SUPREME COURT NO. 96503-0

NO. 76573-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR CHURCH,

Petitioner.

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

The Honorable Susan J. Craighead, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Taylor Church asks this Court to grant review of the court of appeals' published decision in State v. Church, No. 76573-6-I, --- Wn.App. ---, 428 P.3d 150, filed October 8, 2018 (Appendix A).

B. ISSUES PRESENTED FOR REVIEW

RCW 9.94A.664(4) limits sentences at a Drug Offender Sentencing Alternative (DOSA) treatment termination hearing to one half the midpoint of the standard range. This case presents the question of whether section .664 applies to an offender who did not report for treatment.

In addition, the King County Prosecutor's boilerplate language provides notice that failure to comply with DOSA treatment "may" result in a sentence "up to" one half the midpoint of the standard range. Supp. CP ___ (sub. no. 15, Presentence Statement of King County Prosecuting Attorney (09/16/16)), at 17. This case presents the question of whether the agreement bound the State to the maximum sentence listed in the notice, and whether it breached the plea agreement by requesting a sentence in excess of that notice.

1. Is this Court's review warranted under RAP 13.4(b)(4) to determine whether offenders who fail to report for DOSA treatment may be sentenced under RCW 9.94A.660?

2. Is this Court's review warranted under RAP 13.4(b)(4) to determine whether the King County Prosecutor's Office boilerplate language listing a maximum sentence is binding on the State?

3. Is this Court's review warranted under RAP 13.4(b)(3) to determine whether the court of appeals violated principles of State and federal due process under article I, section 3 and the Fourteenth Amendment by declining to apply the rule of lenity to the interpretation of an ambiguous statute?

3. Is this Court's review warranted under RAP 13.4(b)(3) to determine whether due process was violated where the prosecutor breached the plea agreement?

C. STATEMENT OF THE CASE

1. Guilty Plea & DOSA Sentence

On September 15, 2016, appellant Taylor Church pled guilty to residential burglary (count I) and solicitation in Violation of the Uniform Controlled Substances Act (count II). CP 9, 40.

As part of the plea agreement, the prosecution agreed to recommend a residential DOSA on count I. CP 50; Supp. CP __ (sub. no. 15, Presentence Statement of King County Prosecuting Attorney (09/16/16), at 17. Part of the prosecution's sentence recommendation for count I, attached

to the plea agreement and plea statement, provides:

> **NON-COMPLIANCE** with the requirements of the DOSA while in community custody will result in imposition of sanctions, which may include imposition of a term of total confinement of *up to* one-half the midpoint of the standard range.

Supp. CP __ (sub. no. 15, supra), at 17 (italics added).

On or about September 30, 2016,[1] the trial court imposed the contemplated Residential DOSA on count I (residential burglary 16-1-03211-3 SEA) based on an Offender Score of "4" and a standard range of 15-20 months. CP 58, 60; 1RP 9-10.[2] The Court also issued an order to report to ABHS, a treatment center, on 10/5/16. CP 67.

In the Judgment and Sentence the specifics of the DOSA sentence imposed provide:

> **RESIDENTIAL TREAMENT-BASED SPECIAL DRUG OFFENDER SENTENCING ALTERNATIVE (DOSA)** ... The Court finds the defendant eligible ... and concluded that a DOSA sentence is appropriate, waives imposition of sentence within the standard range and sentences the defendant on Count(s) 1 as follows:
>
> The defendant shall serve 24 months in community custody under the supervision of the DOC, on the condition that the defendant enters and remains in residential chemical dependency treatment certified under RCW CH. 70.96 for ___ (between 3 and 6) months. The DOC shall make chemical dependency assessment and treatment services

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[1] The transcript lists the date as September 29, 2016, however, the relevant documents were signed and filed on September 30, 2016. Compare RP 1 with CP 61, 67.

[2] Verbatim Transcripts of Proceedings are referred to in this petition as follows: 1RP (9/29/16 & 2/24/2017), 2RP (3/13/17).

available during the term of community custody, within available resources.

