NO. 30736-1-III

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

PLAINTIFF/RESPONDENT,

VS.

MARIO NOYOLA,

DEFENDANT/APPELLANT.

SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS

MARIO NOYOLA #767684

AIRWAY HEIGHTS CORRECTION CENTER

PO BOX 2049

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN IMPOSING 12 MONTHS COMMUNITY CUSTODY AS PART OF THE SENTENCE.

2. THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM.

3. THE TRIAL COURT ERRED IN ITS APPLICATION OF RCW 9A.20.021 BECAUSE OF ITS AMBIGUITY.

4. MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST REMAIN WHICH REQUIRE REVIEW.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE SENTENCING COURT NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE A SENTENCE OF 60 MONTHS PLUS 12 MONTHS OF COMMUNITY CUSTODY ON COUNT 2, WHERE THE MAXIMUM SENTENCE ONLY COULD BE 68 MONTHS IN COMBINATION WITH COMMUNITY CUSTODY UNDER RCW 9.94A.701(9)?

2. DID THE SENTENCING COURT MISAPPLY THE 'STATUTORY MAXIMUM' FOR COUNT 2, WHERE THE RELEVANT STATUTORY MAXIMUM IS THE HIGH END OF THE STANDARD RANGE UNDER 9A.20.021(1)?

3. IS RCW 9A.20.021(1) AMBIGUOUS WITH REGARDS TO 'STATUTORY MAXIMUM'?

4. THOUGH ACKNOWLEDGED AS MOOT, DOES MR. NOYOLA'S DOUBLE JEOPARDY CLAIM CONTAIN MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST WHICH REQUIRE REVIEW, TO PROVIDE FUTURE GUIDANCE TO PUBLIC OFFICIALS?

C. STATEMENT OF THE CASE

ON JUNE 21, 2011, MARIO NOYOLA, (HEREIN AFTER "MR. NOYOLA") WAS CHARGED BY INFORMATION WITH ASSAULT IN THE SECOND DEGREE, INTIMIDATING A PUBLIC SERVANT, AND ASSAULT IN THE THIRD DEGREE. THE BASIS FOR THE CHARGES WAS FOR AN ALLEGED ASSAULT WITH A CORRECTION OFFICER AT THE GRANT COUNTY JAIL.

PRIOR TO TRIAL, ON FEBRUARY 8, 2012, THE STATE FILED AN AMENDED INFORMATION CHARGING MR. NOYOLA WITH CUSTODIAL ASSAULT RCW 9A.36.100(1)(b); INTIMIDATING A PUBLIC SERVANT RCW 9A.76.180; AND ASSAULT IN THE THIRD DEGREE RCW 9A.36.031(1)(g).

MR. NOYOLA NOTED HIS OBJECTION TO THE AMENDMENT BASED ON THE DUPLICATIVE NATURE OF COUNT 1 AND 3 AND THAT THEY WERE BOTH BASED ON THE SAME INTENT. ALL THREE CONVICTIONS INVOLVED THE SAME ALLEGED VICTIM.

ON FEBRUARY 9, 2012 MR. NOYOLA WAS CONVICTED BY A JURY OF ALL THREE COUNTS.

AT THE SENTENCING HEARING ON MARCH 7, 2012, MR. NOYOLA MOVED TO VACATE ONE OF THE ASSAULT CONVICTIONS FOR VIOLATING DOUBLE JEOPARDY. THE COURT DENIED THE MOTION BUT FOUND THE TWO ASSAULT CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES. THE COURT IMPOSED A SENTENCE OF 60 MONTHS CONFINEMENT ON EACH COUNT TO RUN CONCURRENTLY AND ORDERED 18 MONTHS COMMUNITY CUSTODY.

ON MARCH 26, 2012 MR. NOYOLA APPEALED. IN HIS APPEAL MR. NOYOLA ARGUED, THROUGH COUNSEL, THREE ISSUES: 1) THE TRIAL COURT ERRED IN DENYING MR. NOYOLA'S MOTION TO DISMISS THE THIRD DEGREE ASSAULT CONVICTION AS A VIOLATION OF DOUBLE JEOPARDY; 2) THE TRIAL COURT ERRED IN IMPOSING COMMUNITY CUSTODY OF 18 MONTHS AS PART OF THE SENTENCE; AND 3) THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM.

IN THEIR RESPONSE BRIEF, THE STATE SUBSEQUENTLY CONCEDED ALL THREE ISSUES. THE STATE ASKED THIS COURT TO REMAND THE MATTER TO THE SUPERIOR COURT TO DISMISS THE THIRD DEGREE ASSAULT CONVICTION, CHANGE THE TERM OF COMMUNITY CUSTODY TO 12 MONTHS, AND CLARIFY THAT THE COMBINED LENGTH OF CONFINEMENT AND COMMUNITY CUSTODY CANNOT EXCEED 60 MONTHS.

ON JUNE 28, 2013 COURT OF APPEALS COMMISSIONER, MONICA WASSON, ENTERED AN ORDER REMANDING THE MATTER TO THE SUPERIOR COURT FOR ACTION IN ACCORDANCE WITH THE STATE'S CONCESSIONS.

