71539-9

71539-9

NO. 71539-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY AQUININGOC,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When Anthony Aquiningoc returned to trial court for resentencing after his direct appeal, he complained of a conflict with his assigned attorney. The court let him represent himself but did not first ascertain Mr. Aquiningoc's understanding of the nature and degree of punishment he faced, even though this information is essential to a valid waiver of counsel.

Mr. Aquiningoc objected to his offender score calculation months before sentencing. The court asked the prosecution to prove his proper scoring. But the court included several offenses in his criminal history that were not included in the listed case history the State provided and another offense that the State agreed would not count as criminal history. The court imposed an exceptional sentence after the prosecutor argued that an uncharged crime should be considered as a significant reason to justify a sentence greater than the standard range. These errors require a new sentencing hearing.

Finally, based on an intervening change in the law, Mr. Aquiningoc's convictions for second and fourth degree assault constitute a single unit of prosecution and the lesser conviction must be vacated.

B. ASSIGNMENTS OF ERROR.

1. Mr. Aquiningoc did not knowingly, intelligently, and voluntarily waive his right to counsel as guaranteed by the Sixth Amendment and article I, section 22.

2. The court erroneously included convictions in Mr. Aquiningoc's offender score when the prosecution did not prove the validity of those convictions, contrary to the sentencing statutes and the constitutional guarantee of due process of law under the state and federal constitutions.

3. Mr. Aquiningoc's convictions for second and fourth degree assault premised on a single course of conduct violate the state and federal constitutional prohibitions on double jeopardy.

4. The prosecution impermissibly sought an exceptional sentence based on facts that were not proved to the jury as required by the Sixth Amendment and article I, section 22.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In a criminal case, an accused person's waiver of his right to counsel is presumed invalid absent affirmative evidence demonstrating the accused understood the risks at stake, including the potential punishment. The court did not ask Mr. Aquiningoc if he understood the

punishment he faced or explain what that punishment was. Has the prosecution met its burden of proving Mr. Aquiningoc validly waived his right to counsel?

2. When a defendant notifies the prosecution that he objects to his offender score calculation, the prosecution must present evidence establishing the prior convictions used to prove the standard sentencing range. The prosecution did not present evidence of the offenses it used to calculate Mr. Aquiningoc's sentence and the court included one offense that the State agreed should not be counted. Does this lack of reliable evidence require remand for a new sentencing hearing?

3. Assaultive acts that occur in the course of a single incident constitute one unit of prosecution and may not be separately punished under a recent Supreme Court decision in *Villanueva-Gonzalez.*[1] Mr. Aquiningoc was convicted of two counts of assault based on a single incident and separate punishment was imposed. Should this Court vacate his conviction for fourth degree assault based on this double jeopardy violation?

4. The right to trial by jury prohibits the court from imposing an exceptional sentence based on facts that were not proven to the jury.

Although the jury authorized the State to seek an exceptional sentence based on a pattern of acts of domestic violence, the State did not present evidence that this pattern included a 1995 assault against his sister. When the State urged to the court to impose an exceptional sentence based on a jury-found aggravating factor but premised its argument on a different assault that was not presented to the jury, has it improperly sought an exceptional sentence based on facts not found by the jury?

D. STATEMENT OF THE CASE.

In Anthony Aquiningoc's initial direct appeal, this Court ruled he was entitled to a new sentencing hearing due to several errors. CP 45 (COA 67604-1-I). His convictions for two counts of tampering with a witness violated double jeopardy, his exceptional sentence rested on an aggravating factor of unscored criminal history that should have been proved to the jury, the judgment and sentence listed offenses as convictions when Mr. Aquiningoc was not found guilty of those crimes, and the court prohibited him from having any contact with his young child without considering less restrictive alternatives. CP 36, 42-44.

At his first appearance in court following the Court of Appeals mandate, he objected to his "felony scoring history" and asked the court

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[1] *State v. Villanueva-Gonzalez*, _Wn.2d __, 329 P.3d 78 (2014)

to examine it. RP 4-5.[2] The prosecutor responded that she did not believe the court was permitted to reconsider his offender score because it was beyond the scope of the mandate. RP 6. The court continued the hearing to allow more time for preparation and directed the prosecutor to "prepare something for me" about his scoring history. RP 6-7.

