NO. 32170-3

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	MOTION ON THE MERITS
	)	(Walla Walla County No.
vs.	)	13-1-00020-0)
	)	
CASTULO JOSE RIVAS,	)	
	)	
Appellant.	)	
	)	

I. Identity of Moving Party:

The State of Washington, Respondent, by James L. Nagle, Walla Walla County Prosecuting Attorney, by and through Teresa Chen, Deputy Prosecuting Attorney, asks for the relief designated in Part II.

II. Statement of Relief Sought:

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant in the above-entitled case.

III. Facts Relevant to Motion:

Respondent respectfully requests that the Court of Appeals, Division III, affirm the conviction of Appellant by jury trial in the above-entitled case. Pursuant to Rule of Appellate Procedure 18.14(e), this motion is made on the grounds that the issues on appeal are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision is clearly within the discretion of the trial court.

The Defendant Castulo Jose Rivas is convicted of assault in the first degree. CP 197, 199-207. On February 4, 2012 at the Washington State Penitentiary in Walla Walla, the Defendant Rivas and another inmate Valdez set upon a third inmate de Leon who was using the phone. I RP 80, 81, 83-84; II RP 5, 44-45, 47, 76, 78-79, 85, 92-93.

Rivas and Valdez were armed with deadly shanks. II RP 40, 50-52, 61-62, 79-80, 82-83, 96-100, 105-06, 111, 120-23, 130, 162, 166-67, 174, 177, 188 (shanks can kill; they have been used to puncture lungs or other vital organs, punch holes in throats, and gouge eyes). Correctional officers only carried a radio and handcuffs. I RP 89. Officers forced Rivas to the floor, and ordered

him to drop his weapon. II RP 103-06. The Defendant smiled and then attempted to stab Officer Dustin Davis in the abdomen with a wire shank. II RP 96, 106. Officers were able to wrest the weapon free only to be set upon by Valdez, brandishing another weapon. II RP 96, 107. The officers released Rivas to disarm Valdez. II RP 96, 108.

Rivas then armed himself with a sharpened toothbrush shank and attempted to stab de Leon. II RP 44-45, 49, 96. Correctional officers removed de Leon. II RP 44-45, 49, 96-97.

Rivas and Valdez then turned upon Sergeant James Bailey. II RP 50, 162. Valdez attacked him from behind striking him with a sharpened radio antenna, grabbing him by the neck, and knocking his head to the ground. II RP 51, 63, 71, 128, 164-65, 175, 184. The antenna was prevented from going through the sergeant's neck by a chevron on his uniform. II RP 184. The Defendant Rivas stabbed Sergeant Bailey in the chest with a sharpened toothbrush four times while punching the sergeant in the ribs with the other hand. II RP 6, 39, 45, 51, 70-71, 73, 97, 112-13, 163-64, 175.

Even as other officers pounced on Rivas, he continued

hitting the sergeant all over. II RP 164, 180. Officers pulled the sergeant out of the fray by his feet. II RP 164. When an officer arrived with OC spray and applied it to Rivas, the situation was contained. II RP 97.

The sergeant was bleeding from a puncture wound to his forehead, and he had an injured elbow, a large bump on the back of his head, and bruised ribs. II RP 165, 181, 183. But a thick notebook in his shirt pocket took the four shank stabs. II RP 165, 176-79.

A jury convicted the Defendant as charged. CP 197, 199-207.

At sentencing, defense counsel advised the court that the Defendant is already serving two life sentences. III RP 126. It appears that the Defendant may have three strikes which could indicate that he has been sentenced to life without the possibility of parole. CP 200 (criminal history includes convictions for three counts of second degree assault occurring in separate years and a class A felony of first degree arson with the same occurrence date as one of the assaults); RCW 9.94A.030(32)(a) and (b) (class A felonies and second degree assault are classified as "most serious

offenses"); RCW 9.94A.030(37) (a "persistent offender" is one with convictions of three separate "most serious offenses"); RCW 9.94A.570 (persistent offenders shall be sentenced to life without the possibility of parole).