ON REMAND, AT THE RESENTENCING HEARING HELD SEPTEMBER 10, 2013, THE TRIAL COURT DISMISSED THE THIRD DEGREE ASSAULT CONVICTION BASED ON THE STATES CONCESSION THAT IT VIOLATED DOUBLE JEOPARDY, AND CHANGED THE COMMUNITY CUSTODY FROM 18 MONTHS TO 12, APPLYING THE 12 MONTHS COMMUNITY CUSTODY TO THE INTIMIDATING A PUBLIC SERVANT CHARGE.

MR. NOYOLA NOTED HIS OBJECTION TO THE IMPOSITION OF THE 12 MONTHS COMMUNITY CUSTODY ARGUING, IT EXCEEDED THE STATUTORY MAXIMUM.

MR. NOYOLA APPEALS AS A RESULT.

D. ARGUMENT

1. THE SENTENCING COURT DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE A SENTENCE OF 60 MONTHS PLUS 12 MONTHS OF COMMUNITY CUSTODY ON COUNT 2, WHERE THE MAXIMUM SENTENCE COULD ONLY BE 68 MONTHS IN COMBINATION WITH COMMUNITY CUSTODY UNDER RCW 9.94A. 701 (9).

SENTENCING IS A LEGISLATIVE POWER, NOT A JUDICIAL POWER. STATE V. BRYAN, 93 WN.2d 177, 181, 606 P.2d 1228 (1980). IT IS THE FUNCTION OF

THE LEGISLATURE AND NOT THE JUDICIARY TO ALTER THE SENTENCING PROCESS. STATE v. MONDAY, 85 wn.2d 906, 909-10, 540 p.2d 416 (1975). A TRIAL COURT'S DISCRETION TO IMPOSE A SENTENCE IS LIMITED TO WHAT IS GRANTED BY THE LEGISLATURE, AND THE COURT HAS NO INHERENT POWER TO DEVELOP A PROCEDURE FOR IMPOSING A SENTENCE UNAUTHORIZED BY THE LEGISLATURE. STATE v. AMMONS, 105 wn.2d 175, 718 p.2d 796 (1986)

STATUTORY CONSTRUCTION IS A QUESTION OF LAW AND REVIEWED DE NOVO. COCKLE v. DEPT OF LABOR & INDUS., 142 wn.2d 801, 807, 16 p.3d 583 (2001) A TRIAL COURT MAY ONLY IMPOSE A SENTENCE THAT IS AUTHORIZED BY STATUTE. IN RE PERS. RESTRAINT OF CARLE, 93 wn.2d 31, 604 p.2d 1293 (1980).

RCW 9.94A.701 AUTHORIZES THE SUPERIOR COURT TO IMPOSE A SENTENCE OF COMMUNITY CUSTODY, BUT WITH LIMITATIONS AS TO ITS APPLICATION. RCW 9.94A.701 (9) PROVIDES IN PERTINENT PART:

> (9) THE TERM OF COMMUNITY CUSTODY SPECIFIED BY THIS SECTION SHALL BE REDUCED BY THE COURT WHENEVER AN OFFENDER'S STANDARD RANGE TERM OF CONFINEMENT IN COMBINATION WITH THE TERM OF COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME AS PROVIDED IN RCW 9A.20.021.

SUBSECTION (3) OF RCW 9.94A.701 PROVIDES:

> (3) A COURT SHALL, IN ADDITION TO THE OTHER TERMS OF THE SENTENCE, SENTENCE AN OFFENDER TO COMMUNITY CUSTODY FOR ONE YEAR WHEN THE COURT SENTENCES THE PERSON TO THE CUSTODY OF THE DEPARTMENT FOR:
>
> (4) ANY CRIME AGAINST PERSONS UNDER RCW 9.94A.411 (2)

THE INTIMIDATING A PUBLIC SERVANT CHARGE IS NOT A VIOLENT OFFENSE. SEE RCW 9.94A.030 (54). IT IS A CRIME AGAINST A PERSON. RCW 9.94A.411 (2) INTIMIDATING A PUBLIC SERVANT IS A CLASS B FELONY WITH A SERIOUSNESS LEVEL OF 3. MR. NOYOLA HAS NINE PLUS POINTS SO HIS STANDARD RANGE

SENTENCE IS 51-68 MONTHS PURSUANT TO RCW 9.94A.510, THE STATUTE THAT SPECIFICALLY ESTABLISHES HIS MAXIMUM SENTENCE HE MAY BE GIVEN PURSUANT TO THE SERIOUSNESS OF HIS OFFENSE AND THE OFFENDER CRIMINAL HISTORY. SEE RCW 9.94A.010(1)

HERE MR. NOYOLA WAS GIVEN 60 MONTHS FOR COUNT TWO, INTIMIDATING A PUBLIC SERVANT RCW 9A.76.180, WHICH IS 8 MONTHS BELOW THE MAXIMUM HE COULD RECEIVE. THEREFORE, THE SENTENCING COURT DID NOT HAVE THE STATUTORY AUTHORITY TO IMPOSE 12 MONTHS COMMUNITY CUSTODY BECAUSE THE ADDITIONAL 12 MONTHS WOULD EXCEED THE STATUTORY MAXIMUM BY 4 MONTHS. A SUBSEQUENT REMAND IS NECESSARY TO CORRECT THE RESENTENCING ERROR.

