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STATE OF WASHINGTON
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IN THE SUPREME COURT OF F THE STATE OF WASHINGTON

44594-8-II
(44610-3-II)

ANTHONY LEO KOZEY

Petitioner
v.

STATE OF WASHINGTON,

Respondent,

FROM DIVISION TWO OF THE COURT OF APPEALS

PETITIONER FOR REVIEW

LISE ELLNER
Attorney for Appellant

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A. IDENTITY OF PETITION

Anthony Leo Kozey asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Kozey seeks review of the Court of Appeals decision in State v. Kozey, COA No. 44594-8-II filed September 16, 2014. Mr. Kozey seeks review of the following portions of the Court of Appeals decision erroneously determined (1) that the legislature used the term "and" in RCW 9.94A.030 (20) to mean "or" rather than "and" (RCW 9.94A.030 (20) in relevant part, defines "domestic violence" as having "the same meaning as defined in RCW 10.99.020 **and** 26.50.010.") (Emphasis added); (2) that the legislature did not intend RCW 9.94A.030 (20) to create a group of violent domestic violence crimes for enhanced sentencing purposes, but rather, despite the plain language intended to subject all domestic violence crimes under RCW 10.99.020 and RCW 26.50.10 to enhanced sentencing under RCW 9.94A.525; (3) and that using the term "and" to mean "in the conjunctive renders the use of RCW 10.99.020 "superfluous".

A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the legislature intend the "and" in RCW 9.94A.030 (20) to have a conjunctive meaning ("domestic violence" as having "the same meaning as defined in RCW 10.99.020 and 26.50.010.")?

2. Did the legislature intend to create a sentencing enhancement for violent domestic violence crimes rather than for all crimes listed in RCW 10.99.020 and RCW 26.50.010?

3. Does giving the "and" in RCW 9.94A.030(20) the conjunctive meaning render superfluous RCW 10.99.010?

D. STATEMENT OF THE CASE

Pursuant to a stipulated trial, Mr. Kozey admitted that on November 13, 2011 and on February 9, 2012, he violated a no-contact order contrary to RCW 26.50.010(1). CP 170-188. The sole legal controversy in this case requires this Court to determine if the Court of Appeals erred by reversing the trial court and ruling that under RCW 9.94A.030(20) which defines "domestic violence" as having "**the same meaning** as defined in RCW 10.99.020 **and** 26.50.010[]" (Emphasis added), the state could seek the enhanced sentencing provisions of RCW 9.94A.525(21) if it pleaded and proved that Mr. Kozey committed a domestic violence crime as defined under RCW 10.99.020(5)(r)

or RCW 26.50.010(1).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

a. This Court should accept review under RAP 13.4(c) because the Court of Appeals decision is one of first impression in this State and is of substantial public importance which should be decided by this Court.

b. Summary

On September 16, 2014, the Court of Appeals, Division II, reversed the trial court's decision and remanded for resentencing, holding that the term "and" in RCW 9.94A.030(20) must be construed in the disjunctive rather than the plain meaning in the conjunctive.

c. The Statutes

The definition of domestic violence in RCW 10.99.020 is provided through a non-exclusive list of exemplar crimes, while the term "domestic violence" is more narrowly defined in chapter 26.50 as follows:

> ""Domestic violence" means (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member."

RCW 26.50.010(1). The definition for domestic violence in RCW 26.50.010 specifically requires assault, stalking, or sexual assault. Without these

elements, the state cannot prove domestic violence under RCW 26.50.010. Similarly, as the trial court correctly held in this case, without these elements, the state could not prove a domestic violence crime under RCW 9.94A.030(20). The trial court held that to be eligible for the enhanced sentencing provisions under RCW 9.94A.525(21) the state must do as the legislature stated: plead and prove a crime that meets the definitions in both RCW 26.50.010and RCW 10.99.020.

d. Plain Meaning-Rule of Lenity

This Court provides that "when possible" legislative intent is derived "solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); *State Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). Absent legislative intent to the contrary, only when there is more than one "reasonable" interpretation of the plain language, will the Court engage in statutory construction. Id. Moreover, if a statute is ambiguous, the rule of lenity requires the court to strictly construe the statute in favor of the defendant. *Evans*, 177 Wn.2d at 199, 220 (the legislature did not intend to

identity corporations as victims in the identity theft statute RCW 9.35.020, but since an interpretation including corporations would be reasonable, the statute was ambiguous and thus the rule of lenity applied to the defendant).

Here, the Court of Appeals did not agree that RCW 9.94A.030(20) should be read in the conjunctive but it did admit that there was more than one reasonable interpretation of the term "and". Opinion at page 11:

> [i]n ordinary English, it may seem incongruous that the plain meaning of "and" could be taken as creating a disjunctive series of items in a list..... As just discussed, the plain meaning of the two related statutes linked by "and" in RCW 9. 94A.030(20) leaves little doubt that in this specific context, the legislature intended domestic violence to include the conduct described in either RCW 10. 99.020 or RCW 26. 50. 010. Because the term is not ambiguous in this context, further construction is not needed.

Opinion at page.11.

Not surprisingly, Black's Law Dictionary, Special Deluxe Fifth Edition p.79 (1979) defines "and" primarily having a conjunctive meaning but on rare occasion as having a disjunctive meaning:

> A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first. Added to; together with; joined with; as well as; including. Sometimes construed as "or" . *Land & Lake Ass'n v. Conklin,* 182 A.D. 546, 170 N.Y.S. 427, 428 [(1918)].

The reference to the use of "and" as "or" *Land and Lake*, which cites to *Ludlow v. City* of *Oswego*, 25 Hun, 260, 261 (1893) is a 123 year old case, the only case Black's Law Dictionary cites for the seemingly rare proposition that on occasion "and" may mean "or.