Pending placement in a residential chemical dependency treatment, defendant is ordered to attend a DOC day reporting center and follow all applicable rules. The defendant shall report to DOC to begin the DOC day reporting program within 24 hours of release.

. . .

NON-COMPLIANCE. RCW 9.94A.664(4): At the progress hearing or treatment termination hearing, the court may modify the conditions of community custody, authorize termination of community custody status on expiration of the community custody term, or impose a term of total confinement equal to one-half the midpoint of the standard range, along with a term of community custody.

CP 60 (emphasis added).

In a different section on the same page, the Judgment and Sentence also provides:

ADDITIONAL CONFINEMENT: The court may order the defendant to serve a term of total confinement within the standard range at any time during the period of community custody if the defendant violate the conditions of sentence or if the defendant is failing to make satisfactory progress in treatment.

CP 60 (emphasis added).

2. DOSA Treatment Termination Hearings

At a hearing on February 10, 2017, Church agreed to two DOSA compliance violations, including failure to report to treatment and failure to maintain contact with her Department of Corrections (DOC) officer. CP 86; 2RP 1. Church joined the State's request to revoke her previously

ordered Residential DOSA. CP 86; 2RP 1. However, the parties disputed the appropriate resulting sentence and the hearing was continued. CP 86.

On March 13, 2017, the court held another hearing to address the appropriate sentence resulting from the revocation of Church's Residential DOSA. CP 101; 2RP 1-27. The State calculated the standard range as 15-20 months and recommended a mid-range sentence of 16 months of incarceration. 2RP 24. As set forth in the March 13th defense memorandum, Church's counsel argued that when revoking her Residential DOSA, the court was limited by statute to imposing a term of confinement equal to one-half the midpoint of the standard range sentence, which would result in a sentence of 8.75 months.[3] CP 86-90; 2RP 78.

The prosecution responded by claiming that because Church never entered treatment, she should not benefit from the statutory language authorizing imposition of a sentence not exceeding half the midpoint of the standard range when a Residential DOSA is revoked. 2RP 16-17. The prosecution argued that as a matter of policy, the court should adopt the State's position to avoid creating a "windfall" to defendants who fail to enter treatment. 2RP 17. The State further argued the purpose of the statute

[3] The standard range is 15-20 months. The mid-point is 17.5 months. One-half the mid-point is 8.75 months.

was to reward defendants for the work and effort they had put into treatment. 2RP 17-18.

Church's counsel responded by noting that RCW 9.94A.660 is a general DOSA statute, whereas RCW 9.94A.664 is specific to a Residential DOSA. 2RP 3. Counsel argued that under rules of statutory construction, the more specific statute, RCW 9.94A.664, controls, and that any ambiguity in the relevant statutes should be interpreted in Church's favor under the rule of lenity. 2RP 4. Counsel urged the court not to impose more than half the mid-point of the standard range. 2RP 7. Counsel pointed out that to rule otherwise was highly problematic given the language in Church's Judgment and Sentence, standard language signed by every superior court judge in the county, that strongly suggested termination of a Residential DOSA would result in a sentence of no more than half the mid-point of the standard range. 2RP 6-7.

When confronted with the language in the judgment and sentence, the trial court stated, "It does say that. ... There's no doubt about it." 2RP 8. The court then considered the impact of its ruling on other cases in the jurisdiction as follows:

> ... this is a very intriguing argument, and ... the thing is that I have to keep in mind is that I'm hearing these cases for the other 52 judges. And I think they are all under the impression -- I don't want to speak to every single one of them, but I think the vast majority are under the impression

> that you get your standard range -- sentence within the standard range if you don't complete the residential DOSA.
>
> So I have the Rule of Lenity, but I also have the rule of collegiality in my head at the same time. I just want you to be -- I want to be completely honest with you about that, [defense counsel]."

2RP 8.