The court found that the Defendant has "the potential future ability to pay legal financial obligations, whether or not they would, as a practical matter, that would be addressed at the time they are sought to be paid." III RP 128. *See also* CP 200. The court then imposed restitution of $7,546.76 for medical expenses, $200 in court costs, $250 in jury demand fees, $863.98 in sheriff's fees, $500 victim assessment, $775 for the court-appointed attorney, $100 crime lab fee, and $100 biological sample fee. CP 201; III RP 128. The Defendant's total discretionary and mandatory legal financial obligation (LFO's) is $10,335.74. CP 201; III RP 128. The court ordered the Defendant to pay the LFO's at $100/month, commencing 90 days after his release. CP 201; III RP 129. There was no objection to the imposition of LFO's. II RP 128-31.

IV. Grounds for Relief and Argument:

A. THE STATE DID NOT ABUSE ITS DISCRETION IN CHARGING THE DEFENDANT WITH AN OFFENSE WITH A GREATER PROOF REQUIREMENT.

The Defendant argues that the prosecutor should have charged him with the class B felony of prison riot as opposed to the class A felony of assault in the first degree. He claims that first degree assault is a general offense to the more specific offense of prison riot. Appellant's Brief at 5. Under the equal protections clause, a specific statute supercedes or preempts a general statute and restricts the prosecutor's charging discretion. *State v. Collins*, 55 Wn.2d 469, 470, 348 P.2d 214 (1960). The challenge fails, because the statutes are not concurrent statutes.

For statutes to be labeled the specific or general of each other, they must first be determined to be concurrent statutes. *State v. Datin*, 45 Wn. App. 844, 845-46, 729 P.2d 61 (1986). This condition precedent is well settled in Washington law. *See e.g. State v. Long*, 98 Wn. App. 669, 674-75, 991 P.2d 102 (2000) (finding the gross misdemeanor statute for unlawful killing of a pet is not concurrent with the felony first degree malicious mischief statute, because the felony statute required a value exceeding

$1500); *State v. Rainford*, 86 Wn. App. 431, 440-42, 936 P.2d 1210 (1997) (finding the special statute regarding possession of a controlled substance within a prison facility is not concurrent with the general statute of possession of a controlled substance, because the former statute required situs and the latter required the amount of marijuana exceed 40 grams); *State v. Aiken*, 79 Wn. App. 890, 896-97, 905 P.2d 1235 (1995) (finding the specific statute of unlawful issuance of a check does not supercede the more general money laundering statute); *State v. Karp*, 69 Wn. App. 369, 371-76, 848 P.2d 1304 (1993) (finding the statutes of second degree assault and unlawful display of a firearm are not concurrent); *State v. Darrin*, 32 Wn. App. 394, 647 P.2d 549 (1982) (finding the specialized forest product statutes does not supercede the general theft statute so as to preclude prosecution under the theft statute for theft of cedar from the forest).

Statutes are deemed concurrent if the general statute will be violated in each instance in which the special statute has been violated. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984); *State v. Jendry*, 46 Wn. App. 379, 381-85, 730 P.2d 1374 (1986). In *State v. Jendry*, the court noted that theft one and theft

of rental property (then RCW 9A.56.095) were concurrent statutes, because each required the value of the stolen property exceed $1500. However, theft two and theft of rental property were not concurrent, because one required a value between $250-1500 and the other required a value in excess of $1500.[1]

The crime of prison riot is defined as:

> Whenever two or more inmates of a correctional institution assemble for any purpose, and act in such a manner as to disturb the good order of the institution and contrary to the commands of the officers of the institution, by the use of force or violence, or the threat thereof, and whether acting in concert or not, they shall be guilty of prison riot.

RCW 9.94.010(1).

The crime of first degree assault is defined as:

> (1) [whenever a person] with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
>
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

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[1] The statute for theft of rental property has since been amended as RCW 9A.56.096 to add degrees of the crime reflecting ranges of loss value identical to the theft statute. The amendment renders the theft two statute concurrent to the class C felony of theft of rental property under RCW 9A.56.096(5)(b).

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011. The Defendant was charged under subsection (a), i.e. with a deadly weapon or by any force or means likely to produce great bodily harm or death. CP 176-77, 188, 192. The prosecutor argued in the closing that the toothbrush shank was a deadly weapon. III RP 84-86, 111.

In order for Defendant's challenge to succeed, it must be true that the alleged general statute of first degree assault is violated in each instance in which the alleged special statute of prison riot is violated. This is plainly not the case. Prison riot only requires an act of ***unlawful force or violence*** or threat of unlawful force or violence. This does not arise to the level of assault described in RCW 9A.36.011. For a first degree assault, the offender must ***intend*** to commit ***great bodily injury***. And either:

a) the violence must be:

i. with a firearm or other ***deadly weapon***

ii. and likely to produce great bodily harm or death; or

b) the assault is not forceful or violent but through the

administration of poison; or

c) the assault results in great bodily harm.