2. THE SENTENCING COURT MISAPPLIED THE 'STATUTORY MAXIMUM' FOR COUNT 2, BECAUSE THE RELEVANT STATUTORY MAXIMUM IS THE HIGH END OF THE STANDARD RANGE UNDER RCW 9A.20.021(1).

A COURT REVIEWS A DISCRETIONARY SENTENCING DECISION MADE UNDER THE SRA FOR ABUSE OF DISCRETION OR MISAPPLICATION OF LAW. STATE V. ELLIOTT, 114 WN.2D 6, 17, 785 P.2D 440 (1990). A TRIAL COURT ABUSES ITS DISCRETION IF ITS DECISION IS "MANIFESTLY UNREASONABLE", BASED ON "UNTENABLE GROUNDS", OR MADE FOR "UNTENABLE REASONS". STATE EX REL. CARROLL V. JUNKER, 79 WN.2D 12, 26, 482 P.2D 775 (1971) A DECISION IS BASED ON UNTENABLE GROUNDS OR MADE FOR UNTENABLE REASONS IF IT REST ON FACTS UNSUPPORTED IN THE RECORD OR WAS REACHED BY APPLYING THE WRONG LEGAL STANDARD. A DECISION IS MANIFESTLY UNREASONABLE IF THE COURT, DESPITE APPLYING THE CORRECT LEGAL STANDARD TO THE SUPPORTED FACTS, ADOPTS A VIEW THAT NO REASONABLE PERSON WOULD TAKE, AND ARRIVES AT A DECISION OUTSIDE THE RANGE OF ACCEPTABLE CHOICES. STATE V. ROHRICH, 149 WN.2D 647, 654, 71 P.3D 638 (2003) COURTS INTERPRET A STATUTE DE NOVO. STATE V. BRIGHT, 129 WN.2D 257, 265, 916 P.2D 922 (1996)

RCW 9.94A.515 IDENTIFIES CRIMES ALLEGEDLY COMMITTED WITH ITS SERIOUSNESS LEVEL, TO HELP WITH THE IMPOSITION OF THE TIME PROPORTINATE WITH THE OFFENDERS CRIMINAL HISTORY SCORE.

RCW 9.94A.510 IS THE STATUTE THAT SPECIFICALLY ESTABLISHES THE MAXIMUM SENTENCE A PERSON CAN RECEIVE BASED ON THE SERIOUSNESS OF THE ALLEGED COMMITTED OFFENSE AND THEIR CRIMINAL HISTORY, I.E., ITS THE MAXIMUM SENTENCE ALLOWED BY LAW UNLESS A JUDGE OR JURY DETERMINE THAT FACTS EXIST THAT AUTHORIZE AN EXCEPTIONAL SENTENCE BEYOND OR BELOW THAT STANDARD RANGE, IN OTHER WORDS 'STATUTORY MAXIMUM'. (EMPHASIS ADDED)

RCW 9.94A.505 PROVIDES:

(1) WHEN A PERSON IS CONVICTED OF A FELONY, THE COURT SHALL IMPOSE PUNISHMENT AS PROVIDED IN THIS CHAPTER.

(2)(a) THE COURT SHALL IMPOSE A SENTENCE AS PROVIDED IN THE FOLLOWING SECTIONS AND AS APPLICABLE IN THE CASE:

(i) UNLESS ANOTHER TERM OF CONFINEMENT APPLIES, A SENTENCE WITHIN THE STANDARD SENTENCE RANGE ESTABLISHED IN RCW 9.94A.510 OR 9.94A.517; (EMPHASIS ADDED)

RCW 9A.20.021 PROVIDES:

(1) FELONY. UNLESS A DIFFERENT MAXIMUM SENTENCE FOR A CLASSIFIED FELONY IS SPECIFICALLY ESTABLISHED BY A STATUTE OF THIS STATE, NO PERSON CONVICTED OF A CLASSIFIED FELONY SHALL BE PUNISHED BY CONFINEMENT OR FINE EXCEEDING THE FOLLOWING:

(b) FOR A CLASS B FELONY, BY CONFINEMENT IN A STATE CORRECTIONAL INSTITUTION FOR A TERM OF TEN YEARS...

HERE, ALTHOUGH THE COURT DID NOT SPECIFICALLY IDENTIFY THE STATUTE RCW 9A.20.021 IT REFERRED TO IT IN ITS ANALYSIS STATING:

" THE -- THE RANGE -- FOR THE INTIMIDATING A PUBLIC SERVANT -- STANDARD RANGE IS 51 TO 68 MONTHS, SO THE DEFENDANT HAS TO BE SENTENCED WITHIN THAT RANGE. AND APPARENTLY THE COURT ORDERED 60 MONTHS ON THAT. I WON'T CHANGE THAT. THE QUESTION IS, CAN THE COURT ORDER 12 MONTHS

OF COMMUNITY CUSTODY ON THAT. THE INITIAL ANSWER IS YES. IF THE CRIME AGAINST A PERSON -- THE COURT CAN ORDER UP TO 12 MONTHS.

