Supreme Court No. _____
COA No. 59758-6-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

CURTIS JACKSON JR.,

Petitioner.

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

PETITION FOR REVIEW

MOSES OKEYO
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4(b)(2), Curtis Jackson Jr. asks this Court to review the opinion of the Court of Appeals filed in his case on November 21, 2024. (Attached As Appendix 1-8).

B. ISSUES PRESENTED FOR REVIEW

A defendant is eligible for a Drug Offender Sentencing Alternative (DOSA) if (1) his current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon enhancement; (2) his current offense is not a felony DUI; (3) his prior convictions do not include violent offenses or sex offenses; (4) his current offense, if drug-related, involved only a small quantity of drugs; (5) the defendant is not subject to deportation; (6) the standard range sentence for the current offense exceeds one year; and (7) the defendant has not

received a DOSA more than once in the last 10 years. An eligible defendant has a right to have the sentencing court fairly consider imposing a DOSA sentence. Here, the Court of Appeals acknowledges Mr. Jackson met the statutory eligibility requirements and then it misreads RCW 9.94A.660, *Smith*[1] and *Grayson*[2]. It then endorses the improper reasons the sentencing court relied upon to punish an addict for failing to overcome addiction and continuing to offend because of the "selfishness of [his] addiction." The opinion is incorrect as it incorrectly endorses the improper reasons the sentencing court relied upon. Review appropriate under RAP 13.4(b)(2).

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[1] *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003).

[2] *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005).

C. STATEMENT OF THE CASE

Mr. Jackson is a military veteran who suffers Post Traumatic Stress Disorder (PTSD), depression, and anxiety. RP 25. After enduring war in Afghanistan, he returned home addicted to opioids prescribed to treat his deteriorating mental health and cope with reentry into civilian life in America. RP 25.

Mr. Jackson started using alcohol and smoking marijuana at 15 after the death of his father. RP 15. Mr. Jackson joined the military right after high school. RP 15. In the military, he started using hard liquor on the weekends and smoking cigarettes every day. RP 15.

In 2007, at about 20 years old, the military deployed Mr. Jackson to Afghanistan. RP 25. To cope with war, Mr. Jackson resorted to heavier drinking and smoking hash. RP 25.

After the war, Mr. Jackson returned to United States feeling broken and lacking in life skills. RP 26. Doctors diagnosed him with PTSD, depression, and anxiety. RP 25. They prescribed him opioids to treat his mental health issues, which began Mr. Jackson's struggle with the highly addictive drug. RP 25.

When he was only 23 years old, Mr. Jackson started using methamphetamines, heroin, and later fentanyl to cope with his mental illness and post-war reentry into civilian life. RP 25.

Mr. Jackson's mental health conditions and past service qualified him for Veteran Affairs (VA) benefits. RP 29. Nevertheless, like many other veterans, the first time he applied for VA benefits he was denied. *Id.* The VA's wrongful denial of benefits left Mr. Jackson unhoused and without any help for his addiction and

his only recourse became taking shelter in unoccupied buildings. *Id.*

A realtor reported to police he believed there were squatters in a property that was currently "vacant pending a buyer." CP 1-2. Police found Mr. Jackson sleeping on the garage floor and arrested him. *Id.* Mr. Jackson was charged with residential burglary. *Id.*

A month after the State filed these charges; Mr. Jackson entered a guilty plea. RP 13-14. At sentencing, the State contended although he had mental disorders the Mental Health Sentencing Alternative, was not available to Mr. Jackson because he "picked up" another residential burglary. CP 24; RP 13-15. The sentencing court rejected Mr. Jackson's request for MHSA without articulating why it believed he was ineligible. RP 14-15.

Mr. Jackson then requested a prison-based DOSA: 36.75 months in prison followed by 36.75 months receiving treatment in the community. RP 18-19. He requested an opportunity to learn any job skills in prison and beat his drug habit through the DOSA classes and structure. RP 27. Mr. Jackson reminded the court that between 2015 and 2017, he successfully completed drug court, and it resulted in the prosecution dismissing three cases. RP 21. Mr. Jackson would likely benefit from this alternative, just like he succeeded for two years in the structured environment and close supervision of felony drug court. *Id.* This showed Mr. Jackson will likely also complete the prison-based DOSA. *Id.*

The State opposed Mr. Jackson's DOSA request and urged the court to send him to prison for seven years. RP 15. It argued the court should protect the

community from Mr. Jackson as he was dangerous and would keep committing crimes. RP 15. The State contended that although residential burglary was not a violent crime against a person, it left a "severe psychological impact" on the property owners. RP 15.