Before ruling, the trial court made a record of the DOSA hearings process in King County. 2RP 21-22. The court noted King County courts hold an initial hearing to determine if the person made it to the treatment facility. 2RP 22. A second hearing is set for approximately 2 weeks prior the date the person is scheduled to be released from treatment. 2RP 22. A third hearing, that the court referred to as a "regular review hearing," is then set "to see how they're doing in treatment ... ." 2RP 22. The trial court noted, "none of this is really set forth in the statute," but after learning from the experiences of drug court, the court had adopted this system of DOSA hearings in order to conserve resources. 2RP 22.

The court noted that because the King County court system had adopted its own set of hearings, rather than following the sequence of hearings as laid out in the statute, "it does lead to some confusion about what's a progress hearing and what's a termination hearing ... ." 2RP 22. The trial court also noted that the DOC also intervenes at times to allege a

violation and recommend termination from the DOSA program, "which sounds a little bit like a termination of treatment hearing." 2RP 22-23.

After highlighting the King County DOSA hearings process, the trial court determined it was "not going to try to characterize what type of hearing this is because I think it could get very confusing as we apply it to other defendants." 2RP 23. The court then determined that with respect to Church, because she "didn't go to treatment at all" it was "a very clear violation of [her] judgment and sentence" as the court had "ordered her to go to residential treatment." 2RP 23. The trial court reasoned that because there was a "violation" of the judgment and sentence, RCW 9.94A.660(7)(c) applied because it was the only relevant statute to use the word "violation." 2RP 23. Subsection .660 suggested that when there is a "violation" the court should "revert to the standard-range sentence." 2RP 23.

The court concluded .660(7)(c) applied, revoked Church's DOSA, calculated her standard range as 15-20 months on the residential burglary, and sentenced her to the low end of the standard range, at 15 months. 2RP 23-25; CP 102.

Despite ruling in the State's favor, the trial court noted it had the following concerns with the current DOSA hearings process:

> THE COURT: But I want to make clear that I'm not making a decision for anybody else. It's these unique circumstances.
>
> And I hope that you [Ms. Church] and Mr. Adair [defense counsel] will decide to appeal because it[']s really important for other people -- for the court of appeals to sort this out. Okay?
>
> And I'm particularly concerned because of the way the language and the judgment and sentence reads, and I think that I -- this Court could easily be accused of misleading people out of how this reads, and I'll certainly be bringing that to my colleagues' attention."

2RP 24.

3. Appellate Arguments & Decision

In keeping with the trial court's suggestion, Church timely appealed the sentence imposed after revocation of her Residential DOSA. CP 106.

On appeal, Church argued that the hearings terminating her DOSA treatment was in fact a treatment "termination hearing" under the meaning of RCW 9.94A.664(4)(c). Br. App. at 12. As a result, the maximum sentence the court was authorized to impose was one half the midpoint of the standard range. Br. App. at 12. Even if the court's alternative interpretation was reasonable, the rule of lenity must be applied in favor of a criminal defendant. Br. App. at 13 (citing State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008); State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)). Moreover, given the language in the plea agreement, notifying her that the maximum sentence imposed would be one half the midpoint of

the standard range, the State violated the plea agreement by recommending a higher sentence. Br. App. at 14-15, 16.

The State reasoned the court was authorized under section .660, the statute was unambiguous, and the prosecutor did not breach the plea agreement because the language in the plea did not apply where Church failed to report for her DOSA. Br. Resp. at 6, 9, 18

In a published opinion, Division One held section .664(4)(c) did not apply to an offender who failed to report for treatment, declined to apply the rule of lenity, and held the State had not violated the plea agreement. Church, 428 P.2d at 152. The court reasoned section .660 provided broad authority to sentence an offender who violated the terms of a sentence or failed to make satisfactory treatment. Id. at 152-53. The provisions of section .664, limiting a sentence to one half the midpoint of the standard range, provided a process by which the treatment provider was required to send the court a progress report within 30 days of the offender reporting for treatment, and the court in response must schedule a "termination hearing." Id. at 153. Where Church did not report, and the progress report was not sent, the hearing was not a "termination hearing" under the meaning of the statute, even if it was a hearing that terminated treatment. Id. Thus, the court was authorized to sentence her under the broader section .660. Id.