THE DEFENDANT ARGUES, THOUGH, THAT THAT WOULD EXCEED HIS STATUTORY MAXIMUM. WELL, THAT WOULD EXCEED THE STATUTORY MAXIMUM FOR A CLASS C FELONY SUCH AS WHAT WAS IN COUNT 1, THE CUSTODIAL ASSAULT, OR COUNT 3, THE CUSTODIAL ASSAULT. BUT IT DOESN'T EXCEED THE -- THE STATUTORY MAXIMUM FOR COUNT B [sic], AND THAT'S THE ONLY ONE, COUNT B -- OR, EXCUSE ME -- COUNT 2 IS THE ONLY CHARGE IN WHICH THE COURT IS ORDERING COMMUNITY CUSTODY IN. AND SO THE ANALYSIS OF DOES THE SENTENCE PLUS COMMUNITY CUSTODY EXCEED THE STATUTORY MAXIMUM... THE ARITHMETIC IS, ADDING UP THE ACTUAL SENTENCE PLUS THE COMMUNITY IN THAT PARTICULAR COUNT, AND SEEING IF IN THAT COUNT IT EXCEEDS THE STATUTORY MAXIMUM...

SO I DON'T THINK THAT IT RUNS AFOUL OF ANY LAW. AND SO I'LL ORDER 12 MONTHS COMMUNITY CUSTODY ON COUNT 2 -- WHICH IS THE INTIMIDATING A PUBLIC SERVANT." (RP. SEPT. 10, 2013 AT 45-46)

MR. NOYOLA ARGUES THAT THE TRIAL COURT MADE A MISAPPLICATION OF LAW BY APPLYING THE WRONG LEGAL STANDARD IN REGARDS TO WHAT THE STATUTORY MAXIMUM ACTUALLY IS.

IN BLAKELY V. WASHINGTON, 542 U.S. 296, 124 S.Ct. 2531 (2004) THE SUPREME COURT DEFINED "STATUTORY MAXIMUM" AS THE STANDARD RANGE - I.E., THE AMOUNT OF PUNISHMENT THE JUDGE MAY IMPOSE SIMPLY AS A RESULT OF THE FACTS REFLECTED IN THE JURY VERDICT (AS IN THIS CASE) AND THE OFFENDER SCORE WITHOUT RESORT TO AGGRAVATING FACTORS OR OTHER FACTS. BLAKELY, 542 U.S. AT 303, 124 S.Ct. 2531.

REAFFIRMING THIS DEFINITION, THE WASHINGTON SUPREME COURT IN STATE V. EVANS, 154 Wn.2d 438, 441-42 (2005), CLARIFIED THAT THE 'STATUTORY MAXIMUM' DID NOT REFER TO THE MAXIMUM SENTENCE AUTHORIZED BY

THE LEGISLATURE FOR THE CRIME (AS ALMOST EVERY COURT CONSIDERING THE ISSUE HAD CONCLUDED). INSTEAD 'STATUTORY MAXIMUM' MEANT THE MAXIMUM SENTENCE A TRIAL JUDGE WAS AUTHORIZED TO GIVE WITHOUT FINDING ADDITIONAL FACTS, IN THE CASE OF THE SENTENCING REFORM ACT OF 1981 (SRA) CH. 9.94A RCW, THE TOP OF THE STANDARD RANGE. EVANS, 154 wn.2d AT 441. (EMPHASIS ADDED)

THE TRIAL COURT ACKNOWLEDGED THAT MR. NOYOLA'S SENTENCE RANGE WAS 51 - 68 MONTHS AND THAT HE "HAD TO BE SENTENCED WITHIN THAT RANGE". (RP SEPT. 10, 2013 AT 45) (EMPHASIS ADDED). THE TRIAL COURT FURTHER STATED, "THE ANALYSIS OF DOES THE SENTENCE PLUS COMMUNITY CUSTODY EXCEED THE STATUTORY MAXIMUM... THE ARITHMETIC IS, ADDING UP THE ACTUAL SENTENCE PLUS THE COMMUNITY [CUSTODY] IN THAT PARTICULAR COUNT, AND SEEING IF IN THAT COUNT IT EXCEEDS THE STATUTORY MAXIMUM".

MR. NOYOLA DOES NOT CONTEST THE ARITHMETIC GIVEN BY THE COURT BUT ARGUES THAT THE COURT WENT OUT THE STANDARD RANGE WHICH THE COURT ACKNOWLEDGED WAS MR. NOYOLAS STATUTORY MAXIMUM.