The sentencing court denied Mr. Jackson's request for a prison DOSA and sentenced him to 72 months in jail. RP 32. In denying his request the court reasoned because Mr. Jackson in the past "availed" himself of drug court, he squandered the opportunity he was given by not overcoming his addiction:

> So you've been given every opportunity. I know that addiction is hard to overcome, and I know it can take many attempts to overcome addiction. It's troubling that you continue to offend.

RP 30.

The court analogized Mr. Jackson's property crimes to violent felonies. RP 30-31. It concluded that

although Mr. Jackson did not commit an offense statutorily defined as violent, his "string" of property crimes "hurt" and "terrorized" people. RP 30-31. The court also denied DOSA because of the "selfishness of [Mr. Jackson's] addiction." *Id.*

D. ARGUMENT

This country sent Mr. Curtis Mandell Jackson Jr. to war not long after he completed high school. He returned with hardly any life skills, broken and suffering multiple mental illnesses. Jackson also returned addicted to prescription opioids. Mr. Jackson's addiction escalated to include methamphetamines, heroin, and fentanyl. He used drugs to cope with his mental illnesses and reentry after the VA denied him help.

When Mr. Jackson attended drug court in the past he stayed clean for two years. After Mr. Jackson

pleaded guilty for the present charge, the sentencing court summarily denied him a mental health sentence without analyzing the statutory criteria. And his requests for a Drug Offender Sentencing Alternative (DOSA) was denied for improper reasons. The Court of Appeals takes the view that under *Smith*, none of the reasons the trial court relied on were improper. But a proper reading RCW 9.94A.660, *Smith* and *Grayson* shows the impropriety of punishing an addict with intensive prison time instead of intensive treatment. This Court should accept review, reverse the Court of Appeals.

The Court should accept review because the Court of Appeals misreads *Smith*, *Grayson* and RCW 9.94A.660 and endorse the improper reasons the sentencing court relied on to deny DOSA.

a. *The Legislature created DOSA to treat drug addicts and prevent recidivism, and courts must fairly consider imposing it when eligible defendants request it.*

In 1995, the legislature enacted the DOSA program as a "treatment-oriented alternative to a standard range sentence." *State v. Kane*, 101 Wn. App. 607, 609, 5 P.3d 741 (2000) . It is focused on treatment for addicted offenders who do not have a history of violent crime or high-quantity drug offenses. *State v. Bramme*, 115 Wn. App. 844, 852, 64 P.3d 60 (2003) .

The Legislature clearly intends that drug treatment be used as an alternative to standard sentencing in order to reduce recidivism:

> It is the intent of the legislature to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons. The legislature recognizes that substance abuse treatment can be effective if it is well planned and involves adequate monitoring, and that substance abuse and addiction is a public safety and public health issue that

> must be more effectively addressed if recidivism is to be reduced.

Laws of 2002, ch. 290, § 1

The Legislature granted sentencing courts discretion to impose a DOSA where the offender meets certain eligibility requirements and the court determines that sentencing alternative is appropriate. RCW 9.94A.660. A defendant is eligible for a DOSA if (1) his current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon enhancement; (2) his current offense is not a felony DUI; (3) his prior convictions do not include violent offenses or sex offenses; (4) his current offense, if drug-related, involved only a small quantity of drugs; (5) the defendant is not subject to deportation; (6) the standard range sentence for the current offense exceeds one year; and (7) the defendant has not received a DOSA more than once in the last 10 years.

RCW 9.94A.660(1). If the defendant is eligible, the court may order a risk assessment report and/or a chemical dependency screening report. RCW 9.94A.660(4).