The court further reasoned the "plain language" of the statute was "unambiguous," and so declined to apply the rule of lenity. Id. at 154.

The court further noted that although the plea agreement "provided notice that sanctions will result for noncompliance.. [and] identifies an example of one sanction a court may impose," it was not a "promise" by the State to refrain from seeking a higher sanction. Id. at 155.

Church timely petitions this Court for review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER A HEARING TERMINATING TREATMENT IS IN FACT A TREATMENT "TERMINATION HEARING" UNDER RCW 9.94A.664(4), AND WHETHER A PROSECUTOR VIOLATES THE PLEA AGREEMENT BY RECOMMENDING A SENTENCING IN EXCESS OF THE PURPORTEDLY MAXIMUM SENTENCE PROVIDED IN THE AGREEMENT'S NOTICE SECTION.

1. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

A court's sentencing authority at a hearing terminating treatment under a DOSA presents a question of substantial public interest.

As discussed above, the court of appeals' published decision finds RCW 9.94A.664(4) did not apply to Church because she did not report for treatment. Id. at 152. In reviewing the statute providing authority to impose sanctions based on RCW 9.94A.664(4)(c), the court interpreted the statute as requiring preconditions that must be satisfied. Id. at 152-53. The court

explained there is a process by which treatment providers, within 30 days of the patient's "arrival" to the program, must provide the court with a treatment plan. Id. at 153. (citing RCW 9.94A.664(3)(a)). "'Upon receipt'" of that plan, the court schedules a "'termination hearing.'" Id. (quoting RCW 9.94A.664(3)(b)). Essentially the court found that where a patient had never arrived at the treatment program, the hearing terminating the DOSA was not in fact a treatment "termination hearing" under the terms of the statute, and was in fact a sentencing violation hearing at which the treatment happened to be terminated.

While the Court of Appeals adopted one possible interpretation of the statute, it is by no means the only reasonable interpretation. It is equally possible to interpret the statute to mean that once a DOSA is imposed, any hearing that in fact terminated treatment is a "termination hearing" under section .664(4). And further that at any such "termination hearing" the maximum possible sentence is one half the midpoint of the standard range.

This case has the potential to define whether offenders who fail to report for a DOSA may be sanctioned under the broad authority of section .660 or whether they must be sanctioned under the more limited authority .664. As a result, it has the potential to impact a large number of offenders within the State, and presents a substantial question of public interest.

The related question – whether a prosecutor breaches a plea agreement by recommending a sanction in excess of .664's authority – also presents a question of substantial public interest. This is particularly true where the plea agreements in King County provide boilerplate language that appears to notify defendants that the maximum sentence they can receive for a failure to comply with their DOSA sentence is one half the midpoint of the standard range.

This Court should accept review under RAP 13.4(b)(4).

2. This case presents a significant question of State and federal constitutional law under RAP 13.4(b)(3).

This case involves the breach of a prosecutor's plea agreement and the rule of lenity, both of which present significant questions of due process implicating State and federal constitutional law.

As conceded by the Court of Appeals, a prosecutor's plea agreement "'is a contract with constitutional implications.'" Id. at 154 (citing State v. Townsend, 2 Wn. App. 2d 434, 438, 409 P.3d 1094 (2018); State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997)). In addition, the purpose of the "rule of lenity" is to "ensure[] fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." U.S. v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). The rule of lenity is closely related to constitutional due process rights and the

"fair warning" requirement, as articulated by Justice Holmes. "[W]hat Justice HOLMES spoke of as "fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 265 (quoting McBoyle v. U.S., 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931)). "'The ... principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Id. at 265 (quoting Bouie v. City of Columbia, 378 U.S. 347, 351, 84 S. Ct. 1697, 1701, 12 L. Ed. 2d 894 (1964) (quoting U.S. v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 811-812, 98 L. Ed. 989 (1954))).