THE COURT IS RIGHT THAT COUNT 2 INTIMIDATING A PUBLIC SERVANT IS A CLASS B FELONY BUT ITS CLASS IS IRRELEVANT TO THE APPLICATION OF MR. NOYOLA'S SENTENCE, BASED ON HIS POINTS AND SERIOUSNESS LEVEL OF THE CRIME THE COURT COULD ONLY RELY ON THE CLASS OF FELONY IF IT WAS TO GIVE AN ACCEPTIONAL SENTENCE WHICH COULD NOT EXCEED 10 YEARS.

BECAUSE OF THE MISAPPLICATION TO THE WRONG STATUTORY MAXIMUM WHICH THE COURT FAILED TO IDENTIFY, IT ABUSED ITS DISCRETION IN SENTENCING MR. NOYOLA TO AN UNLAWFUL SENTENCE VIOLATING ITS STATUTORY AUTHORITY.

[redacted]

3. RCW 9A.20.021 IS AMBIGUOUS BECAUSE IT FAILS TO IDENTIFY WHICH STATUTORY MAXIMUM IS TO BE USED.

THE INTERPRETATION OF PROVISIONS OF THE SRA INVOLVES QUESTIONS

OF LAW THAT [ARE] REVIEWED DE NOVO. STATE V. JACOBS, 154 WN.2d 596, 600 (2005) WHEN INTERPRETING A STATUTE, [THE COURTS] OBJECTIVE IS TO DETERMINE THE LEGISLATURE'S INTENT. Id

TO DETERMINE THAT INTENT, [COURTS] FIRST LOOK TO THE LANGUAGE OF THE STATUTE. STATE V. ARMENDARIZ, 160 WN.2d 106, 110 (2007)

IF THE PLAIN LANGUAGE OF THE STATUTE IS CLEAR AND UNAMBIGUOUS [COURTS] MUST GIVE EFFECT TO THE LANGUAGE AS AN EXPRESSION OF LEGISLATIVE INTENT. DEPT OF ECOLOGY V. CAMPBELL & GWINN, LLC, 146 WN.2d 1, 9-10 (2002)

THE 'PLAIN MEANING' OF A STATUTORY PROVISION IS TO BE DISCERNED FROM THE ORDINARY MEANING OF THE LANGUAGE AT ISSUE, AS WELL AS FROM THE CONTEXT OF THE STATUTE IN WHICH THAT PROVISION IS FOUND, RELATED PROVISIONS, AND THE STATUTORY SCHEME AS A WHOLE. WASH. PUB. PORTS ASS'N V. DEPT OF REVENUE, 148 WN.2d 637, 645 (2003)

IF A STATUTE IS AMBIGUOUS, THE RULE OF LENITY REQUIRES THE COURT TO INTERPRET THE STATUTE IN FAVOR OF THE DEFENDANT ABSENT LEGISLATIVE INTENT TO THE CONTRARY. IN RE CHARLES, 135 WN.2d 239, 249 (1998)

RCW 9A.20.021 PROVIDES IN PERTINENT PART:

(1) FELONY. UNLESS A DIFFERENT MAXIMUM SENTENCE FOR A CLASSIFIED FELONY IS ~~ESTABLISHED~~ SPECIFICALLY ESTABLISHED BY A STATUTE OF THIS STATE, NO PERSON CONVICTED OF A CLASSIFIED FELONY SHALL BE PUNISHED BY CONFINEMENT OR FINE EXCEEDING THE FOLLOWING:

(a) FOR A CLASS A FELONY, BY CONFINEMENT IN A STATE CORRECTIONAL INSTITUTION FOR A TERM OF LIFE IMPRISONMENT...

(b) FOR A CLASS B FELONY, BY CONFINEMENT IN A STATE CORRECTIONAL INSTITUTION FOR A TERM OF TEN YEARS...

(c) FOR A CLASS C FELONY, BY CONFINEMENT IN A STATE CORRECTIONAL INSTITUTION FOR FIVE YEARS...

MR. NOYOLA ASSERTS THAT RCW 9A.20.021(1) IS AMBIGUOUS. HE REQUEST THAT THIS COURT LOOK AT THE LANGUAGE IN SUBSECTION (1). SPECIFICALLY HE POINTS TO THE FIRST PART OF THE SENTENCE THAT SAYS, " UNLESS A DIFFERENT MAXIMUM SENTENCE FOR A CLASSIFIED FELONY IS SPECIFICALLY ESTABLISHED BY A STATUTE OF THIS STATE"...

HE CONTENDS THAT THE STATUTE IS MEANT TO READ AS, IF THERE IS A STATUTE THAT IDENTIFIES A MAXIMUM FOR A SENTENCE, SUCH AS RCW 9.94A.510 (THE SENTENCING GRID OR TABLE) THEN THAT STATUTE IS THE 'STATUTORY MAXIMUM' YOU CAN RECEIVE.