After receipt of the report, the court determines whether a DOSA would be an "appropriate" sentence. RCW 9.94A.660(3). If so, the offender serves half of his standard-range sentence in prison where he receives a comprehensive substance abuse assessment and treatment services, and the other half as a term of community custody, with continuing treatment. *Id.*; RCW 9.94A.662. "[A]n eligible defendant. has a right to have the sentencing court fairly consider imposing a DOSA sentence." *State v. Watson*, 120 Wn. App. 521, 532, 86 P.3d 158 (2004) , *aff'd,* 155 Wn. 2d 574, 122 P.3d 903 (2005) .

Therefore "[a] DOSA is appropriate for a defendant who has a substance use disorder and is amenable to treatment." *State v. Olsen-Rasmussen*, 27 Wn. App. 2d 1057, 2023 WL 5282753, at *3 (Aug. 17, 2023) (unpublished) (*citing State v. Williams*, 199 Wn. App. 99, 111, 398 P.3d 1150 (2017)).

The Court of Appeals overlooks that Mr. Jackson was amenable to treatment and had a long history of substance abuse issues.

b. The Court of Appeals acknowledges Mr. Jackson is eligible for DOSA but overlooks and endorses the improper reasons.

In determining whether to grant a DOSA, courts consider two things: 1) whether a person is eligible for a DOSA and 2) whether a DOSA is appropriate. RCW 9.94A.660(1), (3), (5). Eligibility for a DOSA is determined by statute. RCW 9.94A.660(1).

There was no dispute Mr. Jackson met all the DOSA eligibility requirements. In fact, the Court of Appeals acknowledges as much. App. 6. He was convicted of a nonviolent offense. RCW 9.94A.030(55), .660(1)(a). He has never been convicted of using a firearm in a robbery. He has no convictions for sex offenses, and no conviction for violent offense for more than 10 years. CP 25-26; RCW 9.94A.660(1)(c). And he has never previously received a DOSA. RCW 9.94A.660(1)(g).

Mr. Jackson was screened and found eligible for DOSA. CP 6-7; RP 5. And he provided evidence he would benefit from DOSA because he previously was successful in the drug court program and stayed clean for two years while participating in treatment in a closely-monitored and structured environment. RP 21.

Mr. Jackson argued he would learn a trade during the three years of confinement, after which he would benefit from the rest of the sentence in closely monitored community supervision and treatment. RCW 9.94A.660(2). The community would benefit, as it would save the cost of incarcerating Mr. Jackson. *Id.* It would also benefit from rehabilitating a veteran who was broken in the service of our country. *Id.* The court erred in denying Mr. Jackson's request for a DOSA.

After acknowledging Mr. Jackson qualified for a DOSA, the Court of Appeals takes a view that the trial court did not abuse its discretion and believes that none of the reasons were untenable. The Court of Appeals is wrong on both its reading of the law and the facts.

c. The Court of Appeals' opinion is incorrect as it tries to paint over the improper reasons the sentencing court relied upon.

The Court of Appeals recognizes that Mr. Jackson meets the seven statutory requirements of RCW 9.94A.660. App. 7 But it incorrectly holds the trial court could still deny him DOSA because Mr. Jackson is an addict who has squandered opportunity to overcome his addiction by continuing to offend. RP 30. This reasoning misinterprets RCW 9.94A.660, *Smith*, and *Grayson*, and warrants review. *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627 (2009)(The court abuses its discretion in denying a sentencing alternative if its decision was reached by misinterpreting the statute or applying an incorrect legal standard.)

Our courts may not deny a sentencing alternative for improper reasons. *State v. Sims*, 171 Wn.2d 436,

445, 256 P.3d 285 (2011). A court that bases its denial of a DOSA on legally incorrect reasoning abuses its discretion. *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003). A defendant may appeal a DOSA denial "if the trial court refused to exercise discretion at all or relied on an impermissible basis in making the decision." *State v. Lemke*, 7 Wn. App. 2d 23, 27, 434 P.3d 551 (2018).

Here, the sentencing court denied Mr. Jackson's request for prison-based DOSA because he successfully completed drug court in the past but remains still addicted to drugs. RP 30. While failure to successfully complete drug court could be a tenable basis to deny a DOSA, *Smith*, 118 Wn. App. at 292 the sentencing court went beyond that.The court believed Jackson has been given every opportunity to overcome his addiction but he continues to offend. RP 30. Smith does not

control because from this record it appears the sentencing court punished Mr. Jackson for being an addict. Which is impermissible.