Immediately after this hearing, Mr. Aquiningoc filed a motion to discharge counsel, allow him to proceed pro se, and continue the sentencing hearing. CP 46. The motion complained that appointed counsel rarely spoke to him and was not adequately assisting him in preparing mitigating information for sentencing. CP 48-49. When he next appeared in court, he explained he planned on hiring another attorney. RP 9, 11. He told the court that if he was not able to obtain another lawyer, he would proceed pro se. RP 11. The court continued the hearing. RP 18.

One month later, attorney Andrew Subin came to court on Mr. Aquiningoc's behalf. He said he was happy to represent Mr. Aquiningoc but had not been retained. RP 19-20. Mr. Aquiningoc asked for some more time for his family to gather the necessary funds. RP 20.

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[2] The verbatim report of proceedings from the resentencing hearings are contained in a single volume, referred to as "RP." Transcripts from the earlier

The court agreed but told Mr. Aquiningoc that his present attorney Darrin Hall would represent him if "Mr. Subin hasn't substituted in" by the next hearing. RP 22.

Mr. Aquiningoc could not afford to hire Mr. Subin. RP 25. He thanked the judge for letting him try to obtain his own attorney and said he would prefer represent himself rather than being represented by his assigned attorney Mr. Hall. RP 25.

The court warned him that it would be better to have an attorney and asked if he understood "all those things that are used in the process of sentencing someone in this state?" RP 30. Mr. Aquiningoc said he understood "enough" and the court accepted his request to represent himself without further inquiry into his understanding of the charges or punishment. RP 30-32.

Over Mr. Aquiningoc's objection, the court determined that his offender score was "9" for second degree assault and "8" for tampering with a witness, the two felony offenses for which he was convicted. CP 85. He imposed an exceptional sentence of 102 months for second degree assault and standard range, concurrent terms for the remaining offenses. RP 64; CP 86.

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trial and sentencing proceedings are referenced by the date of the proceeding.

Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **Mr. Aquiningoc did not knowingly, intelligently, and voluntarily waive his right to counsel when the court did not ensure he understood the potential punishment he faced at sentencing.**

a. *The right to counsel may be waived only when the defendant clearly understands the possible penalties he faces if convicted.*

A valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused is competent, and knowingly, intelligently, and voluntarily waives the assistance of counsel. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Silva*, 108 Wn.App. 536, 539, 31 P.3d 729 (2001); U.S. Const. amend. 6; Const. art. I, § 22. The validity of a waiver is measured by the defendant's understanding *at the time* he waives his right to counsel. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994).

The knowledge and intelligent understanding that the *pro se* defendant must possess when validly waiving counsel includes at a minimum, "the nature of the charges, the statutory offenses included

within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948); *State v. Woods*, 143 Wn.2d 561, 588, 23 P.3d 1046 (2001).

It is the judge's role to "make certain" the waiver of counsel is understandingly made by conducting "a penetrating and comprehensive examination of all the circumstances." *Von Moltke*, 332 U.S. at 724. To ensure that a defendant "truly appreciates the dangers and disadvantages of self-representation," he or she must waive counsel "with an apprehension of the nature of the charges, the statutory offenses included within them, [and] the *range of allowable punishments thereunder.*" *United States v. Moskovits*, 86 F.3d 1303, 1306 (3d Cir. 1996) (*quoting*, *inter alia*, *Faretta,* 422 U.S. at 835 and *Von Moltke,* 332 U.S. at 724; emphasis added in *Moskovits*).

In *Moskovits*, the defendant received a 15-year sentence after trial, but the court granted his motion for a new trial as well as his motion to represent himself. 86 F.3d at 1305. The court entered into a "lengthy and detailed colloquy" with the defendant about the dangers

and disadvantages of self-representation but did not mention the possibility that punishment could increase after a new trial. *Id.* at 1306.

