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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON BIGSBY,

Petitioner.

AMICI CURIAE BRIEF OF COLUMBIA LEGAL SERVICES

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I. INTEREST OF AMICUS

The identities and interests of *amicus curiae* Columbia Legal Services is described in the Motion for Leave to File *Amicus Curiae* Brief and Extension of Time to File *Amicus Curiae* Brief granted by this Court. The identities and interests of *amicus curiae* Washington Defender Association is described in Motion for Leave to File and Join the *Amicus Curiae* Brief, submitted with this brief.

II. ISSUES TO BE ADDRESSED BY *AMICI*

1. Whether concurrent authority by the trial courts and the Department of Corrections (DOC) to punish people for violations of the conditions of their sentence committed while under DOC supervision would undermine three critical policy objectives associated with our community supervision model as developed by our Legislature over the past three decades, namely the application of immediate consequence (swiftness), certainty of punishment, and proportionality of punishment?

2. Whether concurrent authority by the trial courts and DOC to punish people for violations of the conditions of their sentence committed while under DOC supervision would intensify mass incarceration and stymie individual reentry efforts?

III. STATEMENT OF THE CASE

Amici rely on the facts in the briefs of Mr. Bigsby.

IV. ARGUMENT

An excessively broad interpretation of RCW 9.94A.6332 that creates concurrent authority for the trial courts and DOC to punish people for violations of the conditions of their sentence committed while under DOC supervision — and that allows for the concurrent exercise of that authority — contradicts the plain language of the statute and the historical and expressed intention of the Legislature. Such an interpretation also undermines the three critical policy objectives associated with our community supervision model: the application of immediate consequence (swiftness), certainty of punishment, and proportionality of punishment for violations.[1]

For 30 years, our Legislature has steadily moved away from individualized, discretion-based punishment to a simple, uniform system of punishment (Part A). These legislative efforts have been proven to save money while improving community safety (Part B). However, even more importantly from the prospective of people who must live under community supervision, a simple, uniform system of

[1] ZACHARY HAMILTON, ET. AL., EVALUATION OF WASHINGTON STATE DEPARTMENT OF CORRECTIONS SWIFT AND CERTAIN POLICY PROCESS, OUTCOME AND COST-BENEFIT EVALUATION (Washington State University, August 31, 2015), https://wsicj.wsu.edu/wp-content/uploads/sites/436/2015/11/SAC-Final-Report_2015-08-31.pdf

punishment may reduce mass incarceration and make it easier to successfully reenter society (Part C). The appellate court's interpretation of RCW 9.94A.6332 undermines these efforts and opportunities by allowing people to be punished twice by two separate branches of government for the same violation. This troubling result should raise red flags for everyone in the criminal justice system. Therefore, we respectfully request this Court consider policy impacts as part of interpreting RCW 9.94A.6332 and reverse the Court of Appeals decision.

A. The Legislature has Steadily Moved Away from Discretionary Punishment for Violations.

For 30 years, our Legislature has been steadily moving away from individualized, discretion-based punishment to a simple, uniform system of punishment. This policy move has evolved primarily through four pieces of legislation that demonstrate why the historical and expressed intention of the Legislature in promulgating RCW 9.94A.6332 specifically is to place authority to punish people for violations of the conditions of their sentence committed while under DOC supervision exclusively with the DOC.

The first substantive piece of legislation was the Sentencing Reform Act (SRA) of 1981 (Chapter 9.94A RCW) which largely

replaced Washington's parole system with determinate sentences.[2] The SRA created "community supervision" and tasked the newly created DOC with post-release supervision responsibilities.[3] The SRA continued to allow trial court authority to impose sanctions, but created delineated rules for when the trial courts would apply sanctions and when the DOC would apply sanctions.[4]

The second substantive piece of legislation was the Offender Accountability Act (OAA), passed in 1999 by our Legislature in response to perceived limitations on the DOC, concerns over system complexity and confusion, and the public perception that the DOC could not effectively monitor people while preserving community safety. Under the OAA, our Legislature deliberately shifted authority for punishment *away from the trial courts*, and the judicial branch of government, to the DOC and executive branch of government. Prior to passage of the OAA:

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[2] Laws of 1981, ch. 137, http://leg.wa.gov/CodeReviser/documents/sessionlaw/1981c137.pdf?cite=1981 c 137 § 1.