AS IN THIS CASE, BECAUSE RCW 9.94A.510 IS A SPECIFICALLY ESTABLISHED STATUTE THAT ALLOWS A MINIMUM AND MAXIMUM FOR A PROSCRIBED CRIME BASED ON THE SERIOUSNESS LEVEL AND OFFENDER CRIMINAL HISTORY POINTS, IT CAN ONLY BE THE 'MAXIMUM SENTENCE' (STATUTORY MAXIMUM) YOU CAN HAVE APPLIED TO YOUR SENTENCE. (EMPHASIS ADDED)

THE COURT CAN ONLY APPLY SUBSECTION A, B, AND C IF THERE IS NO SPECIFICALLY ESTABLISHED STATUTE WITH A STANDARD RANGE THAT CONTAINS A MAXIMUM BASED ON OFFENDER POINTS AND SERIOUSNESS LEVEL. IT IS THE INTENT OF THE LEGISLATURE TO CREATE THESE ALTERNATE YEARS OF CONFINEMENT FOR A CLASS A, B, OR C FELONY SO A JUDGE CANNOT SENTENCE A PERSON THAT COMMITTED A CLASS C FELONY TO A LIFE TERM AND SO THEY MAY NOT IMPOSE AN EXCEPTIONAL SENTENCE BEYOND THAT.

IF THE COURT DOES NOT AGREE THEN, WHAT IS THE PURPOSE OF HAVING THE SRA?

RCW 9.94A.010 HELPS FURTHER MR. NOYOLAS ARGUMENT. IT STATES:

" THE PURPOSE OF THIS CHAPTER IS TO MAKE THE CRIMINAL JUSTICE SYSTEM ACCOUNTABLE TO THE PUBLIC BY DEVELOPING A SYSTEM FOR THE SENTENCING OF FELONY OFFENDERS WHICH STRUCTURES, BUT DOES NOT ELIMINATE DISCRETIONARY DECISIONS AFFECTING SENTENCES, AND TO:

(1) ENSURE THAT THE PUNISHMENT FOR A CRIMINAL OFFENSE IS

PROPORTIONATE TO THE SERIOUSNESS OF THE OFFENSE AND THE OFFENDER'S CRIMINAL HISTORY; (EMPHASIS ADDED)

RCW 9.94A.030 IS THE DEFINITION STATUTE AND IT DEFINES 'STATUTORY MAXIMUM SENTENCE, AS, "THE MAXIMUM LENGTH OF TIME FOR WHICH AN OFFENDER MAY BE CONFINED AS PUNISHMENT FOR A CRIME AS PRESCRIBED IN CHAPTER 9A.20, 9.92.010 THE STATUTE DEFINING THE CRIME OR OTHER STATUTE DEFINE THE MAXIMUM PENALTY FOR A CRIME".

RCW 9.94A.505 (2)(a)(i) STATES:

'UNLESS ANOTHER TERM OF CONFINEMENT APPLIES, A SENTENCE WITHIN THE STANDARD SENTENCE RANGE ESTABLISHED IN RCW 9.94A.510 OR 9.94A.517"

(5)..."A COURT MAY NOT IMPOSE A SENTENCE PROVIDING FOR A TERM OF CONFINEMENT OR COMMUNITY CUSTODY THAT EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME AS PROVIDED IN CHAPTER 9A.20 RCW."

ALL THE SUBSEQUENT STATUTES TAKEN AS A WHOLE, FAIL TO IDENTIFY WHICH PART OF 9A.20 APPLIES TO THE STATUTORY MAXIMUM.

ITS VERY APPARENT THAT 9A.20.021 IS AMBIGUOUS IN WHAT A MAXIMUM SENTENCE IS AND IT ALLOWS A COURT TO USE SUBSECTIONS A, B, AND C ONLY IF THERE IS NO MAXIMUM SENTENCE SPECIFICALLY ESTABLISHED BY A STATUTE. BECAUSE OF ITS AMBIGUITY IT ALLOWED THE COURT TO BASE ITS UNLAWFUL SENTENCE ON THE WRONG LEGAL STANDARD GIVING MR. NOYOLA 12 MONTHS OF COMMUNITY CUSTODY WHICH EXCEEDS HIS STATUTORY MAXIMUM BY 4 MONTHS.

BECAUSE THE RULE OF LENITY APPLIES IN THIS CASE, THE RULE FAVORS MR. NOYOLAS INTERPRETATION.

4. THOUGH MOOT BECAUSE OF THE DISMISSAL OF HIS THIRD DEGREE ASSAULT CONVICTION, THIS CASE CONTAINS MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST THAT ARE PRESENT REQUIRING REVIEW TO HELP FUTURE PUBLIC OFFICIALS IN AVOIDING DOUBLE JEOPARDY SENTENCES.

THE COURT HAS THE POWER TO DECIDE A MOOT CASE TO RESOLVE ISSUES OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST IF GUIDANCE WOULD BE HELPFUL TO PUBLIC OFFICERS AND THE ISSUE IS LIKELY TO RECUR. SORENSON V. CITY OF BELLINGHAM, 80 WN.2D 547, 558 (1972)

IN DECIDING WHETHER A CASE PRESENTS ISSUES OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST, THREE FACTORS ARE DETERMINATIVE: 1) WHETHER THE ISSUE IS OF PUBLIC OR PRIVATE NATURE; 2) WHETHER AN AUTHORITIVE DETERMINATION IS DESIRABLE TO PROVIDE GUIDANCE TO PUBLIC OFFICERS; 3) WHETHER THE ISSUE IS LIKELY TO RECUR. SATOMI OWENERS ASS'N V. SATOMI, LLC, 167 WN.2D 781, 796 (2009)

THE COURT MAY ALSO CONSIDER THE LIKELIHOOD THAT THE ISSUE WILL ESCAPE REVIEW BECAUSE THE FACTS OF THE CONTROVERSY ARE SHORT LIVED. Id.