When determining whether he had validly waived counsel, the court refused to assume that information presented during the first trial's sentencing hearing sufficiently informed the defendant of the possible punishment he faced if convicted after a second trial. *Id.* at 1307. Because a court must "indulge every reasonable presumption against waiver of fundamental constitutional rights," it refused to impute some understanding of the sentencing consequences to the defendant and held that the waiver was inadequate. *Id.* at 1308-09 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938)).

Similarly, in *Silva*, the defendant demonstrated his understanding of the nature of the charges and their gravity. 108 Wn.App. at 540. He was familiar with trial practice and he showed "exceptional skill" in his pretrial motions. *Id.* at 540-41. But at the time Mr. Silva waived counsel, he was not informed of the possible punishment he faced. *Id.* at 541. This Court explained:

> even the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision. Silva was never advised of the maximum

> possible penalties for the crimes with which he was charged. Absent this critical information, Silva could not make a knowledgeable waiver of his constitutional right to counsel.

Id. Although Mr. Silva received information about the standard sentencing range, he was not informed that the judge had authority to enter consecutive terms or otherwise impose an exceptional sentence.[3] The court's failure to explain the maximum possible penalties Mr. Silva faced undermined the validity of his waiver of counsel. *Id.*; *see also United States v. Erskine*, 355 F.3d 1161, 1168 (9th Cir. 2004) ("*Faretta* waiver is valid only if the court also ascertained that he understood the possible penalties he faced").

"On appeal, the government carries the burden of establishing the legality of the waiver." *Erskine*, 355 F.3d 1167. The "government has a heavy burden and [courts] must indulge in all reasonable presumptions against waiver." *United States v. Forrester*, 512 F.3d 500, 507 (9th Cir. 2008).

Although there may be some distinction between the extensiveness of the pro se colloquy required before trial as opposed to

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[3] Mr. Silva's sentencing hearing predated the limitations placed on a court's discretion to impose an exceptional sentence in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

for a new sentencing proceeding, this "does not, however, eliminate the need for the district court to make an inquiry sufficient to support a finding that the waiver of counsel is voluntary, knowing and intelligent." *United States v. Salemo,* 61 F.3d 214, 219 (3d Cir.1995).

The warnings given to Mr. Aquiningoc prior to his waiver of his right to counsel did not convey the essential information that would permit a valid waiver of the right to an attorney.

b. *The court did not accurately inform and discuss with Mr. Aquiningoc the possible penalties at the time he waived his right to counsel.*

Mr. Aquiningoc returned to trial court after a partially successful appeal and immediately renewed a request he had made during his trial to discharge his assigned attorney. CP 46-50. He told the court he would try to hire an attorney, but if he could not get a different lawyer, he would prefer to represent himself. RP 9, 12,19-20. When Mr. Aquiningoc was unable to obtain the money he needed to hire a lawyer, he told the court he would waive his right to counsel. RP 25.

Before letting him represent himself, the judge conducted a brief colloquy. RP 28-31. The judge did not mention Mr. Aquiningoc's charges at the time he waived his right to counsel. *Id*. He did not discuss the possible penalties that applied to Mr. Aquiningoc. *Id*.

The only mention the court made about sentencing issues lacked specific information pertinent to assessing the magnitude of the potential sentence Mr. Aquiningoc faced. RP 30. The court spoke only of procedural matters, saying,

> So since what we're talking about is what is the appropriate level of sentence here, at this point in time, have you studied the law about the process of sentencing? Are you familiar with those guidelines and the sentencing grid and all those things that are used in the process of sentencing someone in this state?

RP 30. Mr. Aquiningoc answered, "Yes, Your Honor." *Id.* The court did not follow with any reference to the class of felony, maximum penalty, or possibility of consecutive sentences. *Id.*

Instead, the court said generically, "Okay, and do you understand do you think the legal basis for exceptional sentences as opposed to standard range sentences?" *Id.*

Mr. Aquiningoc gave the ambiguous response: "In the professional capacity Your Honor, I do not, I do not, but as just a layman in propria persona representing myself, I studied enough to understand, yes, Your Honor." *Id.*

Without inquiring into the nature of Mr. Aquiningoc's "layman" understanding of "enough," the court next explained that Mr.