Under *Evans*, the Court of Appeals recognition that the term "and "is usually defined in the conjunctive, but its decision to ignore that meaning in favor of the rarely used disjunctive, is an admission that the term "and" has more than one "reasonable interpretation". This required the Court of Appeals to employ the rule of lenity in Mr. Kozey's favor. *Evans*, 177 Wn.2d at 193.

Under *Evans,* the Court of Appeals failure to apply the rule of lenity, is an issue of significant public importance because this Court continues to hold that "[i]f a penal statute is ambiguous and thus subject to statutory construction, it will be 'strictly construed' in favor of the defendant." Id.

e. Plain Meaning of "and" is Conjunctive.

In *State v. Tiffany*, 44 Wash. 602, 603-04, 87 P.932 (1906) this Court analyzed a criminal statute that contained the term "or" and held that without cogent proof of legislative error "or" has a disjunctive, not a conjunctive meaning and vice versa. *Tiffany*, 44 Wash. at 603-04. "[*O]r* is sometimes construed to mean *and*, and *vice versa*, in statutes, wills and contracts **when**

there is cogent proof of legislative error." (italics emphasis in original; bold added). *Tiffany*, 44 Wash. at 603-605.

The Court of Appeals utilized only part of this language and failed to acknowledge that the Court in *Tiffany* rejected the interchangeability of the terms "and" and "or" without the presence of "cogent proof of legislative error" Opinion at page 4. The Court of Appeals used this quote out of context by citing as follows, "State v. Tiffany, 44 Wash. 602, 603 -05, 87 P. 932 (1906) (discussing the interchangeability of "and" and " or ").

> But the plain language of a statute can **only** be disregarded, and this **exceptional** rule of construction can **only** be resorted to, where the act itself furnishes **cogent proof** of the **legislative error**.

Id. (emphasis added).

The Court in *Tiffany* examined the criminal statute, attempting to destroy a dam under Ballinger's Ann.Codes & St. § 7154 which contained the language, "willfully or maliciously". The Court determined that without proof of legislative error, the legislature did not intend the term "or" to be read as "willfully and maliciously". Id. at 603-05.

> "We are satisfied that the act under consideration contains no such **evidence of error or mistake** as would warrant in disregarding its plain language."

Id. at 604.

Similarly in *State v. Carr*, 97 Wn.2d 436, 645 P.2d 1098 (1982), this Court reversed the Court of Appeals for reading the word "and" in the disjunctive when connecting the following two clauses:

> The court may permit a complaint to be amended at any time before judgment if no additional or different offense is charged, **and** if substantial rights of the defendant are not thereby prejudiced.

(emphasis added) *Carr*, 97 Wn.2d at 439. This Court held that "[p]resumably, the drafters of the Justice Court Criminal Rules would have used the word "or" if they intended to convey a disjunctive interpretation of the rule. " Id. The Court further held that "[t]he word "and" is obviously conjunctive and should not be read as the Court of Appeals insisted. " Id.

In this case, the Court of Appeals did not cite to *Carr a*nd did not analyze *Tiffany*, or acknowledge that it refused to change "or" to and". Opinion at page 4, and did not cite a single case analyzing a criminal statute for legislative error that provided "and" with a the conjunctive meaning. Moreover, all of the cases cited, demonstrate the need for "legislative error" before a court may depart from the plain language meaning of a term, such as adopting a disjunctive meaning of "and" rather than giving its ordinary conjunctive meaning. Neither did the Court of Appeals indicate any evidence

of clear legislative error.

f. Civil Cases Addressing a Limited Grant of Authority.

Division Three in *Mount Spokane Skiing Corporation v. Spokane County*, 86 Wn.App. 165, 174, 936 P.2d 1148 (1997), a civil case, without analysis, cited to *Tiffany*, and held that "[t]he disjunctive 'or' and conjunctive 'and' may be interpreted as substitutes." The statue at issue provided an exclusive list of "possible functions" meant to limit a public corporations authority. *Mount Spokane*, 86 Wn.App. at, 174. The Court held that the plain meaning of the statute listing several permissible functions separated by "and" did not mean the corporation had to engage in all of the activities in the list. Id.

In 2005, in another civil case, Division Two agreed with Division Three to hold that:

> "**In certain circumstances**, the conjunctive "and" and the disjunctive "or" may be substituted for each other **if it is clear from the plain language of the statute that it is appropriate to do so**."

Bullseye Distributing, L.L.C. v. State Gambling Commission, 127 Wn.App. 231, 239, 110 P.3d 1162 (2005), (citing *Mt.Spokane Skiing Corp, citing Tiffany*). The Court in *Bullseye*, like the Court in *Mount Spokane*, applied the legislative error principle based on the plain language and intent of the legislature to similarly determine that to meet the definition of "gaming

device" in the statute defining a "gaming device" with a list of different types of devices, separated by "and" did not require each gaming device to contain elements of every other gaming device. *Bullseye*, 127 Wn.App. at 238-40.

Similarly, this Court in CLEAN, another civil case, held that a conjunctively written statute needed to be read as disjunctive in order to avoid the "meritless" argument that a PDA must perform all 3 functions contemplated by the legislature when it limited the purposes for which a city may create a public corporation. *CLEAN v. City of Spokane*, 133 Wn.2d 455, 473-74, 947 P.2 1169 (1997) (citing *Mount Spokane Skiing Corp*).

Mount Spokane, *Bullseye,* and *CLEAN,* and are not penal statutes rather they describe with specificity the limits of a corporation's authority and the types of permissible gaming devices, thus the Court of Appeals reliance on these cases provides little authority or direction in this case, other than a statute must comport with a common sense reading.

g. Civil Cases Rejecting the "Disjunctive Meaning of "And".

