

66847-1

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COA No. 66847-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL CORNISH,

Appellant.

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

The Honorable Ellen Fair

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SNOHOMISH COUNTY
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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The sentencing court abused its discretion when the judge denied Mr. Cornish's request below the standard range based upon a misapprehension of its power to monitor and enforce compliance with the potential conditions of probation.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

When an offender requests an exceptional sentence, the trial court must exercise discretion and thoughtfully consider the request in relation to the existing law. Where court acknowledges the presence of a statutory mitigating factor, but declines to impose an exceptional sentence based on a misapprehension regarding the adequacy of the oversight and sanction mechanisms available, did the trial court abuse its discretion?

C. STATEMENT OF THE CASE

1. **Bench Trial**. Mr. Cornish was charged with violating a court issued no-contact order with his former wife, Salle Cornish. CP 53-54. He waived his right to jury and the case was tried before the Honorable Ellen Fair. CP 49-50; 2/16/11RP 3. Mr. Cornish further waived his right to confrontation as to Ms. Cornish, stipulating to the admission of her one page statement describing

the incident describing how he had arrived at her home on December 13, 2010. 2/16/11RP 3-9.

Snohomish County Deputy Sherriff Steven Dosch then testified that he was dispatched to Ms. Cornish's home in December 2010. 2/16/11RP 13. There Ms. Cornish reported that:

I was on the computer at 10:30 a.m. when I heard the dog bark. I looked out the window and saw a taxi in the driveway. I saw Sam Cornish get out.

He knocked on the door. I told him to leave without ... opening the door.

He told me that he needed to speak to me. I told him to leave again and that I had called 911. He told me that he had come a long way and it had been a long time.

I thought that Sam had improved under the supervision of his CCO, Eric Peterson. When I called him, he told me that he was no longer under supervision but knew that he had gone downhill.

I have not had any contact with him since 2006. He has been in and out of prison for ten years for stalking and contacting me. It was quite a shock to see him ... today.

2/16/11RP 15 (Exhibit 3).

The deputy prosecutor then offered into evidence, without objection, an order for protection (Cause No 08-2-06538-7) issued August 22, 2000, barring Mr. Cornish from having any contact with Salle Cornish. 2/16/11RP 16 (Exhibit 1). The deputy prosecutor also offered evidence of a conviction and sentence in 2006 (Cause

No 06-1-00889-2), entered November 28, 2006, ordering no contact for a period of five years between the Mr. and Ms. Cornish. 2/16/11RP 17 (Exhibit 4).¹

Mr. Cornish was gone when Officer Dosch arrived, but they spoke by telephone the following day. 2/16/11RP 19. Mr. Cornish acknowledged going to his former wife's house, but indicated he thought the no-contact orders had expired and he only wanted to "find out about his kids." 2/16/11RP 20.

Officer Dosch subsequently met Mr. Cornish in Bellingham, where he had been living, and confirmed that he had visited his former wife's home to check on his sons, but declined to provide a written statement. 2/16/11RP 21-23. Officer Dosch explained that although Mr. Cornish was cooperative, that from what the officer observed, "there might have been some emotional or maybe some mental, something going on [with Mr. Cornish]. He was coherent. He responded to my questions, but his mannerisms and speech

¹ The deputy prosecutor also offered, again without objection, a judgment and sentence (Cause No. 07-1-02457-8), dated December 17, 2007, which imposed a separate no-contact order on Mr. Cornish. 2/16/11RP 17 (Exhibit 2). The deputy prosecutor subsequently acknowledged this "really has no relevance to the issue." 2/16/11RP 18.

[were] a little different than probably a normal person” 2/16/11RP 24.

Officer Dosch explained the Ms. Cornish had alerted him to possible mental health concerns for Mr. Cornish and this had been confirmed by his former community corrections officer (CCO).

2/16/11RP 25. Mr. Cornish’s brother, who lives in Colorado, had also confirmed the he had “gone downhill.” 2/16/11RP 26.