Aquiningoc would not receive any assistance from the court. *Id.* "I won't assist you this way or that way. That's not going to happen. You understand that?" RP 31. Mr. Aquiningoc said he understood. *Id.*

The court warned Mr. Aquiningoc that it "would be better if you have an attorney" but accepted Mr. Aquiningoc's request to represent himself, with prior counsel remaining in the courtroom as standby if Mr. Aquiningoc sought help. RP 31-32.

This discussion between the court and Mr. Aquiningoc does not establish a knowing, intelligent, and voluntary waiver of counsel based on an understanding of the danger of self-representation, particularly as premised on the degree of punishment at risk in the sentencing hearing. The "complexity and difficulty applying the SRA" (Sentencing Reform Act), increases with each year's amendments but the court did not inquire into Mr. Aquiningoc's understanding of the degree of punishment at stake. *In re LaChapelle,* 153 Wn.2d 1, 7, 100 P.3d 805 (2004).

Mr. Aquiningoc's desire to separate himself from his assigned attorney does not demonstrate he possessed the requisite knowledge necessary for a knowing, intelligent, and voluntary waiver of counsel. His written motion asking to discharge counsel did not mention the

charges, standard range, or statutory maximum. CP 47-49. Instead, he complained about how defense counsel had not spent time with him or investigated mitigating factors he wished to present. CP 48-49.

The court's colloquy did not include "critical information concerning the nature of the charges in this case and the maximum possible penalties [Mr. Aquiningoc] faced in this case." *Silva*, 108 Wn.App. at 540. Like Mr. Silva, Mr. Aquiningoc

> was never advised of the maximum possible penalties for the crimes with which he was charged. Absent this critical information, [he] could not make a knowledgeable waiver of his constitutional right to counsel. . . . .
>
> This information was essential to assess the risk of proceeding without the assistance of counsel and [he] did not have the benefit of it.

Id. at 541-42.

c. *The inadequate waiver of counsel is structural error requiring reversal.*

Harmless error analysis is inapplicable where the deprivation of the right to counsel is at issue. *Silva*, 108 Wn.App. at 542. Due to the lack of record establishing a knowing, voluntary, and intelligent wavier of counsel, reversal and remand for a new sentencing proceeding are required. *Id.*

2. **The court sentenced Mr. Aquiningoc based on an erroneous offender score by failing to recalculate his criminal history after the Court of Appeals reversed a conviction and disregarding the insufficient proof of contested prior convictions**

a. *The court was required to sentence Mr. Aquiningoc based on an accurate offender score.*

In Mr. Aquiningoc's initial appeal, this Court held that it violated double jeopardy for Mr. Aquiningoc to be convicted of two counts of tampering with a witness. CP 36. The prosecution conceded this error on appeal. *Id.* This Court's mandate ordered the trial court to vacate one of Mr. Aquiningoc's convictions. CP 45.

Vacating one of Mr. Aquiningoc's convictions necessitated the recalculation of his criminal history. The standard sentencing range is premised on adding together the defendant's current and prior convictions. RCW 9.94A.589(1)(a); RCW 9.94A.525. The trial court vacated one conviction after remand but did not reduce Mr. Aquiningoc's criminal history. The court resentenced Mr. Aquiningoc based on the identical criminal history score used at the prior sentencing hearing, treating his score as "9" for second degree assault and "8" for tampering with a witness. *Compare* CP 20 (prior J&S), *with* CP 85 (resentencing J&S).

The only change that happened between the first and second sentencing hearings was the Court of Appeals opinion vacating one of the felony convictions used at sentencing. The State did not assert new criminal history points that it had not used at the prior sentencing hearing. RP 32.When Mr. Aquiningoc objected to the accuracy of his offender score, the State opposed any recalculation of Mr. Aquiningoc's criminal history. RP 6, 10, 11-12.