[3] Laws of 1981, ch. 137 § 3 ("Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed pursuant to this chapter by a court.").

[4] For example RCW 9.94A.120, now recodified with different language, relating to community supervision for people found guilty of sex offenses read that "[i]f a violation of conditions occurs during community custody, the department shall *either* impose sanctions…*or* refer the violation to the court [for sanctions]…". Laws of 1996, ch. 260 §2, http://lawfilesext.leg.wa.gov/biennium/1995-96/Pdf/Bills/Session%20Laws/Senate/6274-S.SL.pdf?cite=1996 c 275 § 2 (emphasis added).

> [A] felony offender could be sentenced to a term of "community placement," which consisted of both "community custody" and "post-release supervision." If the offender violated the terms of his or her community placement, he or she would be sanctioned by *either* the Department of Corrections (DOC) *or* the sentencing court, *depending on whether the offender was on community custody (DOC) or post-release supervision (sentencing court) at the time of the violation*.[5]

After passage of the OAA in 1999, the Legislature gave the DOC "*exclusive authority to sanction all violations*."[6] The DOC was thus entrusted with sole authority to impose conditions, respond to violations, and punish people for both technical and major violations.[7] The OAA also set state policy regarding the intensity of community supervision by classes of people, differentiated by criminal history.[8]

Third, in 2008, our Legislature reorganized and consolidated the statutes relating to community supervision by creating a new chapter

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[5] H. FINAL BILL REP.-2719, 60TH SESS. (2008), http://lawfilesext.leg.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/House/2719.FBR.pdf (emphasis added). *See also* ELIZABETH DRAKE AND STEVE AOS, CONFINEMENT FOR TECHNICAL VIOLATIONS OF COMMUNITY SUPERVISION: IS THERE AN EFFECT ON FELONY RECIDIVISM? (Washington State Institute for Public Policy, July 2012), http://www.wsipp.wa.gov/ReportFile/1106/Wsipp_Confinement-for-Technical-Violations-of-Community-Supervision-Is-There-an-Effect-on-Felony-Recidivism_Full-Report.pdf (describing history of the OAA).

[6] *Id.*

[7] *Id.*

[8] The calculation of criminal history soon became a complex matter for legal practitioners; this Court issued three separate opinions on scoring criminal history in less than six years: *In re Cadwallader*, 155 Wn.2d 867 (2005); *State v. Lopez*, 147 Wn.2d 515 (2002); *State v. Ford*, 137 Wn.2d 472 (1999); and *State v. McCorkle*, 137 Wn.2d 490 (1999). *See also, e.g.*, legislative note following RCW 9.94A.500.

in Title 9 RCW through House Bill 2719.[9] Mr. Bigsby and the State have both discussed the Legislature's intent in moving the SRA to Chapter 9.94A and creating the new Chapter 9.94B. Yet even after passing House Bill 2719, our Legislature remained stymied in its efforts to create a simple, uniform community supervision model because the historical practice of applying sanctions following a violation remained individualized, discretionary-based, and disproportional with sanctions based on localized resources.[10]

The arbitrary application of punishment was finally addressed in 2012 when our Legislature took away DOC discretion for punishing people and replaced it with a graduated sanctioning schedule for violations in Senate Bill 6204.[11] This fourth and final substantive piece of legislation is central to the dispute here.

B. A Simple, Uniform Model of Community Supervision that Grants Exclusive Authority with the DOC Saves Money while Improving Community Safety.

The move away from individualized, discretion-based punishment has been driven by legislative efforts to save money while improving

[9] Laws of 2008, ch. 231, http://lawfilesext.leg.wa.gov/biennium/2007-08/Pdf/Bills/Session%20Laws/House/2719.SL.pdf?cite=2008 c 231 § 62.

[10] "Jail confinement sanctions were delivered in durations of 30, 60, 90 and 120 days. Graduated jail confinements were used as sanctions resulting from violations but were primarily provided via officer discretion. The stated severity of confinement duration resulted in their erratic delivery, which varied by Community Corrections Officer, hearing officer and geographic region." HAMILTON, *supra* note 1, at 12.