In order to establish a prior conviction, and thereby aggravate the current offense to a felony, the deputy prosecutor offered several prior judgments without objection. 2/16/11RP 30-31.

In closing argument, Mr. Cornish’s attorney argued a conviction could not be based on the 1998 cause number because there was no proof of service. 2/16/11RP 33. Judge Fair concurred. 2/16/11RP 34. Judge Fair did find that the no-contact order under entered in November 2006 was valid and notice had been provided to Mr. Cornish. 2/16/11RP 35. Based on this and his admission he had gone to Ms. Cornish’s home, Judge Fair found Mr. Cornish guilty. CP 46-48; 2/16/11RP 35-37.

2. Sentencing. At sentencing, Mr. Cornish asked the court to impose an exceptional sentence, below the standard 33 to 43 month range, of “a year plus one day in prison and the rest of the time on community custody, so four years of community custody.” 3/16/11RP 7; CP 37. In support of his request, the court was provided with a psychological evaluation of Mr. Cornish performed by psychologist Lee Gustafson, Ph.D., documenting both his psychiatric history and prognosis. CP 21-34.

With regard to history, Dr. Gustafson noted that Mr. Cornish graduated from college and worked as a radio station program manager and announcer. CP 30. He was married for 15 years and had two children, although both had severe autism. CP 30. Unfortunately, in his 40's Mr. Cornish began experiencing significant anxiety, depression and physical ailments. CP 30. He was treated with benzodiazepine medications to inhibit the anxiety, but became dependent. CP 30. His behavior became more erratic and he was unable to maintain employment. CP 30. His deteriorating mental and physical condition led to the breakup of his marriage. CP 30.

Mr. Cornish's psychiatric hospitalization began at Skagit Valley Hospital in December 1997 due to benzodiazepine addiction; was followed by hospitalization at Fairfax Hospital due to severe depression in February 1998; and a commitment to Western State Hospital for forensic evaluation in August 1999 after "bizarre behavior and possible psychotic thinking."²

Mr. Cornish was admitted to Western State Hospital again in December 2005. This time for a 90-day involuntary civil commitment. CP 26. Since his release from DOC custody in September 2005, he had been homeless and was hospitalized three times already. CP 26. His discharge diagnosis was Major Depressive Disorder, Asperger's Syndrome and Dependent Personality Disorder. CP 26.

Mr. Cornish was involuntarily admitted to St. Joseph Hospital in March 2007 after becoming progressively suicidal. CP 27. This was his third admission to the hospital in the past year. CP 27. He

² Dr. Janet Schaeffer concluded in part that "... Mr. Cornish is severely disabled and psychologically impaired individual. He is suffering from a severe depression with anxiety and obsessive-compulsive features." CP 25. Although found competent to stand trial, "Mr. Cornish was diagnosed with Major Depression, recurrent, History of Benzodiazepine Abuse and Passive-Aggressive Personality Disorder." CP 26.

was diagnosed with Depressive Disorder, not otherwise specified, and Personality Disorder, not otherwise specified. CP 27.

Mr. Cornish returned to Western State Hospital again for a court ordered psychological evaluation in October 2007. CP 26. He was diagnosed with Major Depressive Disorder, Moderate, Recurrent, Anxiety Disorder, not otherwise specified, Benzodiazepine Dependence, in Remission and Personality Disorder not otherwise specified, with dependent, borderline, histrionic and passive-aggressive features. CP 27.

Mr. Cornish was hospitalized again at St. Joseph Hospital in August 2010, after a suicide attempt. CP 27. He reported that his symptomology had been worsening for the previous two months and he "was observed to be unable to process information or track the conversation adequately and seemed confused." CP 27. He was again diagnosed with Depressive Disorder, not otherwise specified, Anxiety Disorder, not otherwise specified, and a "rule/out diagnosis" of Major Depression. CP 28.