The prosecution insisted that the criminal history score should not be altered because the Court of Appeals had not directed the court to reconsider Mr. Aqiningoc's criminal history. RP 6, 11-12. It is true that the Court of Appeals mandate orders the vacation of one conviction without mentioning the next step of resentencing Mr. Aquiningoc based on a recalculated offender score. CP 45. However, the crux of a double jeopardy violation is that a person has been impermissibly punished two times for a single conviction. *See State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). It necessarily follows that when this Court ordered the vacation of a witness tampering conviction, it also ordered that this conviction could not be used in the criminal history and required the trial court to recalculate Mr. Aquiningoc's standard range sentence.

Even when the court imposes an exceptional sentence, it "must first consider the presumptive punishment as legislatively determined for an ordinary commission of the crime before it may adjust it up or down to account for the compelling nature of the aggravating or mitigating circumstances of the particular case." *State v. Parker*, 132 Wn.2d 182, 187, 937 P.2d 575 (1997). The court is not excused from its obligation to accurately assess Mr. Aquiningoc's standard sentencing range based on proven criminal history by virtue of the exceptional sentence it imposed. *Id.* The court's failure to reduce Mr. Aquiningoc's offender score by one point after vacating a prior conviction, when no new criminal history was alleged, demonstrates that the court did not appropriately determine the presumptive punishment under the standard range before deciding to depart from the standard range.

b. *The court used the wrong criminal history score to calculate Mr. Aquiningoc's standard range.*

Due process requires the State bear the burden of proving an individual's criminal history and offender score by reliable evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. 14; Const. art. I, § 3. "It is the obligation of the State, not the

defendant, to assure that the record before the sentencing court supports the criminal history determination." *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Proof of criminal history may not rest upon mere allegation to satisfy the fundamental requirements of due process. *Id.*; RCW 9.94A.500.

Hunley explained that the prosecution's burden of proof at sentencing "was rooted in principles of due process" and cannot be overruled by the Legislature. 175 Wn.2d at 914. Consequently, "[o]ur constitution does not allow us to relieve the State of its failure" to establish a person's prior convictions "through certified copies of the judgments and sentences or other comparable documents." *Id.* at 915.

"[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *State v. Wilson*, 170 Wn. 2d 682, 688-89, 244 P.3d 950 (2010).

When a defendant disputes facts material to his sentencing, "the court must either not consider the fact or grant an evidentiary hearing on the point." RCW 9.94A.530(2); *accord State v. Cadwallader,* 155 Wn.2d 867, 874, 123 P.3d 456 (2005).

Mr. Aquiningoc objected to his offender score calculation several times, putting the State on notice he believed they needed to

review his "felony scoring history" months before his new sentencing hearing occurred. RP 4. The court told the prosecution to "prepare something for me" about his history. RP 6. The prosecutor insisted that the calculation was beyond the scope of the issues on remand, without mentioning that such a recalculation would be required by the opinion vacating one of the felonies used to comprise his criminal history score. RP 6.

The State presented the court with Mr. Aquiningoc's criminal history and an affidavit from a legal assistant that this history was the result of a query run in the Judicial Information System (JIS) based on "Defendant name and DOB." CP 78. It contained a "JIS" list of case history, which included charged offenses for which Mr. Aquiningoc was not convicted. CP 79-83.

But the list of criminal history the State offered from JIS contained fewer felony convictions than those listed on the judgment and sentence as prior convictions. While the judgment and sentence lists juvenile convictions that the State relied on in calculating Mr. Aquiningoc's offender score, the JIS list the State offered at resentencing contained none of these juvenile offenses. CP 79-83, 85; RP 63.

The judgment and sentence listed three adult felonies as prior convictions. CP 85. However, the State told the court it was not using one of these listed offenses in calculating Mr. Aquiningoc's offender score. Mr. Aquiningoc asserted that the 1991 burglary conviction should not be included in his criminal history. RP 46. The prosecutor said, "I did not include it as a point in his calculation." RP 48. The court confirmed, "It's not one of those listed offenses on this previous judgment and sentence?" RP 49. The prosecutor said, "No" and again assured the court that "I did not" include it. RP 49.