> [A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, ... due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope ... .

Lanier, 520 U.S. at 266 (emphasis added) (citations omitted); also U.S. CONST., AMEND. XIV; WASH. CONST., ART. I, SEC. 3.

This case presents the significant constitutional issue of whether principles of due process permit the application of the court of appeals' construction of the ambiguous and potentially conflicting sentencing provisions of section .660 and .664. It also presents the significant issue of whether the boilerplate notice in the King County Prosecutor's Office

constitutes a binding promise by the State not to seek sanctions above the purportedly maximum sentence as noted in the agreement. This Court should accept review under RAP 13.4(b)(3).

E. CONCLUSION

For the aforementioned reasons, Church respectfully asks this Court to grant review under RAP 13.4(b)(3) and (4).

DATED this 7th day of November, 2018.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. TAYLOR CHURCH, Appellant.	)	No. 76573-6-I PUBLISHED OPINION FILED: October 8, 2018

VERELLEN, J. — A court may impose sanctions when the recipient of a residential drug offender sentencing alternative (DOSA) fails to comply with the terms of her judgment and sentence. RCW 9.94A.664(4) allows imposition of total confinement equal to one-half the midpoint of the standard range of the underlying sentence. Because the provisions of RCW 9.94A.664(4) are inapplicable to an offender who fails to report to residential treatment, they do not apply to Taylor Church.

Church also argues the State breached the plea agreement by recommending a standard range sentence after she failed to report to treatment. But she misconstrues the terms of the plea agreement.

Therefore, we affirm.

FACTS

On September 15, 2016, Taylor Church pleaded guilty to first degree residential burglary and solicitation to possess heroin. The trial court calculated an offender score of 4, which carries a standard range sentence of 15 to 20 months. In exchange for Church's guilty plea, the State agreed to recommend a residential DOSA. On September 29, 2016, the court accepted the State's recommendation and sentenced Church to three to six months of addiction treatment in a residential facility followed by two years of community custody.

Church failed to report to treatment. At a hearing on December 23, 2016, she admitted violating her sentence. The State requested revocation of Church's DOSA, but the court declined to do so and again ordered Church to report to a residential treatment facility. By February 10, 2017, Church still had not reported to treatment and again stipulated to violating her sentence. At a March 13, 2017, revocation hearing, the State recommended a 16-month sentence within the standard range, relying on RCW 9.94A.660(7)(c). Church argued that RCW 9.94A.664(4)(c) limited the court to one-half the midpoint of the standard range, or 8.75 months of total confinement. Specifically, Church contended the rule of lenity must apply to resolve an irreconcilable conflict between sections .660 and .664. The court revoked Church's DOSA for willfully failing to report to treatment as ordered and sentenced her to 15 months' incarceration pursuant to RCW 9.94A.660(7)(c).

Church appeals.

ANALYSIS

"When a trial court exceeds its sentencing authority under the [Sentencing Reform Act of 1981, chapter 9.94A RCW], it commits reversible error."[1] Determining whether a trial court exceeds its authority under the Sentencing Reform Act is an issue of law, which the court reviews de novo.[2]

Issues of statutory interpretation are also legal questions subject to de novo review.[3] When engaging in statutory interpretation, a court's purpose is "'to determine and give effect to the intent of the legislature.'"[4] Legislative intent is derived, when possible, "solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole."[5]

RCW 9.94A.660 governs both prison-based and residential chemical dependency treatment-based DOSAs. If an offender meets the requirements in RCW 9.94A.660(1), then the court waives the standard range sentence and "impose[s] a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664."[6] RCW 9.94A.660(7)(a) includes broad provisions for

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[1] State v. Murray, 118 Wn. App. 518, 522, 77 P.3d 1188 (2003).

[2] State v. Button, 184 Wn. App. 442, 446, 339 P.3d 182 (2014).

[3] State v. Evans, 177 Wn.2d 186, 191, 298 P.3d 724 (2013).