OUR SUPREME COURT HAS OBSERVED THAT ISSUES OF CONSTITUTIONAL OR STATUTORY INTERPRETATION TEND TO BE MORE PUBLIC IN NATURE MORE LIKELY TO ARISE AGAIN AND THE DECISIONS HELP TO GUIDE PUBLIC OFFICIALS. IN RE BOVAN, 157 WN. APP. 588 (2010)

MR. NOYOLA ASKS THIS COURT TO REVIEW THE ISSUE OF DOUBLE JEOPARDY WHEN A PERSON IS CONVICTED OF CUSTODIAL ASSAULT AND THIRD DEGREE ASSAULT BASED ON THE SAME INTENT FOR THE SAME VICTIM.

ITS PUBLIC OR PRIVATE NATURE EXIST BECAUSE IT DEALS WITH CONSTITUTIONAL AND STATUTORY INTERPRETATION, AN AUTHORITIVE DETERMINATION IS NECESSARY TO GIVE GUIDANCE TO PUBLIC OFFICERS BECAUSE THE POSSIBLE ADVERSE CONSEQUENCES HAVING MULTIPLE CONVICTIONS BASED ON ONE ACT WHICH EITHER INCREASE AN OFFENDER SCORE OR SUBJECT THEM TO THE PERSISTENT OFFENDER ACT AND AS IN THIS CASE, IT WAS SHORT LIVED BECAUSE OF THE STATES ~~CONTENTION~~ CONCESSION AND ALSO IS LIKELY TO RECUR BECAUSE COURTS ARE STILL UNDECIDED ON HOW TO SENTENCE CRIMES BASED ON THE SAME INTENT, SAME VICTIM BUT DIFFERENT STATUTES.

AT ISSUE IS WHETHER CUSTODIAL ASSAULT RCW 9A.36.100 AND ASSAULT IN THE THIRD DEGREE RCW 9A.36.031 ARE THE SAME OFFENSE AND IF THE LEGISLATURE HAS AUTHORIZED PUNISHMENT OR CONVICTIONS FOR BOTH SEPARATELY.

BOTH THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE. U.S. CONST. AMEND. V, CONST. ART. I, § 9 STATE V. TVEDT 153 WN.2d 705, 710 (2005). CLAIMS OF DOUBLE JEOPARDY ARE QUESTIONS REVIEWED DE NOVO. STATE V. SAUKMAN 156 WN. 2d 736, 746 (2006)

TO DETERMINE WHETHER THE LEGISLATURE INTENDED TO PUNISH CRIMES SEPARATELY, COURTS APPLY THE FOUR-PART TEST ENUNCIATED IN STATE V. FREEMAN, 153 WN.2d 765, 771-73 (2005). FIRST, COURTS LOOK AT THE STATUTORY LANGUAGE TO DETERMINE IF SEPARATE PUNISHMENTS ARE SPECIFICALLY AUTHORIZED. Id AT 773. SECOND, COURTS ASK WHETHER ONE OFFENSE INCLUDES AN ELEMENT NOT INCLUDED IN THE OTHER AND WHETHER PROOF OF ONE OFFENSE WOULD NOT NECESSARILY PROVE THE OTHER. STATE V. CALLE, 125 WN.2d 769, 777 (1995). THIRD, COURTS USE THE MERGER DOCTRINE TO DETERMINE LEGISLATIVE INTENT EVEN IF TWO CRIMES HAVE FORMALLY DIFFERENT ELEMENTS. FREEMAN, 153 WN.2d AT 772. FINALLY, EVEN IF ON AN ABSTRACT LEVEL THE TWO CONVICTIONS APPEAR TO BE FOR THE SAME OFFENSE OR FOR CHARGES THAT WOULD MERGE, COURTS MUST DETERMINE WHETHER THERE IS AN INDEPENDENT PURPOSE OR EFFECT FOR EACH OFFENSE. Id AT 773.

THE COURT FIRST CONSIDERS ANY EXPRESS OR IMPLIED LEGISLATIVE INTENT BASED ON THE CRIMINAL STATUTES INVOLVED. THE TWO STATUTES GOVERNING CUSTODIAL ASSAULT AND ASSAULT IN THE THIRD DEGREE, RCW 9A.36.100 AND RCW 9A.36.031 DO NOT CONTAIN SPECIFIC PROVISIONS EXPRESSLY AUTHORIZING SEPARATE PUNISHMENTS FOR THE SAME CONDUCT.

THUS, THIS COURT SHOULD TURN TO THE SAME EVIDENCE TEST AND ASK WHETHER THE TWO CRIMES ARE THE SAME IN BOTH LAW AND IN FACT. STATE V. MARTIN, 149 WN APP. 689, 698-99 (2009) OFFENSES ARE THE SAME IN LAW WHEN PROOF OF ONE WOULD ALSO PROVE THE OTHER. Id AT 699.