[11] Laws of 2012, ch. 6, http://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Bills/Session%20Laws/Senate/6204-S2.SL.pdf#page=1

community safety. First, considering money, our Legislature found the DOC's historical overreliance on confinement is expensive. Between the fiscal years 2002 and 2008, approximately 72-percent of all people with a violation received confinement as a punishment.[12] During the fiscal year 2011 alone, DOC spent $38.5 million on jail sanctions, translating to 17,193 jail bed days.[13] Mr. Bigsby's case demonstrates the costs that can occur when the DOC relies on confinement, and serves as a warning for how these costs could grow if this Court finds that the trial courts and DOC have concurrent jurisdiction to punish people.

Second, the Legislature found the DOC's historical overreliance on confinement did not make our communities safer, either for people in the community-at-large or for people under community supervision. A study commissioned by our Legislature found "felony recidivism is not lowered by using confinement when people violate the technical conditions of their community supervision."[14] To the contrary, researchers found confinement is associated with *increased* recidivism, which researchers speculated might result from confinement

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[12] DRAKE, *supra* note 5, at 1.
[13] FINAL BILL REP.-6204, 62ND SESS., 1ST SPEC. SESS. (2012), http://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Bill%20Reports/Senate/6204-S2.E2%20SBR%20FBR%2012%20E1.pdf
[14] DRAKE, *supra* note 5, at 6.

preventing reentry into the labor market.[15] A different research study in California revealed that among those who had experienced both prison and probation, probation was considered worse due to the unpredictable, seemingly capricious enforcement of a laundry list of rules:

> The young men felt so negatively treated by the system that the rules of probation (a common example would be imposed curfews) were deliberately broken as a way of establishing some dignity in the face of a system that was seen as putting them down. Here again, the ethnographer finds a general feeling that there is no way to succeed with the load of probation conditions placed on the young men. Probation was seen as a form of punitive social control, a destroyer of self-esteem, with no evidence of efforts by the officers to express acceptance or the offering of an affirmative statement if a job was obtained by a probationer.[16]

Researchers found, broadly speaking, the perception of disproportionate punishment among people living under community supervision may *increase* recidivism.[17] Here again, Mr. Bigsby's case demonstrates the counterproductive impact that double-punishment by the trial courts and DOC for the same violation would have on legislative efforts to save money and improve community safety.

With these findings, our Legislature introduced the "Swift and

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[15] FINAL BILL REP.-6204, *supra* note 13.
[16] Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1721 (2015).
[17] Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1050 (Fall 2013).

Certain" policy.[18] This policy created substantial operating changes to DOC, including matching the level of supervision to individual risk level, utilizing evidence-based treatment, and implementing "swift and certain" jail sanctions for violations.[19] As demonstrated in Mr. Bigsby's case, this policy cannot be effectuated when the trial courts and DOC are both given authority to exercise concurrent jurisdiction for punishment; in fact, the opposite occurs. To start with, the Swift and Certain policy utilizes *short-term* jail sanctions for violations.[20] Our Legislature believed a system of immediate, graduated punishment rather than individualized, discretion-based punishment would be more effective:

> Increasing the severity of a penalty does little to increase deterrence, but rather increasing the certainty of apprehension and punishment demonstrates a significant deterrent effect.[21]

A multi-phase research project by Washington State University to examine the Swift and Certain policy found the policy has met its intended objectives and, in some respects, may have exceeded

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[18] Laws of 2012, ch. 6, *supra* note 11.
[19] Paul Suarez, *Probation Violations Will Result In 'Swift And Certain' Penalties* (THE COLUMBIAN, May 22, 2012), http://www.columbian.com/news/2012/may/22/swift-and-certain-penalties-officials-hope-short-i/
[20] *Id.*
[21] FINAL BILL REP.-6204, *supra* note 13. A finding of concurrent authority would likely increase the severity of punishment, which has little deterrent effect on people like Mr. Bigsby, while exposing them to serious consequences and unnecessary incarceration.

expectations.[22] Researchers found:

- People under community supervision incurred fewer days of confinement following a violation and the odds of confinement were reduced by roughly 20-percent in the initial 12 months following reentry.

