition, at 16. This claim takes the State's argument out of context. Moreover his further contention that the State has failed to show he was not in compliance with his sentence is laughable.

First it must be noted that Donnelly quotes the trial court out of context, arguing that the State opposed conversion of community restitution under RCW 9.94A.6333. But looking at

the entire passage Donnelly cites shows that the statement was made in the context of having Donnelly serve his community custody in Canada:

> At oral argument, I inquired and requested additional briefing on whether the Court has authority under RCW 9.94A.6333(2)(d) to modify community restitution obligations of the Judgment and Sentence based on Mr. Donnelly's non-willful failure to comply with the original sentence. *The Court's obvious intention in that regard was to consider any vehicle through which the SRA would provide the Court authority to modify the sentence to allow Mr. Donnelly to serve the community service portion of his sentence in Canada*.

CP 358 (emphasis supplied). Given that there is no authority or practicable means for supervision in another country, the State's opposition in this context hardly establishes the invited error that Donnelly appears to be implying.

Moreover, assuming that the statute applied, the State complied with it in spirit if not in citation. It filed a motion to enforce sentence, Donnelly was given ample opportunity to respond, and did so at length. Moreover, the record is inarguably clear that Donnelly has failed to comply with any

portion of the community restitution part of his sentence. Indeed throughout the torturous post-sentencing proceedings in this case, Donnelly has maintained that he has not completed his sentence and has repeatedly argued that that fact somehow excuses his compliance. Donnelly fails to demonstrate an issue worthy of review by this Court.

D. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT SHOULD HAVE CONSIDERED THE STATE'S MOTION FOR REVISION OF ITS LETTER DECISION.

Donnelly next argues that the Court of Appeals erred in finding the Superior Court abused its discretion in refusing to consider the Sheriff's affidavit. The Court held:

> Despite the significance of this information, the superior court ruled that, pursuant to CrR 7.8, it could not consider the declaration. However, the superior court's reasoning fails to recognize that the nature of the proceeding before it was an action to enforce a judgment and sentence. Indeed, on October 24, 2019, the State filed a motion wherein it sought an order requiring Donnelly to appear and complete the remainder of the sentence. Donnelly's motion to amend the warrant of

> commitment, in which he sought equitable relief from serving the remainder of the sentence, was filed in response to the State's motion to enforce the sentence. As already explained, the superior court was vested with the statutory authority to enforce its judgment and sentence. The most important information for the court to acquire was what, exactly, the sheriff was willing to do and what was the sheriff's reasoning behind his decision. The superior court abused its discretion by choosing to ignore this information at a stage of the proceeding at which it still had time and statutory authority to enforce its judgment and sentence.

Opinion, at 11. This conclusion is well-reasoned, and Donnelly offers no authority to the contrary.

Moreover even if Donnelly had cited any authority in support of his argument that the analysis of the Court of Appeals were incorrect, he fails to show that the result in this unpublished opinion was wrong. CP 365. The trial court also erred because CrR 7.8 should not have been applied to a motion for revision of a letter decision filed before the entry of a formal order.

The criminal court rules supersede conflicting procedural rules and statutes. CrR 1.1. Otherwise, the criminal procedures

are "interpreted and supplemented" by other appropriate rules, law, and practice. CrR 1.1. No criminal rule is in conflict with the civil rule describing motions for reconsideration. Therefore, CR 59 applies in criminal cases and provides the procedure and authority for the superior court to reconsider its own rulings. *See State v. Batsell*, 198 Wn. App. 1066 (2017) (unpublished, *see* GR 14.1(a)) (observing there was some dispute as to whether CR 59 applied to a criminal case, but "because the State filed a timely motion for reconsideration, it was entitled to rely on the rule."); *see also* CrR 8.2 (as amended effective Feb. 1, 2021) (specifically clarifying that CR 59 applies to criminal matters).

This procedure was applied in *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859 (2015). There the defendant made a motion for self-representation. *Englund*, 186 Wn. App. at 459. When his motion was denied, he made a motion for reconsideration. The superior court denied the motion, relying on CR 59. *Id*. When the defendant appealed, the court of

appeals applied the standard of review found in a civil case, which is abuse of discretion. Id. (*citing Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997)).

The application of the civil rule for reconsideration is appropriate in criminal cases, as recognized by the Supreme Court's recent adoption of the amendments to CrR 8.2 to clarify the point. Motions for reconsideration are a cost effective procedure that permits a court to correct its own errors that it catches and recognizes without further ado.

The court's error in believing it lacked authority to reconsider placed a significant burden on the State. A trial court has considerable discretion in deciding motions to reconsider. *Englund*, 186 Wn. App. at 459. A court sitting in review has less. By refusing to reconsider the motion on the basis of evidence that was truly the defendant's to bring, the court altered the standard of review to unfairly prejudice the State. This Court should hold the superior court erred in finding that it lacked authority to consider the State's motion and should

remand the matter for the superior court to decide the motion on its merits.

Moreover, there was not even an order in place when the State filed its motion, merely a letter decision. *See State v. Prado*, 144 Wn. App. 227, 250, 181 P.3d 901, 913 (2008) (Sentencing court's letter decision was not an order, and thus, State was not required to file a CrR 7.8 motion to vacate with a supporting affidavit, and instead could file a motion to reconsider); *In re Tahat*, 182 Wn. App. 655, 672, 334 P.3d 1131 (2014) ("Washington case law has long considered letter rulings as preliminary or tentative decisions subject to change before a final decision that begins the time for an appeal or motion for reconsideration."). The trial court was thus completely within its authority to entertain the State's motion for revision on the merits.