Mr. Cornish was back in the emergency room on September 14th, September 20th, October 21st, and October 31st, 2010, with varying degrees of suicidal ideation and abdominal pain. CP 28.

He was then transferred to Fairfax Hospital on an involuntary hold on November 1, 2010, and was not discharged to transitional housing until November 30, 2010, two weeks before the current offense. CP 28. He was diagnosed with a Mood Disorder, not otherwise specified, and Anxiety Disorder, not otherwise specified.

CP 28.

Dr. Gustafson explained that,

In terms of Mr. Cornish's repeated violation of the No-Contact Order with his ex-wife, it is highly likely that these violations happen during the most severely regressive episodes. At these times, Mr. Cornish cuts himself off from all significant human relationships. He in [effect], lives in a cocoon of anxiety that he is unable to actively penetrate. At these times his ex-wife would represent the hope of connection much as a small child needs to periodically connect with his mother in order to maintain a feeling of comfort and safety. It is unlikely that Mr. Cornish has any ability at these times to recognize or appreciate the effect of his behavior on his wife much as a small child is not capable of feeling empathy for his mother.

CP 32.

Dr. Gustafson went on to insightfully note,

People such as Mr. Cornish present a real challenge to the criminal justice system. Mr. Cornish's problems are psychiatric in nature. He does not learn from the experience of being arrested and incarcerated. Such considerations are of little importance to him in the face of the distress he feels in the midst of these

regressive episodes. In actuality, people such as Mr. Cornish get worse in institutions.

CP 32. Dr. Gustafson then outlined his thoughts on treatment:

At this point, Mr. Cornish's function is so regressed that he would be unable to manage on his own in the community without significant external structure to assure ... he was following treatment recommendations and taking his medications. His regressed behavior would need to be consistently confronted. He would require regular meetings with a counselor or probation officer on a weekly basis. It is notable that Mr. Cornish was able to maintain himself in the community when required to meet regularly with a probation officer and fell apart ... after these meetings stopped.

CP 34. That treatment might include:

He would likely benefit from antidepressant medications and there would need to be consequences if he stopped taking his medications. Something like a less restrictive order, as is available through the involuntary treatment system, would be optimal. Such an order would require Mr. Cornish to take his medications, follow treatment recommendations and not violate the No-Contact Order or he would be hospitalized in a psychiatric hospital or be returned to jail.

CP 34. Dr. Gustafson described the other support services that would be necessary as well:

Mr. Cornish would also need some sort of group home or adult family home for a residence until he is better able to motivate himself to actively participate in his recovery. I would recommend an adult family

home as this type of living environment would make it more difficult for Mr. Cornish to isolate himself and the staff would be in a better position to monitor his medications. ... Active treatment including weekly counseling through a community mental health clinic would be necessary as Mr. Cornish will likely continue to need external support in the community to manage outside an institution.

CP 34.

Because they had been unable to arrange the sort of housing situation Dr. Gustafson described Mr. Cornish as needing, defense counsel requested the sentencing court consider a year and a day of confinement and the remaining four years as community custody in order to provide the structure and support Mr. Cornish requires. 3/16/11RP 7.

DOC's Offender Reentry Community Safety (ORCS) could provide the structure and an exceptionally long term of community custody would provide the supervision which had been successful in the past. 3/16/11RP 9. When Mr. Cornish was under the supervision of CCO Eric Peterson from November 2007 through October 2009, he was able to maintain his physical and mental health. Mr. Cornish explained, however, that,

I had gone almost three years and things just fell apart for me. This wasn't premeditated or anything

like that. It was – no harm was meant in this process. I was down to nothing and I didn't know what to do. I was off of supervision. So I had pretty well gone off the deep end, so but I'm not a violent person. I've never hurt anybody.

3/16/11RP 12.