In *Ski Acres, Inc., v. Kittitas County*, 118 Wn.2d 852, 855-56, 827 Wn.2d 100 (1992), the parties disputed whether a statue that read:

> a charge made for rental or use of equipment or facilities for purpose of recreation or amusement, ***and*** where the rental of the equipment or facilities is necessary to the enjoyment of a privilege for which a general admission is charged, the combined charges shall be considered as the admission

charge.

(Italics in original, bold added).

The Court held that "and" must be read as conveying a conjunctive meaning. Id. The Court explained

> The rejection of the term "or" in favor of "and" is clear evidence of legislative intent because "The statute contains an 'and', not an 'or'. We thus read the "and" as simply being an "and". **The Legislature would have used the word "or" if it had intended to convey a disjunctive meaning.**"

Ski Acres, Inc., 118 Wn.2d at 856.(Emphasis added). The Supreme Court, in a parenthetical, also cited *Childers v. Childers*, 89 Wn. 2d 592, 596, 575 P.2d 201 (1978) for the proposition that "**the word 'and' does not mean 'or.'**" in the context of a statue that reads: "the court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support." *Childers*, 89 Wn. 2d at 595.

This Court in *Childers* held that "[w]hen the term 'or' is used it is presumed to be used in the disjunctive sense, unless the legislative intent is clearly contrary." *Childers*, 89 Wn.2d at 595-96 (internal citations omitted), In 2010, the Court of Appeals likewise declined to read "or" into a statute that was written with "and" explaining as follows:

> 'And' conveys a conjunctive meaning, otherwise the legislature would

> have used 'or' if it meant to convey a disjunctive meaning. To achieve the meaning urged by Ahten requires us to rewrite this provision by replacing the word "and" with the word "or" ... We decline to read 'or' into this provision.

Ahten v. Barnes, 158 Wn.App. 343, 352-353, n.5, 242 P.3 35 (2010) (internal citations omitted).

Here, the plain meaning of RCW 9.94A.030(20) is apparent from the language of this statute. "[D]omestic violence" has "the same meaning as defined in RCW 10.99.020 **and** 26.50.010." (Emphasis added). A Court may only read "and" in the disjunctive if there is proof of cogent legislative error. As these cases demonstrate, "and" and "or" are not simply interchangeable, rather "and" has a conjunctive meaning except in very limited circumstances where either there is clear legislative error or a plain meaning reading does not permit the conjunctive. Although there are several civil cases which permitted this "interchangeability", this Court has repeatedly rejected this interchangeability in criminal cases. *Carr, supra., Tiffany, supra.* Here, in RCW 9.94A.030(20), if the legislature had intended "and" to have a disjunctive meaning, it would have used the term "or, but it did not, rather, it rejected the Attorney General proposal to use "or". Laws OF 2010, ch. 274, § 101, 401-07.

h. Legislative History and Examination of Related Statutes In Same Act.

In 2010 the legislature enacted an extensive array of new measures designed to provide enhanced punishment for domestic violence offenders. See Laws OF 2010, ch. 274, § 101, 401-07. RCW 9. 94A.030(20) and RCW 9. 94A.525(21), were new measures at the heart of the issue raised in this petition. The bill proposing the 2010 legislation, ESHB2777, originated as an attorney general proposal to the legislature. See *State v. Sweat*, 174 Wn. App. 126, 131 n.5, 297 P. 3d 73 (2013), aff'd, 180 Wn.2d 156 (2014). The proposal requested the legislature amend "[RCW] 9. 94A.030 ... to add ` domestic violence,' defined as a criminal offense committed between defendant and a victim having a relationship as defined in RCW 10. 99. 020 or 26. 50. 010." WASHINGTON STATE ATTORNEY GENERAL — ROB MCKENNA, AG REQUEST LEGISLATION — 2009 SESSION: SUPPORTING LAW ENFORCEMENT: DOMESTIC VIOLENCE SANCTIONS, at 1 (2009) (AG PROPOSAL) (emphasis added).

The proposal also suggested amending RCW 9. 94A.525 to increase the scoring for prior domestic violence convictions. The sentencing amendments the legislature enacted in 2010 tracked some of the amendments proposed by the attorney general, but rejected the AG proposal to use **"or"** instead of "and" in RCW 9. 94A.030(20). This rejection was not a mistake or

a scrivener's error, this was a debated and considered concept that the legislature decided against. Compare Laws OF 2010, §§ 401, 403 with AG PROPOSAL at 1 (proposing amendments to RCW 9. 94A.030 and RCW 9. 94A.525).

"[F]rom a change in the wording of a statute, a change in legislative purpose shall be presumed." *Childers*, 89 Wn.2d at 596. In *Childers*, a statute was amended rather than a proposed bill rejected, but the wisdom of *Childers* is relevant here for the proposition that where the legislature changes a statute either by amendment or rejection of proposed language, the reviewing courts

> "will not be presume[] that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change . . ."

Childers, 89 Wn.2d at 596.

Here, the legislature's rejection of the term "or" in favor of "and" cannot be presumed to be the result of oversight or inadvertence, rather as in *Childers*, it "indicates persuasively, and raises a presumption that the departure" was intentional, and therefore must be generally construed to effect

the meaning of the changed language. The Court of Appeals failed to give the legislature its due by ignoring the legislature's intentional decision to reject "or" in favor of "and". Laws OF 2010, §§ 401, 403.

The legislature has ample experience drafting domestic violence legislation and many definitions of domestic violence include intentional reference to other statutes. See e.g., RCW 9.94A.535(3)(h); 70.123.020(2); 35.20.255; 3.50.330; 3.66.068; 10.99.080(4). The legislature's specific inclusion of RCW 26.50.010 as a requirement for imposition of an enhanced offender scoring for certain convictions is significant, because it differs from other definitions of domestic violence located in other sections of the RCW.