- People were 20-percent less likely to be convicted of *any* offense, including felony and property convictions.

- People *increased participation and time spent in chemical dependency and cognitive behavioral therapies*, with many differences identified in the 12 months following reentry.

- People supervised under the Swift and Certain policy reduced their propensities for non-serious violations at a greater rate than the historical comparison subjects over time and were less likely to incur a serious violation throughout their supervision.

- A cost savings ratio of 16 dollars was saved for every dollar spent on community supervision.[23]

Analyzing the success of the Swift and Certain policy, researchers noted while *certainty of sanctioning* was the key policy alteration, this policy was combined with a *proportionality of punishment* component that graduated and distinguished sanctions for low versus high level

[22] HAMILTON, *supra* note 1, at 8.
[23] HAMILTON, *supra* note 1, at 7-8. Note that for people like Mr. Bigsby who are ordered to pursue drug treatment, the Swift and Certain policy has been more effective than the individualized, discretion-based approach that came before (and would return if this Court should find concurrent authority for punishment).

violations.[24] Providing trial courts and the DOC with concurrent authority to punish violations counters the spirit of the Swift and Certain policy and threatens its success by creating unpredictable punishment for the same violation.

C. Concurrent Authority Thwarts Prospects for Reducing Mass Incarceration and Improving Opportunities for Successful Reentry

1. Intensifying Mass Incarceration

At the end of 2015, about 4,650,900 adults were under community supervision in the United States — roughly 1 in 53 adults — either on probation, parole or some other form of post-prison supervision with probationers accounting for the majority of people under community supervision (81-percent).[25] In Washington, the DOC reports it supervises an active caseload of approximately 18,000 people in communities across the state.[26]

This year, the Marshall Project conducted a three-month survey of state correction departments, finding over 60,000 people held in prisons across the country for minor parole and probation violations —

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[24] HAMILTON, *supra* note 1, at 8.
[25] Danielle Kaeble and Thomas P. Bonczar, *Probation and Parole in the United States, 2015* NCJ 250230 (U.S. Dep't of Justice, Office of Justice Programs Bureau of Justice Statistics, December 2016), https://www.bjs.gov/content/pub/pdf/ppus15.pdf
[26] Department of Corrections, *Supervision in the Community*, http://www.doc.wa.gov/corrections/community/supervision.htm (last visited April 20, 2017).

like those committed by Mr. Bigsby through failing to make sufficient efforts towards pursing drug treatment — and even more people held in local or county jails.[27] At least one researcher has suggested that half of the people admitted to U.S. jails, and more than one-third of those admitted to prison, arrive there because of revocation from community supervision.[28] Increases in the U.S. probation population have dwarfed even the extreme increases in our prison population, so the connection between community supervision and mass incarceration cannot be ignored.[29]

Without addressing the propriety of the conditions imposed on Mr. Bigsby, the fact is that punishment by the trial court and the DOC regarding the same conditions and the same conduct unnecessarily lengthened his incarceration and delayed addressing his actual need for successful reentry – drug treatment. The DOC sanctioned Mr. Bigsby to 18-days confinement and then the trial court sanctioned Mr. Bigsby to 30-days confinement with no credit for the time served under the DOC sanction – a more severe punishment that almost doubled the

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[27] Eli Hager, *At Least 61,000 Nationwide Are in Prison for Minor Parole Violations* (THE MARSHALL PROJECT, April 23, 2017), https://www.themarshallproject.org/2017/04/23/at-least-61-000-nationwide-are-in-prison-for-minor-parole-violations?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170424-741#.4EL4GaH5a

[28] Klingele, *supra* note 17, at 1019-20.

[29] Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292-3 (2016).

time Mr. Bigsby spent in jail for the same violation. As his case illustrates, an excessively broad interpretation of RCW 9.94A.6332 that creates concurrent authority for the trial courts and DOC to punish people contributes to the bloating of our jails and prisons.