In passing sentence, Judge Fair noted,

I don't have necessarily a serious disagreement with what [defense counsel] is proposing in terms of its benefits. My problem with it is just that the Court doesn't have the ability to do much of anything if it goes wrong. In other words, if we had a system where I could give some sort of suspended sentence or something like that so that if, like in a DOSA or some of the other situations that we have, so that if things didn't go as was hoped, that then there would be another fall-back position, which would be the incarceration. At this point if Mr. Cornish doesn't comply, there can be 60 days for each violation to be served in the county jail and I think that's an imperfect remedy if things don't go well.

3/16/11RP 18. Judge Fair further outlined her trepidation,

I also have to say that having, I guess, basically engaged in the experiment, if you will, of the exceptional sentence down and the intensive supervision, which worked to some degree, obviously didn't work perfectly, it has an end point as well, which everything does: Incarceration does, community supervision does. I mean, there just aren't any good answers here. That is abundantly clear to the Court.

3/16/11RP 18-19. Judge Fair then concluded,

So I think, unfortunately, I'm going to have to go on the side of incapacitation even though I know that is not a good place for Mr. Cornish to be, but I think when I'm faced with the situation of protection of the community and specifically the victim in this case, who certainly has not been well protected by the system, and what, under either scenario, is a short-term solution to the problem, I'm afraid I'm going to have to go with the surer bet, which is incapacitation, because even under the scenario of intensive supervision, that will come to an end. Once that ends, apparently, then we're back in the same situation that we started with.

So, unfortunately, I think all I can do is go for the maximum term of incapacitation. So I'm going to impose the sentence, the high end sentence of 43 months, which of course, Mr. Cornish will get credit for time served.

3/16/11RP 19.

Mr. Cornish timely appealed from the court's sentence. CP

2-13.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. CORNISH'S REQUEST FOR AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

1. Exceptional sentences based upon mental illness are permitted under appropriate circumstances.³ A court's sentencing authority is defined by statute and that includes the power to "impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The SRA allows "variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993).

³ As a general rule, pursuant to RCW 9.94A.585, when the sentence is within the correctly calculated standard range, there is no right to appeal that sentence. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). However, relief may be granted where the sentencing judge has refused to exercise discretion, or where the procedure by which a court determined not to impose an exceptional sentence was premised on an incorrect or impermissible legal basis. State v. Schloredt, 97 Wn. App. 789, 801-02, 987 P.2d 647 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989).

The statutory provisions regarding potential mitigating factors provides:

(1) Mitigating Circumstances--Court to Consider. The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1)(e). This mitigating factor has been understood to refer to the presence of a mental disorder or infirmity which in turn impairs the capacity referred to:

While mental conditions not amounting to insanity or diminished capacity may constitute mitigating factors supporting an exceptional sentence below the standard range, the record must establish not only the existence of the mental condition, but also the requisite connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law.

State v. Schloredt, 97 Wn. App. 789, 802, 987 P.2d 647 (1999)

(discussing former RCW 9.94A.390(1)(e)). The record below established this connection.

2. The record amply established the debilitating nature of Mr. Cornish's mental illness and its connection to the current offense. Factors favoring the mitigation of the standard range need be established only by a preponderance of evidence. RCW 9.94A.535(1). Dr Gustafson's evaluation provided an extraordinary amount of background information regarding Mr. Cornish's continuing problems including major depression, generalized anxiety disorder, depersonalization disorder, and dependent personality disorder. CP 29-30. With regard to the connection between his condition and the underlying incident, Dr. Gustafson explained:

Mr. Cornish was certainly significantly depressed at the time of the incident. He had recently been released after spending a month in a psychiatric hospital. He had been consistently depressed for almost six months with little relief from his distress. He had become very passive in his response to the problems in his life, had stopped taking his prescribed medication and was not in any active treatment. He was very anxious and isolated and his life was devoid of any emotional contact with another person."