The Court of Appeals erroneously assumed that the legislature is incapable of drafting a statute to state what it means. At page 7. The Court of Appeals ignored the fact that the legislature has enacted many different definitions of domestic violence, depending on the context.

For example, ESHB 2777 also amended RCW 3.66.068, RCW 3.50.330, and RCW 35.20.255. RCW 3.66.068, 3.50.330, and RCW 35.20.255 specify that in addition to meeting the definition of domestic violence in RCW 10.99.010, the crime: " For the purposes of this section, "domestic violence offense" means a crime listed in RCW 10.99.020 that is not a felony offense."

RCW 35.20.255. RCW 3.66.068, 3.50.330, and 35.20.255. For the 5 year probationary period to apply, in these statutes, the crime must be a listed crime; and must not be felony.

If the legislature had intended all of these statutes to apply to all domestic violence, it would not have added to RCW 10.99.020 and provided a second and third definition of domestic violence ((1) listed, (2) non-felony). Similarly, if the legislature, in RCW 9.94A.030(20), intended for all domestic violence crimes to meet the definition in RCW 10.99.020, it would not have made reference to RCW 26.50.010. In each of these statutes additional language was required to achieve the legislative goal. The reference to both RCW 10.99 and RCW 26.50 in RCW 9.94A.030(20) achieves the legislative goal to target violent offenders by providing harsher sentencing, more treatment for violent offenders, and more resources for victims of violent domestic violence . Examining these related statues reveals that the legislature intended RCW 9.94A.030(20) to limit the type of offender eligible for enhanced sentencing under RCW 9.94A.525(21).

i. Other Penal Statues, Not Amended in ESB 2777

RCW 9.94A.535(3)(h) is another example of the legislature's use of RCW 10.99 as the generic statute with reference to another statute to narrow

the definition to meet the legislative goal to focus on a specific class of offenders. RCW 9.94A.535(3)(h) defines domestic violence for purposes of the domestic violence aggravator for application of an exceptional sentence. RCW 9.94A.535(3)(h) provides:

> The current offense involved domestic violence, as defined in RCW 10.99.020 or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

and lists four aggravators: ongoing pattern of abuse, multiple victims or incidents, children were present, deliberate cruelty, and rape of a child. Id. Under the Court of Appeals reasoning, reference to RCW 9A.46.110 in RCW 9.94A.535(3)(h) would necessarily render superfluous RCW 9A.46.110 because stalking is listed in RCW 10.99.020(5)(v).

Similarly, under the Court of Appeals reasoning, all reference to any other statute that defines domestic violence would be superfluous because 10.99 is a non-exclusive list. The same "logic" would apply to the following statutes that reference RCW 10.99.020 and then limit that it by reference to another statute. RCW 10.99.080(4) references RCW 10.99.020 but expands the definition of domestic violence:

> For the purposes of this section, "domestic violence" has the same meaning as that term is defined under RCW 10.99.020 and includes violations of equivalent local ordinances.

Id. RCW 10.99.080(4), RCW 3.66.068, RCW 3.50.330, RCW 35.20.255 and. RCW 9.94A.030(20), each modify the definition of RCW 10.99.020. Contrary to the Court of Appeals holding, the legislature cannot have made a mistake by referencing RCW 26.50.010 in conjunction with RCW 10.99.020.

The Court of Appeals interpretation of RCW 9.94A.030(20) as a mistake, defeats the legislative purpose and ignores the fact that RCW 10.99.020 is a non-exclusive list. The Court of Appeals stated, "RCW 9. 94A.030(20) most logically reads as using RCW 10. 99. 020 to set out per se crimes of domestic violence and RCW 26. 50.010 to define when a crime otherwise omitted from the nonexclusive list is nonetheless also deemed to involve domestic violence." This reasoning does not make sense because RCW 10.99.020 provides a non-exclusive list of crimes, thus any crime between household members, whether listed or not will meet the definition under RCW 10.99.020.

The Court of Appeals provided the following:

> For example, RCW 10. 99. 020 omits crimes such as third degree rape and child molestation, which would fall under the definition of 'domestic violence' in RCW 26. 50. 010. Reading RCW 9.94A.030(20) to require conduct simultaneously to meet both RCW 10. 99. 020 and RCW 26. 50. 010 in order to constitute domestic violence for sentence enhancement purposes would forfeit this logic."

Opinion at page 7. Because RCW 10.99.020(5) is not exclusive, the Court's construction conflicts with the plain language of RCW 10.99.020 and is inconsistent with other cases holding or assuming that an unlisted crime of domestic violence is still domestic violence under RCW 10.99.020(5) if the victim is a family or household member. See e.g., *In re Washington*, 125 Wn.App. 506, 510, 106 P.3d 763 (2004) (any offense committed by one family or household member against another); *State v. Lindahl*, 114 Wn.App. 1, 17-18, 56 P.3d 589 (2002) (Although murder is not included in that list, the definition expressly states that domestic violence is not limited to the crimes listed); *State v. Goodman*, 108 Wn.App. 355, 361 30 P.3d 516 (2001)(presumes arson is domestic violence under 10.99.020).

Even though the Court of Appeals observed that RCW 10.99.020 is a nonexclusive list on at least five separate occasions within its opinion., it nonetheless ignored this fact in its conclusion that RCW 9.94A.030(20) is disjunctive. Opinion at pages 5, 7, 8, 9.

j. Legislative Intent

> The legislature intends to improve the lives of persons who suffer from the adverse effects of domestic violence and to require reasonable, coordinated measures to prevent domestic violence from occurring. **The legislature intends to give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable.** The legislature intends to: Increase the safety

> afforded to individuals who seek protection of public and private agencies involved in domestic violence prevention; improve the ability of agencies to address the needs of victims and their children and the delivery of services; upgrade the quality of treatment programs; and enhance the ability of the justice system to respond quickly and fairly to domestic violence. In order to improve the lives of persons who have, or may suffer, the effects of domestic violence the legislature intends to achieve more uniformity in the decision -making processes at public and private agencies that address domestic violence by reducing inconsistencies and duplications allowing domestic violence victims to achieve safety and stability in their lives.