Although the State's JIS case history list mentions a 1991second degree burglary, it does not contain a sentencing date. CP 83. Each other conviction has such a sentencing date. CP 79-83. Based on the prosecutor's concession that the 1991 conviction was not intended to be included in the Mr. Aquiningoc's criminal history, it should not have been included in the score. This offense should be stricken based on the State's representation that it was not used to calculate Mr. Aquiningoc's offender score.

Without the 1991 second degree burglary, the judgment and sentence lists two prior adult felonies: second degree malicious mischief and second degree assault. CP 85.

The judgment and sentence also used eight juvenile felony adjudications as part of Mr. Aquiningoc's criminal history. *Id.* Because the State offered no proof of these offenses after Mr. Aquiningoc objected to his felony scoring and the court directed the prosecutor to address his history, they could not be used in his offender score. RP 4, 6, 10; see *State v. Cadwallader,* 155 Wn.2d 867, 878, 123 P.3d 456 (2005); *State v. Lopez,* 147 Wn.2d 515, 521, 55 P.3d 609 (2002).

c. *On remand, the court must reduce the offender score based on the evidence provided at the January 2014 sentencing hearing.*

The State did not meet its due process burden of proving convictions for juvenile offenses or the 1991 burglary that it claimed not to count in the offender score. These offenses must be stricken from the offender score. Because the State has had an opportunity to prove the criminal history following Mr. Aquiningoc's objection and it failed to do so, the resentencing must occur without any additional evidentiary hearing. *Lopez*, 147 Wn.2d at 523.

3. **Mr. Aquinongoc's convictions for second and fourth degree assault based on a single incident violate double jeopardy**.

a. *Acts of assault that occur as part of one course of conduct may not be separately punished.*

The Supreme Court recently held that when the acts underlying two assault convictions occur as part of the same course of conduct, they may not be separately punished. *State v. Villanueva-Gonzalez*, _ Wn.2d __, 329 P.3d 78 (2014) ("we hold that assault should be treated as a course of conduct crime"). Multiple convictions for such a course of conduct violates the state and federal prohibitions against double jeopardy. *Id*. at ¶7; U.S. Const. amend. 5; Wash. Const. art. I, § 9.

The opinion in *Villanueva-Gonzalez* rested on the Court's interpretation of the unit of prosecution as defined by the Legislature. It represented the first time the Supreme Court had construed the unit of prosecution for assault, and represents what the statute meant since its enactment. *See In re Hinton*, 152 Wn.2d 853, 859, 100 P.3d 801, 804 (2004). The double jeopardy analysis in *Villanueva-Gonzalez* applies here.

The *Villanueva-Gonzalez* court reasoned that a defendant should not be "convicted for every punch thrown in a fistfight." 329 P.3d at ¶

19. Factors "useful" to determine whether "multiple assaultive acts constitute one course of conduct" include:

> - The length of time over which the assaultive acts took place,
> - Whether the assaultive acts took place in the same location,
> - The defendant's intent or motivation for the different assaultive acts,
> - Whether the acts were uninterrupted or whether there were any intervening acts or events, and
> - Whether there was an opportunity for the defendant to reconsider his or her actions.

Id. at ¶ 20. Mr. Villanueva-Gonzalez was accused of hitting his girlfriend in the head, which broke her nose and caused "profuse" bleeding, and then grabbing her by the neck so she had trouble breathing. *Id.* at ¶ 2. He was charged with two counts of second degree assault, under the different statutory prongs of causing substantial bodily injury and committing assault by strangulation. *Id.* at ¶ 3. The jury convicted him of one count of fourth degree assault for the injury alleged and one count of second degree assault for the strangulation. *Id.* at ¶ 4.