The prosecutor charged a crime with a significantly greater proof requirement. *State v. Barstad*, 93 Wn. App. 553, 560-61, 970 P.2d 324 (1999) (finding no equal protection violation or abuse of prosecutorial discretion where the prosecutor increases the proof requirements by charging first degree murder with a mens rea of extreme indifference as opposed to vehicular homicide with a lesser mens rea of only more than ordinary negligence). A prison riot does not require an intent to inflict great bodily harm. Certainly, a prison riot does not require a poisoning. Nor does it require a deadly weapon or the potentiality or actuality of great bodily harm. Therefore the statutes are not concurrent.

There was no abuse of discretion in the prosecutor's decision to charge assault in the first degree.

B. THE COURT WILL NOT CONSIDER CHALLENGES TO LEGAL FINANCIAL OBLIGATIONS WHEN RAISED FOR THE FIRST TIME ON APPEAL.

The Defendant argues that because he is serving a life sentence without the possibility of parole under Skagit County

Cause No. 96-1-00519-2, the court abused its discretion in imposing legal financial obligations. The Defendant argues that there is no likelihood that his indigency will end, therefore, there is no likelihood that he will be able to pay. Appellant's Brief at 10-11 (citing *State v. Eisenmann*, 62 Wn. App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) and RCW 10.01.160(3)). Such argument disregards the power of the appellate courts and governor to change circumstances. More importantly, the Court should not reach the argument, because the error was not preserved for appeal and because the state is not currently attempting to collect the imposed LFO's.

Because the Defendant did not object at his sentencing, he cannot challenge the imposition of legal financial obligations for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014).

Also, a challenge is not properly before the court until the State seeks to enforce them. *State v. Hathaway*, 161 Wn. App. 634, 651, 251 P.3d 253 (2011); *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009). A person is not an "aggrieved party" under RAP 3.1 "until the State seeks to enforce the award of costs

and it is determined that [the defendant] has the ability to pay." *State v. Mahone*, 98 Wn. App. 342, 349, 989 P.2d 583 (1999); *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). "Inquiry into the defendant's ability to pay is only appropriate when the State enforces collection under the judgment or imposes sanctions for nonpayment." *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008).

The court ordered the Defendant to begin paying the LFO's "after his release." CP 201; III RP 129. He is not released. Therefore, the State is not currently seeking to enforce them.

Even if the judgment and sentence had not indicated that collection would be delayed until the Defendant's release, the Defendant could not object to mandatory Department of Corrections deductions from inmate wages for repayment of legal financial obligations. Such deductions "are not collection actions by the State requiring inquiry into a defendant's financial status." *State v. Crook*, 146 Wn. App. at 27-28.

The Defendant's challenge may not be reviewed at this time.

V. Conclusion:

Respondent finds no meritorious issues which can be or have been raised by the Appellant and submits that Appellant's conviction should be affirmed.

Dated this 5th day of September, 2014.

Respectfully submitted,

JAMES L. NAGLE
Prosecuting Attorney

By: Teresa Chen
Teresa Chen,
WSBA 31762
Deputy Prosecuting Attorney

Dennis W. Morgan nodblspk@rcabletv.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED September 5, 2014, Pasco, WA Teresa Chen **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

WALLA WALLA COUNTY PROSECUTOR

September 05, 2014 - 12:31 PM

Transmittal Letter

Document Uploaded:	321703-321703 MOM.pdf
Case Name:	State v. Castulo Jose Rivas
Court of Appeals Case Number:	32170-3
Party Respresented:	State of Washington
Is This a Personal Restraint Petition?	☐ Yes ☑ No
	Trial Court County: Walla Walla - Superior Court # 13-1-00020-0

Type of Document being Filed:

- ☐ Designation of Clerk's Papers
- ☐ Statement of Arrangements
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- ☐ Response/Reply to Motion: ____
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- ☐ Affidavit of Attorney Fees
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
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- ☐ Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____ Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to jnagle@co.walla-walla.wa.us and nodblspk@rcabletv.com.

Sender Name: Teresa J Chen - Email: tchen@wapa-sep.wa.gov