(Emphasis added) LAWS OF 2010, ch. 274, § 101. The emphasized language in this statement is the only language related to punishment of domestic violence offenders. The remaining language addresses other concerns such as prevention, resources for victims and treatment. RCW 9.94A.030(20) does not limit these varied intended purposes, rather, it targets the violent perpetrator and their victims, by focusing its resources prevention, and punishment on the most violent offenders and their victims.

k. Neither Stature is Superfluous.

Contrary to the Court of Appeals opinion at page 8-9, neither statute is superfluous, because while all of the crimes in RCW 26.50.010 satisfy the definition in RCW 9.94A.030(20), without RCW 26.50.010, none of the crimes in RCW 10.99, other than assault, sexual assault and stalking would

fall within RCW 9.94A.030(20). And if the Court of Appeals is correct then under a disjunctive reading of RCW 9.94A.030(20) every crime committed by and against family members, such as unlisted property crimes, would be eligible for enhanced sentencing even though the crimes are not violent crimes. E.g., RCW 10.99.020(5). theft in the second degree DV or Theft of a Motor Vehicle DV with the victim being a family or household member, meet the definition under RCW 10.99.020(5).

Under the Court of Appeals rationale, its interpretation renders superfluous RCW 26.50.010, not RCW 10.99.020 because there is no crime committed by and against a family member that does not meet the definition of RCW 10.99.010. There is no evidence to support the Court of Appeals decision under the plain reading of RCW 9.94A,030(20), the current case law, the rules of statutory construction, or the rule of lenity. For these reasons, this Court should accept review of this case and reverse the Court of Appeals.

F. CONCLUSION

Mr. Kozey respectfully requests this Court accept review on grounds that the Court of Appeals interpretation is contrary to the legislative intent and the plain meaning of the statute and is therefore an issue of substantial public importance.

DATED this ___ day of October 2014

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the– "kcpa@co.kitsap.wa.us Kitsap County prosecutor's office and **Anthony Kozey 1526 Callow Ave. N Bremerton, WA 98312** Chehalis WA 98532 a true copy of the document to which this certificate is affixed, on October October 14, 2014. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. ANTHONY KOZEY, Respondent.	No. 44594-8-II (Cons. with No. 44610-3-II) PUBLISHED OPINION

BJORGEN, A.C.J. — The State appeals Anthony Kozey's sentences for two felony violations of domestic violence no-contact orders. The State argues that the trial court erred by interpreting RCW 9.94A.030(20) as conjunctively incorporating the definitions of "domestic violence" found in RCW 10.99.020 and RCW 26.50.010. Agreeing with the State, we reverse and remand for resentencing consistently with a disjunctive interpretation of the definition of "domestic violence" in RCW 9.94A.030(20).

FACTS

In violation of a no-contact order, Kozey contacted his longtime girl friend, Chalene Johnston, on at least two occasions in September 2011. Kozey was convicted of gross misdemeanor no-contact order violations for these offenses. His sentences included a post-conviction no-contact order that again forbad him from contacting Johnston.

In spite of this order, Johnston called Kozey in November 2011 and asked for help transporting and pawning some power tools. A police officer investigating a different matter at the pawn shop saw Kozey and Johnston together, discovered the no-contact order after running the plates of the vehicle they used, and arrested Kozey for violating the order. Because Kozey

already had two convictions for no-contact order violations, the State charged him with a felony for the new violation under RCW 26.50.110(5).

Johnston again initiated contact with Kozey in February 2012 while he was out on bail and awaiting trial for the November 2011 no-contact order violation. As a result, Kozey visited Johnston and their children at her grandmother's house. During the visit, one of Johnston's grandmother's checks disappeared, and Kozey later cashed it. Police learned of Kozey's violation of the no-contact order when the grandmother reported the theft of the check, and the State charged Kozey with another felony for the no-contact order violation.

During pretrial proceedings, Kozey argued that RCW 9.94A.030(20) defines "domestic violence" by conjunctively incorporating the definitions of "domestic violence" codified at RCW 10.99.020 and RCW 26.50.010, thereby requiring proof of both definitions.[1,2] Because the parties agreed that Kozey did not violate the no-contact order with the type of conduct necessary to constitute domestic violence under RCW 26.50.010, Kozey maintained that the State had not pleaded and could not prove domestic violence under its definition in RCW 9.94A.030(20), thus

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[1] As relevant, RCW 10.99.020(5) states that

> "[d]omestic violence" includes but is not limited to any of the following crimes when committed by one family or household member against another:
>
> . . . .
>
> (r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person.

[2] RCW 26.50.010(1) states that

> "[d]omestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

precluding any enhanced sentence. The State argued that RCW 9.94A.030(20) disjunctively incorporated RCW 10.99.020 and RCW 26.50.010, such that conduct falling under either definition constituted domestic violence for purposes of the enhanced domestic violence penalties of the Sentencing Reform Act (SRA), chapter 9.94A RCW.

The trial court adopted Kozey's reading of RCW 9.94A.030(20) and entered findings of fact and conclusions of law to that effect. These conclusions prevented the State from seeking enhanced penalties under RCW 9.94A.525(21).

After a bench trial on stipulated facts, the trial court found Kozey guilty of both the November 2011 and the February 2012 no-contact order violations. Based on its interpretation of the definition of "domestic violence" in RCW 9.94A.030(20), the trial court calculated his offender score as zero for the November 2011 felony no-contact order violation and as one for the February 2012 felony no-contact order violation. The trial court imposed a standard 12-month term of incarceration for the November 2011 violation and a standard 14-month term of incarceration for the February 2012 violation, ordering that Kozey serve the terms concurrently.