The Court of Appeals renders the court's decision to deny DOSA as follows:

> The court was "at a loss . . . to understand how a prison-based DOSA [was] going to assist [Jackson] in recovery." RP at 32. The court found it "troubling that [Jackson] continue[d] to offend," even after successfully completing drug court. RP at 30. The court discussed Jackson's recent criminal actions, noting how, while they were property crimes, they still "terrorized" the community and observed that his actions were a product of "the selfishness of addiction." RP at 30-31. When imposing the sentence, the court expressed hope that Jackson would complete his degree, get clean, and "come out being [a] contributing citizen and man." RP at 32.

App. 3.

The Court of Appeals ruled it was "reasonable" for the sentencing court to consider Jackson's prior success and subsequent recidivism because it may have

supported the need for more intensive intervention, such as imprisonment. App. 5. The reasoning makes no sense.

For one, Jackson was asking for prison-DOSA, not to be prematurely let out of prison. He asked to receive intensive treatment while in prison, because he was "likely to benefit from it" and could "help them recover from [his] addictions." *Grayson*, 154 Wn.2d at 337. He did not need "intensive intervention" meaning prison without receiving treatment.

In *Smith*, the court explained it was appropriate to consider whether a DOSA candidate "successfully complete[d] drug court," because this would help predict, "whether that candidate and the community likely will benefit from a DOSA." 118 Wn. App. at 293. The Court of Appeals misreads *Smith* and fails to recognize that Mr. Jackson previously *succeeded* in

treatment he can recover from his addiction given the chance. See App. 5.

In short, the Court of Appeals and the sentencing court misinterpreted RCW 9.94A.660, Smith, and Grayson in denying DOSA. *Adamy*, 151 Wn. App. at 587. Both courts flouted RCW 9.94A.660(5) and the legislative intent by failing to consider Mr. Jackson' history of substance use disorder and amenability to treatment. *Olsen-Rasmussen,* at *3; *Williams*, 199 Wn. App. at 111.

The evidence that Mr. Jackson successfully completed drug court showed that he will likely benefit from DOSA. Both Courts overlooked this evidence. Instead the sentencing court concluded: "I'm at a loss, Mr. Jackson, to understand how a prison-based DOSA is going to assist you in recovery." RP 32.

The proper focus should have been on whether Mr. Jackson accepted responsibility and has a substance abuse issue. *See Olsen-Rasmussen*, at *3. The statute focuses mainly on offender-based criteria, setting out when an offender is eligible for the sentencing alternative, not when an offense is eligible. See RCW 9.94A.660(1); *In Re Hardy*, 9 Wn. App. 2d 44, 50, 442 P.3d 14 (2019). The legislature enacted the DOSA statute because it recognized that drug addiction often prevents individuals from being "law abiding" in general. Laws of 2002, ch. 290, § 1. The statute is directed at individuals who need drug treatment in order to stop violating the criminal laws generally. The court's refusal to consider a DOSA because it Mr. Jackson committed a "string" of residential burglaries was an abuse of discretion. RP 31.

The Court of Appeals concluded the sentencing court did not punish Mr. Jackson solely for his drug use but "based on the illegal conduct Jackson engaged in while he was under the influence of drugs" and for the "selfishness of addiction." App 6. But that seems like a distinction without a difference. When the dust settles, this is an impermissible basis for denying DOSA. The one commonality among drug addicts' repeat crimes is that "drug users often commit crimes to support their habits[.]" Robert L. Misner, *A Strategy for Mercy*, 41 Wm. & Mary L. Rev. 1303, 1394 (2000). Moreover, "drug treatment programs appear to be much more effective than jail or prison sentences in reducing recidivism rates." *Id.* at 1393. It makes no sense to exclude people with crippling drug issues for their history of reoffending and denying them life-saving treatment.

It was also improper for the trial court to deem squatting in a vacant, unoccupied home as "terrorizing" property owners as much as violent felonies. For one, nothing in the DOSA eligibility statute authorizes a court to treat non-violent offense as a violent for repeat crimes against property.