THE STATE ALLEGED THAT MR. NOYOLA COMMITTED TWO SEPARATE ASSAULTS, ASSAULTING OFFICER KISLER WHILE AT A ADULT CORRECTION INSTITUTION OR LOCAL ADULT DETENTION FACILITIES WHO WAS PERFORMING OFFICIAL DUTIES AND A LAW ENFORCEMENT OFFICER OR OTHER EMPLOYEE OF A LAW ENFORCEMENT AGENCY WHO WAS PERFORMING HIS OR HER OFFICAL DUTIES.

THE EVENTS IN QUESTION WERE ACTIONS TAKEN AGAINST THE SAME VICTIM, AT THE SAME TIME AND PLACE. BECAUSE ASSAULT IS NOT DEFINED IN TERMS OF EACH PHYSICAL ACT AGAINST A VICTIM, NOYOLA'S ACTIONS CONSTITUTED ONE SINGLE ASSAULT IN FACT. THEY ARE THE SAME IN LAW BECAUSE PROOF OF ONE NECESSARILY PROVES THE OTHER.

AS THE SUPREME COURT STATED IN STATE V. TILI:

"[THE ASSAULT STATUTE DOES NOT DEFINE THE SPECIFIC UNIT OF PROSECUTION IN TERMS OF EACH PHYSICAL ACT AGAINST A VICTIM. RATHER, THE LEGISLATURE DEFINED ASSAULT ONLY AS THAT OCCURRING WHEN AN INDIVIDUAL 'ASSAULTS' ANOTHER." STATE V. TILI, 139 WN.2d 116-17 (1999)

IN 1985, THE UNITED STATES SUPREME COURT OBSERVED THAT MULTIPLE CONVICTIONS WHOSE SENTENCES ARE SERVED CONCURRENTLY MAY STILL VIOLATE THE RULE AGAINST DOUBLE JEOPARDY. STATE V. CALLE, 125 WN.2d 769, 773 (1995) (CITING BALL V. UNITED STATES, 470 U.S. 856, 864-65, 105 S.CT. 1668, 1673-74, 84 L.Ed.2d 740 (1985)

THEY NOTED THAT THE SECOND CONVICTION, WHOSE CONCOMITANT SENTENCE IS SERVED CONCURRENTLY, DOES NOT EVAPORATE SIMPLY BECAUSE OF THE CONCURRENCE OF THE SENTENCE. THE SEPARATE CONVICTION, APART FROM THE CONCURRENT SENTENCE, HAS POTENTIAL ADVERSE COLLATERAL CONSEQUENCES THAT MAY NOT BE IGNORED. id

IN THIS CASE THE COURT PROPERLY DISMISSED COUNT 3 BECAUSE IT RECOGNIZED THAT THE ASSAULT WAS ONE ACT AND THAT TWO CONVICTIONS FOR THE SAME ACT COULD SUBJECT MR NOYOLA TO ADVERSE CONSEQUENCES.

BOTH STATUTES ALSO IDENTIFY THAT A PERSON IS GUILTY OF CUSTODIAL

ASSAULT AND ASSAULT IN THE THIRD DEGREE IF NOT GUILTY OF FIRST OR SECOND DEGREE ASSAULT. THEY ARE NOT DIFFERENTIATED IN TERMS OF DEGREE OF ASSAULT SO THIS FURTHER DRIVES THAT THE LEGISLATURE AGREES THAT THEY ARE THE SAME CRIME.

BECAUSE THIS CASE PRESENTS A PERFECT SET OF FACTS FOR A DOUBLE JEOPARDY ANALYSIS FOR FUTURE GUIDANCE, THIS COURT SHOULD REVIEW THIS CASE.

CONCLUSION

WHEREFORE, FOR THE REASONS STATED, THE COMMUNITY CUSTODY ON COUNT 2 SHOULD BE REDUCED TO 8 MONTH, THE RULE OF LENITY SHOULD APPLY TO MR. NOYOLA, AND THIS COURT SHOULD REVIEW MR. NOYOLAS CASES BECAUSE IT CONTAINS MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST.

DATED THIS 26TH DAY OF FEB. 2014.

MARIO NOYOLA

CERTIFICATE OF SERVICE

MAILBOX RULE GR 3.1

HOUSTON V. LACK, 487 U.S. 266, 108 S.Ct. 2379 (1988)

I CERTIFY THAT ON THIS DATE THAT I MAILED THE FOLLOWING DOCUMENT(S):

'SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS'

BY GIVING THEM TO AHCC PRISON AUTHORITIES TO BE PROCESSED LEGAL MAIL POSTAGE PRE PAID, TO:

RENEE S. TOWNSLEY
COURT OF APPEALS CLERK
500 N. CEDAR ST
SPOKANE, WA. 99201

DATED THIS 27TH DAY OF FEBRUARY 2014 AT AIRWAY HEIGHTS WA.

MARIO NOYOLA