The State appeals, asking us to reverse Kozey's sentence and to remand the matter for resentencing consistent with a disjunctive interpretation of the definition of "domestic violence" in RCW 9.94A.030(20).

ANALYSIS

The parties contest the same issue they contested before the trial court: whether the word "and" in RCW 9.94A.030(20) conjunctively or disjunctively joins the definitions of "domestic

violence" found in RCW 10.99.020 and RCW 26.50.010 for purposes of enhancing sentences for crimes involving domestic violence.

We review a statute's meaning de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our "fundamental objective" when interpreting a statute is to "ascertain and carry out the [l]egislature's intent." *Campbell & Gwinn*, 146 Wn.2d at 9. Washington's courts have long recognized that, despite the common, conjunctive usage of "and," service of the legislature's intent may require reading the word disjunctively. *State v. Keller*, 98 Wn.2d 725, 728-31, 657 P.2d 1384 (1983); *see State v. Tiffany*, 44 Wash. 602, 603-05, 87 P. 932 (1906) (discussing the interchangeability of "and" and "or"). To determine if the legislature intended "and" to read disjunctively, we must apply general rules of statutory interpretation. *See Tiffany*, 44 Wash. at 603-04 (quoting G.A. Endlich, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 2 (1888)).

Under those rules, we first attempt to discern the plain meaning of the legislature's use of "and" from the text of the provision at issue and any related provisions which disclose legislative intent about the provision in question. *See Campbell & Gwinn*, 146 Wn.2d at 11-12; *Tiffany*, 44 Wash. at 603-04 (requiring courts to examine the "context" of the legislature's use of "and" or "or"). If, after this plain meaning analysis, the statute remains "susceptible to more than one reasonable meaning," it is ambiguous, and we resort to aids to construction, including legislative history. *Campbell & Gwinn*, 146 Wn.2d at 12.

A. The Statutory Scheme

Under RCW 9.94A.525(21), the offender score used in sentencing is increased due to certain prior convictions when "the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead[ed] and proven." Among the prior convictions triggering this enhancement is a felony violation of a no-contact order conviction. RCW 9.94A.525(21)(a). Kozey was convicted of two felony violations of a no-contact order: one in November 2011 and one in February 2012. Under RCW 9.94A.589(1)(a),

> whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.

Thus, Kozey's felony convictions are among the prior convictions for which the offender score may be enhanced under RCW 9.94A.525(21)(a). With that, the remaining issue is whether each present felony conviction is one "where domestic violence as defined in RCW 9.94A.030 was plead[ed] and proven." RCW 9.94A.525(21).

RCW 9.94A.030(20) states simply that "'[d]omestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010." RCW 10.99.020(5), in turn, states that "'[d]omestic violence' includes but is not limited to any of the following crimes when committed by one family or household member against another." The nonexclusive list includes violent crimes, such as assault, kidnapping, and rape; property crimes, such as criminal trespass and malicious mischief; and other miscellaneous crimes, including the "[v]iolation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person." RCW 10.99.020(r).

RCW 26.50.010(1), the second statute referenced in RCW 9.94A.030(20), states that

> "[d]omestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010 thus defines an offense as a domestic violence offense when it is an assault, sexual assault or stalking committed by one family or household member against another family or household member.

The defendant's conduct in November 2011 and February 2012 falls under the definition of "domestic violence" of RCW 10.99.020, but not that of RCW 26.50.010. Thus, the validity of the challenged sentence enhancement hangs on whether the definitions in these statutes are read conjunctively or disjunctively.

B. The Plain Meaning of "and" in RCW 9.94A.030(20)

The plain meaning analysis begins with the text of RCW 9.94A.030(20). As Kozey notes, the legislature used the term "and" in the provision, and we presume "and" functions conjunctively. *Tiffany*, 44 Wash. at 603-04. On the other hand, our courts have recognized that "and" must sometimes be given disjunctive force to preserve legislative intent. *See Keller*, 98 Wn.2d at 728-31; *Tiffany*, 44 Wash. at 603-05; *Bullseye Distrib., LLC v. Wash. State Gambling Comm'n*, 127 Wn. App. 231, 239-40, 110 P.3d 1162 (2005). The plain meaning analysis also requires us to go beyond the text of RCW 9.94A.030(20) and to examine the text of related statutes. *Campbell & Gwinn, LLC*, 146 Wn.2d at 11-12. RCW 9.94A.030(20) incorporates

RCW 10.99.020 and RCW 26.50.010, making them related statutes. *See Jametsky v. Olsen*, 179 Wn.2d 756, 766, 317 P.3d 1003 (2014).

We begin by noting the way in which RCW 9.94A.030(20) refers to these related statutes. RCW 9.94A.030(20) does not state that conduct must meet the requirements of both RCW 10.99.020 and RCW 26.50.010 to count as domestic violence. Rather, it states domestic violence "has the same meaning as defined in RCW 10.99.020 and 26.50.010." RCW 9.94A.030(20).

RCW 10.99.020 sets out a nonexclusive list of specific crimes the legislature has deemed to be domestic violence when committed by one family or household member against another. RCW 26.50.010 eschews a specific list of crimes and instead sets out the types of acts the legislature has determined generally constitute domestic violence when perpetrated by one family member against another. With these differing conceptual approaches, there is no "same meaning" shared by both RCW 10.99.020 and RCW 26.50.010. Instead, RCW 9.94A.030(20) most logically reads as using RCW 10.99.020 to set out per se crimes of domestic violence and RCW 26.50.010 to define when a crime otherwise omitted from the nonexclusive list is nonetheless also deemed to involve domestic violence. For example, RCW 10.99.020 omits crimes such as third degree rape and child molestation, which would fall under the definition of "domestic violence" in RCW 26.50.010. Reading RCW 9.94A.030(20) to require conduct simultaneously to meet both RCW 10.99.020 and RCW 26.50.010 in order to constitute domestic violence for sentence enhancement purposes would forfeit this logic.