CP 33. With regard to his understanding of the consequences of his actions, Dr. Gustafson opined,

As previously indicated, it is likely that Mr. Cornish had, at best, a poorly organized impulse to make

some sort of contact with his ex-wife as a means of ameliorating his painful feelings of isolation, helplessness and emptiness. In his condition, notions of future legal consequences for his behavior would have [been] extremely remote and have an unreal quality. This type of higher-order thinking would be extremely attenuated.

CP 33. So, while Mr. Cornish did maintain a rudimentary ability to distinguish right and wrong, “[t]hese considerations would simply not have had much importance to him. They would have likely seemed remote and unreal.” CP 33. Dr. Gustafson concluded that Mr. Cornish’s psychiatric condition “was profoundly disabling and could be considered as a mitigating factor for purposes of sentencing should the court be so inclined.” CP 34.

In fact, neither the deputy prosecutor nor Judge Fair disputed the impact of Mr. Cornish’s mental illness in the incident. Judge Fair explained, “I would certainly agree that this is a case that, to a very large degree, is driven by mental health issues that the mental health system and the court system have not been able to adequately address....” 3/16/11RP 17.

3. The court's denial of was based on a misapprehension of the law and, therefore, an abuse of discretion. Notwithstanding the direct effect of Mr. Cornish's condition on his ability to appreciate the effect of his conduct and conform to the law, Judge Fair chose to impose a sentence at the top of the standard range. 3/16/11RP 19. Judge Fair came to this conclusion, however, based upon a fundamental misconception regarding the court's and DOC's ability to sanction Mr. Cornish if he failed to comply with the probationary conditions that might be imposed upon him. 3/16/11RP 18.

The trial court must apply the correct law and when it does not do so, the court's discretion has been abused. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 377 (2000); see also State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see also Ryan v. State, 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (discretion is abused where a court bases its decision on an incorrect understanding of the law) (citing Junker, at 12).

As noted already, Judge Fair concluded that:

I don't have necessarily a serious disagreement with what [defense counsel] is proposing in terms of its benefits. My problem with it

is just that the Court doesn't have the ability to do much of anything if it goes wrong. In other words, if we had a system where I could give some sort of suspended sentence or something like that so that if, like in a DOSA or some of the other situations that we have, so that if things didn't go as was hoped, that then there would be another fall-back position, which would be the incarceration. At this point if Mr. Cornish doesn't comply, there can be 60 days for each violation to be served in the county jail and I think that's an imperfect remedy if things don't go well.

3/16/11RP 18 (emphasis added). But there were other, more perfect remedies available to the court and the failure, therefore, to properly consider the imposition of an exceptional sentence based upon this misperception is an abuse of the discretion provided by the SRA.

4. The court's enforcement authority, both independently and through DOC, provided the power it mistakenly thought it lacked. Sentencing courts generally enjoy broad discretion in tailoring sentences. State v. Jacobs, 154 Wn.2d 596, 602, 115 P.3d 281 (1995). In this case, Mr. Cornish sought a reduced period of total confinement with a far greater period of community custody during which his mental health and general compliance could be closely monitored. 3/16/11RP 7-12. This intensive supervision had been successful in the past and provided

the best opportunity to fulfill the goals of the SRA while meeting the needs of the victim.

In structuring an appropriate exceptional sentence, the sentencing court had the authority to impose extended periods either community custody and to require Mr. Cornish perform affirmative conduct, i.e. actively participate in mental health treatment. State v. Jones, 118 Wn.App. 199, 205, 76 P.3d 258 (2003); 13 Ferguson, Criminal Prac and Pro., WASH PRAC., at 385 (2004), citing RCW 9.94A.030(5), (9). The sentencing court also has the power to impose crime related prohibitions or requirements, and to punish violations, even beyond the period of community supervision. This authority is relatively broad because under RCW 9.94A.030(13), the prohibitions imposed need merely relate to the circumstances of the crime. State v. Llamas-Villa, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). This broad discretion in crafting sentencing conditions is reviewed only for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Particularly relevant here, RCW 9.94A.562 gives an additional tool to the sentencing court and DOC by providing for

them to be fully informed regarding Mr. Cornish's mental health treatment.