[4] Id. at 192 (quoting State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)).

[5] Id.

[6] RCW 9.94A.660(3).

sanctions applicable "at any time" to "any offender sentenced under this section" if they violate the conditions of their sentence or fail to make satisfactory progress in treatment. Specifically, RCW 9.94A.660(7)(c) provides:

> The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

RCW 9.94A.664 sets out specific provisions for residential DOSAs. There is no period of total confinement. The residential DOSA offender is subject to community custody for the greater of 24 months or one-half the midpoint of the standard range "conditioned upon the offender entering and remaining in residential chemical dependency treatment for . . . between three and six months."[7] RCW 9.94A.664(4)(c) allows sanctions at a "progress hearing" or a "treatment termination hearing," including "a term of total confinement equal to one-half the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701."[8]

The narrow issue here is whether Church qualifies for the more lenient sanction allowed under RCW 9.94A.664(4)(c).

RCW 9.94A.664(3)(b) requires the court to schedule both a "progress hearing" and a "treatment termination hearing." The former must be held "during

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[7] RCW 9.94A.664(1).

[8] RCW 9.94A.664(4)(c). RCW 9.94A.701(4) in turn provides that if an offender is given a DOSA sentence, "the court shall impose community custody as provided in RCW 9.94A.660."

the period of residential chemical dependency treatment," and the latter must be held "three months before the expiration of the term of community custody."[9] The offender's treatment provider must write and send a treatment plan to the court "within thirty days of the offender's *arrival* to the residential chemical dependency treatment program."[10] "Upon receipt of the plan" from the treatment provider, "the court shall schedule a progress hearing during the period of residential chemical dependency treatment, and schedule a treatment termination hearing."[11]

The court's authority to impose sanctions based on RCW 9.94A.664(4)(c) requires satisfaction of the section's preconditions. These include the condition that the offender report to the facility for residential treatment.[12] Because Church never reported for treatment, she could not be evaluated, the treatment provider could not develop a treatment plan, and the court could not schedule a progress or termination hearing.[13] Therefore, Church's failure to report to treatment made the sanctions provision of RCW 9.94A.664(4)(c) inapplicable to her.

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[9] RCW 9.94A.664(3)(b).

[10] RCW 9.94A.664(3)(a) (emphasis added).

[11] RCW 9.94A.664(3)(b).

[12] RCW 9.94A.664(1), (3)(a).

[13] The trial court explained that, in King County, several hearings are typically used to monitor the progress of residential DOSA offenders, not just a single progress and a single termination hearing. For example, King County superior courts often conduct an early review hearing to determine if the offender has reported for treatment and subsequent review hearings to monitor progress. Because of the statutory timing requirements, these review hearings are not necessarily the "progress hearing" or "treatment termination hearing" contemplated by the statute. In any event, the King County variations do not alter how we construe the statute.

Furthermore, the purpose of the DOSA statutes is "to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community."[14] The same interests are at issue when the trial court decides the sanctions for noncompliance. Church's desired reading of RCW 9.94A.664(4) would undermine these interests by creating a disincentive to comply with the terms of a residential DOSA. Accepting Church's reading of the statutes, offenders would be tempted to agree to a residential DOSA and then fail to report in order to reduce a standard range sentence to half the midpoint of the standard range. This would undermine the DOSA statutes' purpose.

Because the plain language in RCW 9.94A.664 is unambiguous and sufficient to resolve this issue, we do not need to consider the broader question of the interplay between RCW 9.94A.660(7)(c), allowing incarceration for the standard range, and RCW 9.94A.664(4)(c), allowing incarceration for one-half the midpoint of the standard range when it is applicable.[15] That question would be best addressed on specific facts squarely presenting it.[16]

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[14] State v. Grayson, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005).

[15] See Evans, 177 Wn.2d at 192 ("Plain language that is not ambiguous does not require construction.").