Although involving different types of statutes, our conclusion is consistent with the reasoning in *Mount Spokane Skiing Corp. v. Spokane County*, 86 Wn. App. 165, 171, 936 P.2d 1148 (1997). In that appeal those challenging a public authority pointed out that RCW 35.21.730(4) authorized a public authority to

> (1) administer and execute federal grants or programs; (2) receive and administer private funds, goods or services for any lawful public purpose; (3) and perform any lawful public purpose or function.

Mount Spokane Skiing Corp., 86 Wn. App. at 171. Because these elements were connected with the word "and," the challengers argued that a public authority must perform all three functions to be valid. Division Three of our court disagreed. It held that based on common sense and legislative intent, the plain meaning of the terms was that, despite the presence of "and," the public authority had to carry out only one of the listed functions. *Mount Spokane Skiing Corp.*, 86 Wn. App. at 174.

Turning now to RCW 10.99.020 and RCW 26.50.010 themselves, their presence virtually compels adoption of the disjunctive reading of RCW 9.94A.030(20), since the conjunctive reading would effectively rob one of them of any effect. As discussed above, RCW 10.99.020 defines "domestic violence" through a nonexclusive list of crimes; RCW 26.50.010 defines "domestic violence" through a list of qualifying behaviors. If the conjunctive reading of RCW 9.94A.030(20) were correct, then the list of crimes found in RCW 10.99.020 would have meaning only where the offender commits an act encompassed by RCW 26.50.010. The reference to RCW 10.99.020 would be superfluous.

In contrast, as noted above, a disjunctive reading gives meaning to both of the cross-references in RCW 9.94A.030(20): RCW 10.99.020 defines the nonexclusive list of per se crimes of domestic violence and RCW 26.50.010 tells the court how to determine if a crime not on the list constitutes domestic violence. The examination of related statutes therefore requires a disjunctive reading of RCW 9.94A.030(20).[3]

Further, these same considerations show that reading RCW 9.94A.030(20) conjunctively quickly descends into self-contradiction. The conjunctive interpretation of "and" in RCW 9.94A.030(20) would mean that the requirements of *both* referenced statutes must be met before a crime can be deemed domestic violence. As just shown, requiring both statutes to be met reduces the definition of domestic violence to that of RCW 26.50.010 only. Thus, the conjunctive interpretation defeats itself by making RCW 10.99.020 superfluous. When our court interprets a statute, we attempt to avoid interpretations that render statutory language "meaningless or superfluous." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001). A disjunctive reading, therefore, is the only way to give meaning to all the language in RCW 9.94A.030(20).

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[3] At trial Kozey suggested that a conjunctive reading gave meaning to RCW 10.99.020 by ensuring that only domestic violence *crimes* were punished under the SRA. However, the definition of "domestic violence" in RCW 9.94A.030(20) informs the penalty provisions in RCW 9.94A.525(21), which punish an offender more severely for a current domestic violence conviction based on past domestic violence convictions. Due process forbids the State from convicting an offender for something that is not a crime. *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986). RCW 10.99.020, therefore, does not serve the purpose Kozey ascribes to it; the state and federal constitutional due process clauses already function to ensure that the State can seek to enhance a domestic violence offender's punishment only for criminal acts.

Finally, a conjunctive reading of RCW 9.94A.030(20) would defeat the legislature's intent in enacting the statute. The statement of intent accompanying the 2010 domestic violence amendments reads:

> The legislature intends to improve the lives of persons who suffer from the adverse effects of domestic violence and to require reasonable, coordinated measures to prevent domestic violence from occurring. The legislature intends to give law enforcement and the courts better tools to identify violent perpetrators of domestic violence and hold them accountable. The legislature intends to: Increase the safety afforded to individuals who seek protection of public and private agencies involved in domestic violence prevention; improve the ability of agencies to address the needs of victims and their children and the delivery of services; upgrade the quality of treatment programs; and enhance the ability of the justice system to respond quickly and fairly to domestic violence. In order to improve the lives of persons who have, or may suffer, the effects of domestic violence the legislature intends to achieve more uniformity in the decision-making processes at public and private agencies that address domestic violence by reducing inconsistencies and duplications allowing domestic violence victims to achieve safety and stability in their lives.

LAWS OF 2010, ch. 274, § 101. Kozey correctly notes that this statement of intent speaks, in part, to enabling law enforcement and the courts to respond to violent perpetrators of domestic violence. He claims that this shows the legislature intended to capture only the type of violent behavior defined as "domestic violence" in RCW 26.50.010. The statement of legislative intent, though, also generally speaks to "prevent[ing] domestic violence from occurring" and "[i]ncreas[ing] the safety afforded to individuals who seek protection" from law enforcement or the courts. LAWS OF 2010, ch. 274, § 101. One way the 2010 amendment accomplishes these goals is to deter contact between a victim and an offender by stiffening the penalties associated with violations of a protection or no-contact order. Reading RCW 9.94A.030(20) disjunctively

preserves this legislative purpose by capturing the wider range of behaviors that the legislature has already deemed to constitute domestic violence in RCW 10.99.020 and RCW 26.50.010.

In ordinary English, it may seem incongruous that the plain meaning of "and" could be taken as creating a disjunctive series of items in a list. Our job in interpreting a statute, though, is not the mapping of popular usage, but the determination of legislative intent. As just discussed, the plain meaning of the two related statutes linked by "and" in RCW 9.94A.030(20) leaves little doubt that in this specific context, the legislature intended domestic violence to include the conduct described in either RCW 10.99.020 or RCW 26.50.010. Because the term is not ambiguous in this context, further construction is not needed.