The court believed Mr. Jackson was a threat to the community because the "string" of residential burglary "terrorized" people in their own homes. RP 31. But Mr. Jackson was charged with squatting in a vacant, unoccupied property that was up for sale. The property owner did not even live there. No property owner was terrorized in this crime. The charging documents show that the realtor met police at the property and then let police into the vacant property. Police found Mr. Jackson peacefully asleep on the floor of the garage. The realtor was not terrorized, and

neither was the property owner. The Court of Appeals erred.

To be clear the "selfishness" of addiction is not a permissible basis to deny DOSA. RP 30-31. In *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 8 L. Ed. 2d 758 (1962), the United States Supreme Court held that cruel and unusual punishment consists not only of punishment disproportionate to the crime, but also to punishment inflicted on an untenable basis. As the Court expressed it: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667. The *Robinson* court overturned a conviction and sentence of 90 days in jail for the status of being addicted to narcotics. Here, denying Mr. Johnson DOSA because of the "selfishness" of addiction punishes him for being an addict.

In short, the Court of Appeals recognizes that Mr. Jackson was eligible for DOSA. He met the statutory criteria. He demonstrated that he would greatly benefit from prison-based DOSA just as he benefited from drug court for two years. He also showed that the community would benefit from engaging a broken veteran in structured drug treatment with significant punitive sanctions in prison imposed should he fail to comply. The Court should accept review because the Court of Appeals recognize Mr. Jackson met the statutory requirements for a DOSA, yet it endorses the untenable reasons the sentencing court relied on to deny the sentencing alternative. RAP 13.4(b)(2).

E. CONCLUSION

Mr. Jackson Jr. respectfully requests this Court accept review and reverse the Court of Appeals. It misapplied RCW 9.94A.660, *Smith*, and *Grayson*, to

sidestep how the sentencing court wrongly denied him a DOSA. RAP 13.4(b)(2).

This brief complies with RAP 18.7 and contains 3,832 words.

DATED this 19th day of December 2024.

Respectfully submitted,

MOSES OKEYO (WSBA 57597)
Washington Appellate Project
Attorneys for Petitioner

APPENDICES

Filed
Washington State
Court of Appeals
Division Two

November 21, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CURTIS MANDELL JACKSON, JR., Appellant.	No. 59758-6-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — Curtis Jackson appeals the superior court's imposition of a 72-month sentence following his guilty plea to one count of residential burglary. Jackson raises two issues on appeal. First, he argues that the court erred in denying his request for a Drug Offender Sentencing Alternative (DOSA) based on impermissible reasons. Second, Jackson argues that the court erred in categorically denying his request for a Mental Health Sentencing Alternative (MHSA). Because the court did not abuse its discretion in denying the DOSA, and Jackson failed to develop the record for adequate review of the MHSA, we affirm the superior court's sentence.

FACTS

I. BACKGROUND

Jackson has struggled with substance abuse most of his life. Initially, he drank beer and smoked marijuana. After enlisting in the military, he drank hard liquor and smoked cigarettes. Jackson was deployed to Afghanistan in 2007, and he began to drink more frequently and smoke hash. After returning, he suffered from Post-Traumatic Stress Disorder (PTSD), anxiety, and

depression. This caused him to turn to harder substances, including methamphetamine, opiates, and fentanyl. Since 2009, Jackson has had several encounters with the law. He successfully completed drug court but continued to reoffend.

In 2023, Jackson pled guilty to four charges: three counts of unlawful possession of a stolen vehicle and one count of burglary in the second degree. Jackson was released from custody pending sentencing. On October 18, 2023, Jackson and another individual broke into a private residence in Lakewood. The property was vacant and pending sale. Officers arrived on the scene around 2:30 p.m. They searched the residence and did not find any signs of forcible entry. They did, however, observe that the door to the detached garage was broken. The officers found Jackson inside, asleep, next to another individual, and plastic baggies containing fentanyl and methamphetamine. After receiving his *Miranda*[1] warnings, Jackson acknowledged that he was unlawfully occupying the residence and was subsequently charged with residential burglary in violation of RCW 9A.52.025.