2. Creating Barriers to Reentry

Considering the ongoing punishment associated with collateral consequences,[30] the need for clear *and final* guidelines for punishment for violations committed during community supervision is especially important. Prolonged punishment harms reentry efforts. For example, if a person is attempting to maintain or secure housing, and comply with conditions related to or dependent upon housing, then serving back-to-back sentences in jail for the same violation may result in missing rent payments, resulting in late fees or eviction, or losing his or her place in line for permanent housing. Missing curfews or other responsibilities can also mean eviction from low-income housing programs. A research study in Michigan found that through parole

[30] As this Court is aware, the collateral consequences of convictions may result in ineligibility for certain employment and licenses; barriers to housing, including prohibition from public housing; debarment from government contracts; forfeiture of pension benefits; ineligibility for welfare benefits; disqualification from serving in the military or as a volunteer in the community; and more. Because members of minority groups are particularly likely to be convicted, the resulting exclusion amounts, in Michelle Alexander's now famous words, to "the New Jim Crow." MARGARET COLGATE LOVE, ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE 2-3 (Thomson Reuters, 2016); Francis T. Cullen, et al., *Reinventing Community Corrections,* 46 CRIME & JUST. 27, 73 (2016).

supervision, the criminal justice system generates significant residential mobility by using sanctions such as jail confinement:

> The median parolee experienced 2.6 moves per year, or one move every four and a half months. This is a very high level of residential mobility, a level not seen in most other populations. By comparison, the conventional threshold for a high degree of residential instability is more than one move per year.[31]

Also, if a person is attempting to go to work or school, then long-term jail sanctions mean losing opportunities to interview for jobs or getting fired from newly secured jobs, which can further damage his or her work history.[32]

Finally, the stress of confinement, even just a few days of confinement, can cause a person's mental health to deteriorate.[33] As this Court is aware, health services are frequently limited, inadequate or even nonexistent during confinement.[34] People may be denied their prescriptions, or forced to wait days or weeks before they are provided with their proscribed medication.[35] For people with mental illnesses,

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[31] David J. Harding, et al., *Home Is Hard to Find: Neighborhoods, Institutions, and the Residential Trajectories of Returning Prisoners*, 647 ANNALS 214, 226 (May 2013).
[32] *See, e.g.*, Suarez, *supra* note 19 ("Shorter time in jail [with the Swift and Certain policy] also means offenders can keep their jobs and housing while in jail.").
[33] Edward P. Mulvey and Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 CRIME & JUST. 231, 231(2016) ("[Jail] environments can contribute greatly to psychiatric deterioration.").
[34] *See, e.g.*, *In re Det. of D.W.*, 181 Wn.2d 201, 204, 332 P.3d 423 (2014) (holding the practice of "boarding" mental health patients in emergency rooms is unlawful).
[35] Matti Hautala, *In the Shadow of Sandra Bland: The Importance of Mental Health Screening in U.S. Jails*, 21 TEX. J. ON C.L. & C.R. 89, 92 and 101 (Fall 2015) ("Although

such as Mr. Bigsby, the aggravation of existing stresses caused by long-term jail sanctions may result in additional health complications and certainly hinder attempts to get treatment once released.

Given the already diminished level of economic security, family ties and social safety networks, and access to healthcare experienced by people attempting reentry, any confinement, but especially prolonged punishment resulting from concurrent authority may trigger a downward spiral. As researchers observed, confinement for violations is associated with – and may indeed have a *causal* relationship with – recidivism.[36]

V. CONCLUSION

A confusing and arbitrary system for punishing people who violate the conditions of their sentence created by vesting two distinct branches of government with authority over punishment for the same violations will thwart legislative intent to impose sentences that are swift, certain and proportional, to save money, and to improve community safety, while potentially intensifying mass incarceration and creating barriers to reentry. Therefore, this Court should interpret the plain language of

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consistent governmental oversight and data reporting is hard to come by, research in recent years has shown that many jails are not completing a quality mental health screening during the intake of every new inmate.") ("Ms. Bland had been taking at least one epilepsy medication before she got to the Waller County jail, but did not receive any does of that medication during her three day stay at the jail.").

[36] DRAKE, *supra* note 5, at 6; Corbett, *supra* note 16, at 1721.

RCW 9.94A.6332 to find that only the DOC has authority to punish people for violations committed while under DOC supervision.

RESPECTFULLY SUBMITTED this 9TH day of May, 2017.

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