When any person is convicted in a superior court, the judgment and sentence shall include a statement that if the offender is or becomes subject to court-ordered mental health or chemical dependency treatment, the offender must notify the department and the offender's treatment information must be shared with the department of corrections for the duration of the offender's incarceration and supervision.

Id.

In the event Mr. Cornish failed to comply with the form of intensive supervision he requires, DOC is provided the authority to detain probationers who are in violation of the conditions of their sentences.

(1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or a department of corrections hearing officer.

....

If a community corrections officer arrests or causes the arrest of an offender under this section, the offender shall be confined and detained in the county jail of the county in which the offender was taken into custody, and the sheriff of that county shall receive and keep in the county jail, where room is available, all prisoners delivered to the jail by the community corrections officer, and such offenders shall not be released from custody on bail or personal recognizance, except upon approval of the court or

authorized department staff, pursuant to a written order.

RCW 9.94A.631.

Contrary to Judge Fair's belief then, both she and the DOC the retained significant and effective tools to monitor and ensure compliance with whatever conditions might have been imposed. As a sanction for the failure to comply, and a tool to effectively isolate and incapacitate Mr. Cornish if necessary, RCW 9.94A.633 gives the court considerable authority. It allows for confinement:

An offender who violates any condition or requirement of a sentence may be sanctioned with up to sixty days' confinement for each violation.

RCW 9.94A.633(1)(a). Furthermore, subsection (b) gives the court and the court and DOC the ability to impose a wide variety of alternative sanctions.

In lieu of confinement, an offender may be sanctioned with work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, or any other sanctions available in the community.

RCW 9.94A.633(b).

To the extent that it was the 60-day limit for each violation which Judge Fair found inadequate, she misapprehends the scope of the authority granted. In practice, violations seldom occur in isolation. For example, a failure to comply with treatment is inevitably accompanied by a failure to keep the CCO apprised of circumstances or to report as directed. This practice of stacking violations and the availability of other involuntary treatment alternatives are just some of the ways in which the exceptional sentence Mr. Cornish sought could still provide the security Judge Fair felt was necessary.

Finally, the court and DOC can use polygraphs and urinalyses as monitoring tools to ensure Mr. Cornish is in compliance with the conditions imposed. State v. Julian, 102 Wn.App. 296, 305, 9 P.3d 851, rev. den., 143 Wn.2d 1003 (2000). Ultimately, there are ample enforcement mechanisms to ensure compliance with any conditions the court wished to impose, and the sentencing court's failure to properly consider these alternatives was error.

5. Remand for a new sentencing hearing is required.

The trial court's decision not to impose an exceptional sentence because of its misapprehension regarding the enforcement tools available to ensure compliance warrants reversal and remand because the court "relied on an impermissible basis for refusing to impose an exceptional sentence." State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000) (discussing former RCW 9.94A.210(1)). Furthermore, a court abuses its discretion when its decision is based upon untenable grounds. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Id. at 339.

Mr. Cornish may obtain relief on appeal from the sentencing court's decision to reject his request for an exceptional sentence, therefore, when that decision was based on the trial court's erroneous belief that it lacks the necessary legal authority. See generally State v. Bunker, 144 Wn. App. 407, 411-13, 183 P.3d 1086 (2008) (sentencing court abuses discretion if it refuses to consider mitigating factor based on erroneous belief it has no

authority to do so). In Mr. Cornish's case, where the sentencing judge's decision was based upon the mistaken belief that she did not retain adequate legal authority to enforce the sentence, the court has failed to exercise its discretion for untenable reasons or on untenable grounds.

E. CONCLUSION

Based on the foregoing, Mr. Cornish requests that this Court reverse his sentence and remand for resentencing.

Respectfully submitted this 31st day of August 2011.

A handwritten signature in black ink, appearing to read 'David L. Donnan', written over a horizontal line.

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Washington Appellate Project - 91052
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