II. GUILTY PLEA AND SENTENCING

Jackson appeared in the Pierce County Superior Court for a plea and sentencing hearing on November 9, 2023. The court acknowledged Jackson's DOSA request at the beginning of the hearing. Jackson pleaded guilty to one count of residential burglary, and the court proceeded with sentencing. The parties stipulated Jackson's offender score at nine points. At the beginning of the State's argument, it was noted that Jackson had previously requested the MHSA on the four other charges. Apparently, the MHSA was unavailable after the October 13 incident, and Jackson

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

decided to pursue a DOSA. This was the only mention of the MHSA.[2] The State asked the court to deny the DOSA and impose a sentence of 84 months to be served concurrently with all five charges.

Defense counsel argued for a prison-based DOSA, requesting 36 months in prison and 36 months in the community in Alabama, where Jackson's family lives. Counsel argued Jackson satisfied all requirements of RCW 9.94A.010, and explained that the DOSA would benefit Jackson because he had previously done "well in a very structured environment" with "close supervision." Rep. of Proc. (RP) at 21. Additionally, counsel argued that being with his family in Alabama would provide the additional support needed for recovery, illustrated by Jackson's spouse's testimony.

After hearing arguments from both sides and Jackson's testimony, the court denied the DOSA request and imposed a 72-month sentence. The court was "at a loss . . . to understand how a prison-based DOSA [was] going to assist [Jackson] in recovery." RP at 32. The court found it "troubling that [Jackson] continue[d] to offend," even after successfully completing drug court. RP at 30. The court discussed Jackson's recent criminal actions, noting how, while they were property crimes, they still "terrorized" the community and observed that his actions were a product of "the selfishness of addiction." RP at 30-31. When imposing the sentence, the court expressed hope that Jackson would complete his degree, get clean, and "come out being [a] contributing citizen and man." RP at 32.

Jackson timely appeals his sentence.

[2] Jackson discussed his mental health conditions at several stages of the sentencing hearing, but neither Jackson or defense counsel identified they were requesting the MHSA. Also, Jackson crossed out the relevant section for the MHSA in his plea agreement for the residential burglary charge.

ANALYSIS

I. THE SUPERIOR COURT DID NOT ERR IN DENYING THE DOSA REQUEST

Jackson contends that the superior court erred in denying his DOSA request for impermissible reasons, abusing its discretion. We disagree.

Under RCW 9.94A.505(2)(a)(i), a court is ordinarily expected to impose a standard range sentence, but it "may deviate from the standard range in statutorily specified circumstances." *State v. Yancey*, 193 Wn.2d 26, 30, 434 P.3d 518 (2019). The DOSA program enables the court "to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions." *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). To qualify, a defendant must satisfy the requirements outlined in RCW 9.94A.660(1)(a)-(g). A court exercises "considerable discretion under" the Sentencing Reform Act, but "they are still required to act within its strictures and principles of due process of law." *Grayson*, 154 Wn.2d at 342. Therefore, "no defendant is entitled to an exceptional sentence below the standard range." *Id.* But they are "entitled to ask the . . . court to consider such a sentence and to have the alternative actually considered." *Id.*

Generally, a "judge's decision whether to grant a DOSA is not reviewable." *Id.* at 338. A defendant, however, "may always challenge the procedure by which a sentence was imposed." *Id.* A court abuses its discretion when it categorically "refuses to consider the alternative" or denies the request on impermissible factors, such as "the defendant's race, sex, . . . religion," *State v. Williams*, 199 Wn. App. 99, 112, 398 P.3d 1150 (2017), or personal animus, *State v. Lemke*, 7 Wn. App. 2d 23, 27-28, 434 P.3d 551 (2018).

Jackson identifies three "untenable" bases for the superior court's denial of the DOSA request. Br. of Appellant at 13-18. First, he argues the court incorrectly relied on the fact that Jackson previously completed drug court but continued to offend. Jackson relies on *State v. Smith*, 118 Wn. App. 288, 75 P.3d 986 (2003), arguing *Smith* precludes a court from considering prior success in a rehabilitative program. We disagree. *Smith* focused on the denial of a DOSA request based on the defendant's *prior failure* to complete drug court, holding that such a factor was permissible to consider. 118 Wn. App. at 292-94. Nowhere in *Smith* does the court say that a court cannot consider *prior success* with subsequent recidivism. *See id.* at 291-94. Moreover, "courts are not required to consider granting community-based treatment alternatives indefinitely." *Id.* at 293. Therefore, it was reasonable for the court to consider Jackson's prior success and subsequent recidivism because it may have supported the need for more intensive intervention, such as imprisonment.