C. Ambiguity and Extrinsic Evidence of Legislative Intent

Alternatively, even if RCW 9.94A.030(20) were deemed ambiguous, Kozey's challenge would still fail. Under *Campbell & Gwinn*, 146 Wn.2d at 12, we would resolve the ambiguity by resorting to aids to construction, including legislative history. This examination shows even more forcefully that the legislature used "and" disjunctively in RCW 9.94A.030(20).

1. Legislative History

We may use legislative history as evidence of the legislature's intent where the plain meaning of a statute is ambiguous. *Cockle*, 142 Wn.2d at 808. Here, the legislative history suggests a disjunctive reading of RCW 9.94A.030(20)'s use of "and."

In 2010 the legislature enacted an extensive array of new measures designed to provide enhanced punishment for domestic violence offenders. *See* LAWS OF 2010, ch. 274, § 101, 401-07. Among these new provisions were RCW 9.94A.030(20) and RCW 9.94A.525(21), measures

at the heart of the issue raised by this appeal. The bill proposing the 2010 legislation, ESHB 2777, originated as an attorney general proposal to the legislature. *See State v. Sweat*, 174 Wn. App. 126, 131 n.5, 297 P.3d 73 (2013), *aff'd*, 180 Wn.2d 156 (2014). The proposal asked the legislature to amend "[RCW] 9.94A.030 . . . to add 'domestic violence,' defined as a criminal offense committed between defendant and a victim having a relationship as defined in RCW 10.99.020 *or* 26.50.010." WASHINGTON STATE ATTORNEY GENERAL – ROB MCKENNA, AG REQUEST LEGISLATION – 2009 SESSION: SUPPORTING LAW ENFORCEMENT: DOMESTIC VIOLENCE SANCTIONS, at 1 (2009) (AG PROPOSAL) (emphasis added).[4] The proposal also suggested amending RCW 9.94A.525 to increase the scoring for prior domestic violence convictions.

The sentencing amendments the legislature enacted in 2010 tracked the amendments proposed by the attorney general in function, but the amendments used "and" in the place of "or" when adding what became RCW 9.94A.030(20). *Compare* LAWS OF 2010, §§ 401, 403 *with* AG PROPOSAL at 1 (proposing amendments to RCW 9.94A.030 and RCW 9.94A.525). The intended effect of this change, if any, is plain from the surrounding circumstances. The legislation implements both the attorney general's proposal and the vigorous statement of intent in LAWS OF 2010, ch. 274, § 101, cited above. A conjunctive reading of RCW 9.94A.030(20) narrows the scope of its protections and starkly contradicts the statement of legislative intent to "prevent domestic violence" and to "[i]ncrease the safety afforded to individuals who seek protection."

[4] The AG request is located at:
http://atg.wa.gov/uploadedFiles/Home/Office_Initiatives/Legislative_Agenda/2009/DV_Sanctions%20(20-sided).pdf.

LAWS OF 2010, ch. 274, § 101. The disjunctive reading of RCW 9.94A.030(20) is necessary to preserve that intent.[5]

2. Principles of Statutory Construction

Our court may also use principles of statutory construction to determine legislative intent when a statutory provision remains ambiguous after a plain meaning analysis. *Cockle*, 142 Wn.2d at 808. Here, the relevant canons of construction point without question to a disjunctive reading of RCW 9.94A.030(20).

When our court interprets a statute, we attempt to avoid rendering statutory language "meaningless or superfluous." *Cockle*, 142 Wn.2d at 809. As shown in the plain meaning analysis above, reading RCW 9.94A.030(20)'s list conjunctively would make its reference to RCW 10.99.020 superfluous. A disjunctive reading, therefore, is the only way to give meaning to all the language in RCW 9.94A.030(20).

Kozey contends that chapter 9.94A RCW is a penal statute and must be strictly construed, requiring us to reject the State's interpretation of RCW 9.94A.030(20). Strict construction cannot defeat the intent of the legislature. *State v. Rinkes*, 49 Wn.2d 664, 667, 306 P.2d 205 (1957). Here, even if the plain meaning of the statute is ambiguous, the legislature's intent is not, after considering its statement of intent, the history of the amendments that added RCW

[5] We recognize that, under the canons of construction, the change from "or" to "and" could also be taken as a sign of a change in legislative intent. However, the purpose of the 2010 legislation, and its consistency with the attorney general's proposal, clearly support the much more direct message of legislative intent: that the disjunctive reading of RCW 9.94A.030(20) should be preserved.

9.94A.030(20), and the need to give effect to all the portions of RCW 9.94A.030(20). Construing RCW 9.94A.030(20) as Kozey advocates would defeat this intent, and we decline his invitation.

Kozey next invokes the rule of lenity and contends that, because RCW 9.94A.030(20)'s meaning is, at best, ambiguous, the rule requires that we adopt his reading of RCW 9.94A.030(20). The rule of lenity applies to the SRA and it requires that, where a statutory provision remains ambiguous after we exhaust all means of attempting to ascertain the legislature's intent, we interpret the statute in the manner favorable to the defendant. *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Even if RCW 9.94A.030(20) is assumed ambiguous after the plain meaning inquiry, our examination of legislative history and application of the principles of statutory construction clarify how that ambiguity is resolved, leaving no room for application of the rule of lenity.

We reverse Kozey's sentence and remand for resentencing consistently with a disjunctive interpretation of the definition of "domestic violence" in RCW 9.94A.030(20).

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Hunt, J.
HUNT, J.

J
LEE, J.

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Ms. Ellner,

Can you please reference the COA number for this case and also, your Appendix A did not come all the way through. We only received the cover page.

Thank you,

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Please find attached a petition for review and the court of appeals opinion from which review is requested. Thank you.