Turning to those merits, the State presented evidence that the Sheriff would in fact entertain applying for parole waiver *if* Donnelly were to serve the sentence entirely in custody. As

discussed above, and as the trial court essentially acknowledged, Donnelly failed to meet the requirements of the doctrine of credit for time served at liberty. The trial court primarily relied on a footnote in *Donnelly I*, which noted that the trial court could take action if the Sheriff failed to. CP 341 (citing *Donnelly I*, at 8 n.2 (CP 85)). By refusing to consider the merits of the State's motion for revision, the trial court granted Donnelly a windfall.

Further, the circumstances under which the Sheriff was willing to apply for a parole waiver already exist by operation of law. This Court so noted in *Donnelly I*, at 10 (CP 87) (*quoting* RCW 9.94A.731(2) ("'An offender in a county jail ordered to serve all or part of a term of less than one year in ... work crew ... who violates the rules of ... work crew ... may be transferred to the appropriate county detention facility without further court order.'").

The criminal rules are to "be construed to secure simplicity in procedure, fairness in administration, effective

justice, and the elimination of unjustifiable expense and delay." CrR 1.2. Here, Donnelly committed an unprovoked assault resulting in serious injury. In an effort to obtain a just resolution, the State reduced the charges and accommodated Donnelly's needs to allow him to serve his sentence. It was rewarded with repeated attempts by Donnelly to further reduce his sentence. Donnelly failed to meet his burden to show entitlement to relief under the doctrine of credit for time served at liberty. Absolving him from serving his sentence based on a misperception of the facts and the refusal to acknowledge that misperception based on inapplicable procedural rules was an abuse of discretion. The Court of Appeals properly reversed the trial court's ruling.

E. THE COURT OF APPEALS CORRECTLY HELD DONNELLY TO THE ELEMENT OF EQUITABLE RELIEF FROM SENTENCE THAT REQUIRED HIM TO SHOW THAT HE DID NOT CONTRIBUTE TO THE SITUATION.

Finally, Donnelly argues that the conclusion of the Court

of Appeals that he failed to show he had not contributed to his predicament presented him with "a Hobson's Choice between his right to appeal and his right to serve his sentence." Petition at 21. The Court of Appeals correctly addressed this issue:

> Finally, the superior court reasoned that Donnelly could not be disadvantaged as a result of pursuing a meritless appeal:
>
> > The second choice to return home was related to his choice to pursue his legal right of appeal. It would not be appropriate for the Court to "punish" Mr. Donnelly for appealing or to conclude that his choice to appeal is equivalent to contributing to the problem at issue.
>
> The superior court was wrong to so reason. Litigants often find themselves in worse positions after filing an unsuccessful appeal. For example, in civil cases, appellants have been required, following an unsuccessful appeal, to either pay the opposing party's attorney fees or fulfill their obligations pursuant to a supersedeas bond. *See*, *e.g.*, *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 214-15, 165 P.3d 1271 (2007) (holding that respondent was entitled to an award of attorney fees on appeal from appellant); *Holmquist v. King County*, 192 Wn. App. 551, 558, 368 P.3d 234 (2016) ("Washington courts follow the established rule that once an appeal has failed, the supersedeas obligor's 'liability for damages ... is *absolute*.'"

(alteration in original) (*quoting John Hancock Mut. Life Ins. Co. v. Hurley*, 151 F.2d 751, 755 (1st Cir. 1945))).

Likewise, in criminal cases, defendants have, upon remand from an appeal, been resentenced with higher offender scores as a result of an intervening conviction. *See*, *e.g.*, *State v. Collicott*, 118 Wn.2d 649, 668-69, 827 P.2d 263 (1992). Additionally, nonindigent criminal defendants have been required to pay court costs for an unsuccessful appeal. *See*, *e.g.*, *State v. Gonzales*, 198 Wn. App. 151, 155-56, 392 P.3d 1158 (2017). Cases are legion in which a party—in either a civil or criminal matter—is worse off for pursuing a meritless appeal. There is nothing unjust or unusual about this outcome.

Donnelly decided to depart the United States after filing what proved to be a meritless appeal. Thus, he alone contributed to his inability to reenter the United States, after remand, to serve the remainder of the sentence. It is of no consequence that he now finds himself in a worse position after filing the unsuccessful appeal. Most importantly, the State in no way contributed to Donnelly's decision to act in this way.

Opinion, at 19-21.[7]

Donnelly's argues that the reasoning of the Court of

[7] Donnelly's speculation that the Sheriff originally declined to apply for another parole waiver solely to "punish" him, Petition at 21, is not supported by any finding of the trial court. There is no basis for this Court on discretionary review to engage in

Appeals is contrary to several old cases: *State v. Proctor*, 68 Wn.2d 817, 415 P.2d 634 (1966), and *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980). Neither is relevant here.

In *Proctor*, the Court held that an appeal following a contested trial from an order deferring sentence conditioned upon serving time in jail or the payment of a fine would be limited to a review of claimed trial error. *Proctor*, 68 Wn.2d at 819. *Price* is even more removed: the choice between the right to speedy trial and the right to present a defense.[8]

Neither of these cases involved a claim for equitable relief filed long after the defendant's judgment became final. Yet equitable relief from a sentence requires a defendant to show that he did contribute to his predicament. *In re Roach*, 150 Wn.2d 29, 37, 74 P.3d 134 (2003). Despite his protestations to the contrary, Donnelly failed to meet this element for relief. The Court of Appeals did not err in so

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such fact finding, and this allegation should be disregarded.

[8] The Court actually affirmed Price's conviction and sentence.

holding.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Donnelly's petition for review.

VII. CERTIFICATION

This document contains 4995 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED July 27, 2022.

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State v. Price, 94 Wn.2d at 820.

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