Next, Jackson argues the court impermissibly categorized his residential burglary charge as a "violent" offense and that it "terroriz[ed] property owners." Br. of Appellant at 15. Not only does Jackson cite no authority supporting this argument,[3] but he misunderstands the record. The court specifically noted that Jackson's crimes *were not violent*. Also, the court correctly observed that while these were non-violent property crimes, they still impacted the community. Jackson focuses solely on the residential burglary charge, but Jackson had committed other crimes, including unlawful possession of a stolen vehicle and burglary in the second degree. The court expressed concern about the community, a factor enumerated in RCW 9.94A.660(5)(d). This was not improper.

[3] "Where no authorities are cited in support of a proposition, [courts are] not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligence*, 60 Wn.2d 122, 126, 373 P.2d 193 (1962).

Finally, Jackson argues the denial of the DOSA request "punishes him for being an addict," violating *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). Br. of Appellant at 16-17. We disagree. In *Robinson*, the United States Supreme Court held unconstitutional a California statute making the status of being an individual afflicted by substance abuse disorder a crime. 370 U.S. at 666-68. Here, the court's sentence does not implicate *Robinson* because the court's decision was not based solely on Jackson's substance abuse disorder; rather, it was based on the illegal conduct Jackson engaged in while he was under the influence of drugs. As a result, the court's comments regarding the "selfishness of addiction" do not rise to the level of an abuse of discretion.

The court did not base its denial on impermissible factors. In light of the totality of the record, the court engaged in a colloquy with the parties, illustrating its concern for Jackson's misconduct after completing drug court, the community's safety, and the benefit Jackson would derive from a DOSA. Even if Jackson may have qualified for the program, it is solely within the court's discretion to authorize this alternative. *See Grayson*, 154 Wn.2d at 342; RCW 9.94A.660. Nothing suggests the superior court abused its discretion by relying on impermissible factors. *See Williams*, 199 Wn. App. at 112; *Lemke*, 7 Wn. App. 2d at 27-28.

Therefore, the court did not err in denying Jackson's DOSA request.

III. THE SUPERIOR COURT DID NOT ERR IN DENYING THE MHSA REQUEST

Jackson argues that the superior court erred in categorically denying his MHSA request. We disagree.

Generally, courts do not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). An issue, however, may be raised for the first time on appeal if there is (1) a "lack of trial court jurisdiction," (2) a "failure

to establish facts upon which relief can be granted, or (3) "a 'manifest error affecting a constitutional right.'" RAP 2.5(a); *McFarland*, 127 Wn.2d at 332-33. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown[,] and the error is not manifest." *McFarland*, 127 Wn.2d at 332.

The party seeking review has the burden of perfecting the record so that, as the reviewing court, we have all relevant evidence. *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). An insufficient appellate record precludes review of the alleged errors. *Bulzomi v. Dep't of Lab. & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994).

At no point during sentencing did Jackson or his counsel raise the issue of an MHSA. In fact, Jackson crossed out the portion of the statement of defendant on plea of guilty regarding the MHSA. As a result, the issue is unpreserved. Jackson provides no direct response to the State's argument that this does not implicate a manifest error.

Even if Jackson had preserved the issue, we cannot determine whether the court categorically denied Jackson's MHSA request. The record is insufficient for our review. There is only *one reference* to an MHSA, and it was by the prosecutor. While there are comments regarding Jackson's mental health, Jackson provides no other documentation supporting his contention that the court categorically denied the MHSA request for our review.

Therefore, we decline to consider Jackson's argument that the court categorically denied his request for an MHSA.

CONCLUSION

Accordingly, we affirm Jackson's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, A.C.J.

We concur:

Maxa, J.

Che, J.

WASHINGTON APPELLATE PROJECT

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Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Curtis Jackson, Jr., Appellant
Superior Court Case Number:	23-1-03049-6

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