[16] We note the State's observation at oral argument that the two statutes might be harmonized as allowing the trial court the option of selecting which of the two total confinement sanctions best meets the interests of the offender and the community upon revocation of a residential DOSA. This observation appears to fit with the DOSA statutes' purpose as stated in Grayson, 154 Wn.2d at 343.

For the first time on appeal, Church argues the State breached the plea agreement when it recommended a standard range sentence after she failed to report to treatment.[17]

When a plea agreement is unambiguous, as it is here, the court reviews the agreement de novo.[18]

"A plea agreement is a contract with constitutional implications."[19] The agreement is evaluated under basic contract principles.[20] The agreement binds the State and the defendant.[21] Because of a plea agreement's constitutional implications, "due process 'requires a prosecutor to adhere to the terms of the agreement.'"[22] The State is bound by the Constitution and the plea agreement's terms to recommend its promised sentence.[23]

At its most basic, Church's plea agreement bound the State to recommend a residential DOSA in exchange for her pleading guilty to residential burglary and

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[17] The breach of a plea agreement may be raised for the first time on appeal as a manifest constitutional error. But to be considered "manifest," the facts necessary to review the claimed error must be in the appellate record. State v. Xaviar, 117 Wn. App. 196, 199, 69 P.3d 901 (2003); State v. Williams, 103 Wn. App. 231, 234, 11 P.3d 878 (2000).

[18] State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650, cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017).

[19] State v. Townsend, 2 Wn. App. 2d 434, 438, 409 P.3d 1094 (2018); see State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997).

[20] State v. McInally, 125 Wn. App. 854, 867, 106 P.3d 794 (2005).

[21] Sledge, 133 Wn.2d at 839 n.6.

[22] State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015) (quoting id. at 839).

[23] Id.

solicitation to possess heroin. The State made that recommendation at sentencing. Church's contention is based on the State's conduct after she failed to comply with the terms of her sentence.

The contested provisions of the plea agreement are in the State's residential DOSA recommendation form: "NONCOMPLIANCE with the requirements of the DOSA sentence while in community custody *will* result in imposition of sanctions, which *may* include a term of total confinement of up to one-half the midpoint of the standard range."[24]

Church's argument presumes that the State breached a promise to recommend total confinement up to one-half the midpoint of the standard range. But the State made no such promise. "'While the government must be held to the promises it made, it will not be bound to those it did not make.'"[25]

The "noncompliance" section of the plea agreement merely provides notice that sanctions will result for noncompliance. It then identifies an example of one sanction a court may impose. Church provides no authority that such a statement of one possible sanction is the same as a promise by the State that it will forgo recommending another available sanction. To the contrary, an equivocal

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[24] Clerk's Papers at 39 (boldface omitted, emphasis added).

[25] WAYNE R. LEFAVE, JEROLD H. ISRAEL, NANCY J. KING, AND ORIN S. KERR, CRIMINAL PROCEDURE § 21.2(d) n.173 (4th ed. 2015) (quoting United States v. Fentress, 792 F.2d 461 (4th Cir. 1986)).

statement about which sanction might be imposed in the future is, in this context, no promise at all.[26]

Because the court did not err by declining to rely on RCW 9.94A.664(4) and the State did not breach the plea agreement, we affirm.

Verellen, J.

WE CONCUR:

Andrus, J.

Becker, J.

[26] See Washington Educ. Ass'n v. Washington Dep't of Ret. Sys., 181 Wn.2d 212, 225-27, 332 P.3d 428 (2014) (concluding that no binding promise was made when communications are "equivocal" and "too qualified"); accord United States v. Battle, 467 F.2d 569, 570 (5th Cir. 1972) (information relayed by prosecutor to defendant in plea bargaining "in equivocal terms such as 'could' and 'perhaps'" are not promises); United States v. Nuckols, 606 F.2d 566, 568 (5th Cir. 1979) (prosecutor "venturing a guess" as to length of sentence the appellant "could expect" is not an enforceable promise).

NIELSEN, BROMAN & KOCH P.L.L.C.

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