Applying the factors "useful" to assessing whether these incidents were part of a single course of conduct, the Supreme Court noted that the acts took place in the same location. *Id.* at ¶ 21. They appeared to have taken place over a short time period, without

intervening events, although no clear timeline was established. *Id.* No evidence showed "he had a different intention or motivation for these actions or that he had an opportunity to reconsider his actions." *Id.* The court concluded that the acts constituted a single course of conduct and his two convictions for fourth and second degree assault violated double jeopardy. *Id.*

Likewise, Mr. Aquiningoc was convicted of two counts of assault for acts that occurred in the same location, close in time without intervening events or evidence of a separate motivation. CP 35. The entire incident happened inside the complainant's apartment, where Mr. Aquiningoc argued with his wife Ashley. 7/19/11RP 28, 37-46. He pushed Ashley onto the bed and intermittently squeezed his hand against the side of her throat for several minutes, which left Ashley temporarily unable to breathe. 7/19/11RP 38-42. They were "still arguing" when he slapped Ashley, causing her to fall backward and hit her head on the toilet (she was sitting down when this occurred). 7/19/11RP 45-46. At that point, the police arrived at the apartment and arrested Anthony without incident. 7/19/11RP 46, 116-17. This constitutes a single course of conduct under *Villlanueva-Gonzalez.*

b. *The change in the law defining double jeopardy in the course of an assault applies to Mr. Aquiningoc and requires this Court to revisit an issue raised in his initial appeal.*

This Court may revisit an issue raised in an earlier appeal when there has been an intervening change in or clarification of the law. RAP 2.5(c)(2). In his original direct appeal, Mr. Aquiningoc argued that his convictions for second and fourth degree assault violated double jeopardy because there was no clear finding from the jury that its verdicts were based on separate acts of assault. Opening Brief, COA 67604-1-I at 17-23. This Court rejected his argument because "strangulation" was the underlying act for the second degree assault conviction and other "minor pushes and slaps" constituted a separate basis for fourth degree assault. CP 39-40.

The opinion in *Villanueva-Gonzalez* alters the unit of prosecution used in the original appeal. It constitutes the first time the Supreme Court has construed the statutory unit of prosecution in this context. 329 P.3d at ¶ 13-14. It marks a change in the law that applies to Mr. Aquiningoc, whose conviction is not final when the judgment imposed is on direct review. *See In re Skylstad*, 160 Wn.2d 944, 950, 162 P.3d 413 (2007).

RAP 2.5(c)(2) gives the Court discretion to reconsider an issue on which it previously ruled, particularly when there has been an "intervening change in controlling precedent." *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005) (citing, inter alia 1B James Wm. Moore, *Moore's Federal Practice* ¶ 0.404[1], at II–6 - II–7 (2d ed. 1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, *must* be followed on the second appeal, despite the doctrine of the law of the case.")).

The *Villanueva-Gonzalez* decision formulating the unit of prosecution for assaultive conduct is controlling law. Mr. Aquiningoc was convicted of two assaults based on a single course of conduct. This Court originally affirmed his two convictions by considering the strangulation as a legally separate act from other slaps or pushes during the same incident, without the benefit of *Villanueva-Gonzalez*. CP 39-40. *Villanueva-Gonzalez* involved a markedly similar scenario and shows that a different analysis is required. The court held that when such assaultive conduct, including an act of strangulation and other infliction of bodily injury, occurs in a similar time frame without intervening events, it is one unit of prosecution. 329 P.3d at ¶21. Not

every blow during a fight is intended to be separately punished. The same reasoning dictates the appropriate unit of prosecution for the single course of conduct at issue in the case at bar.

c. *The fourth degree assault conviction must be vacated based on the double jeopardy violation.*

When two offenses constitute a single unit of prosecution for purposes of double jeopardy, the court may impose only a single sentence and judgment entered may not refer to both offenses. *Turner*, 169 Wn.2d at 464.

As the Supreme Court explained in *Turner*,

> To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction-nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

169 Wn.2d at 464-65. Due to the double jeopardy violation, the court must strike the fourth degree assault conviction from Mr. Aquiningoc's criminal history and assess whether the reduced criminal history undermines the reason for imposing an exceptional sentence.

4. The State impermissibly sought an exceptional sentence based on uncharged conduct

A person's sentence may not be increased above the standard range based on allegations that were not proven to a jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). "[T]he jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime." *State v. Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012); RCW 9.94A.535; RCW 9.94A.537. The State must prove all facts supporting the aggravating circumstance beyond a reasonable doubt. RCW 9.94A.537(3) (implementing *Blakely,* 542 U.S. 296).

The jury found that the second degree assault offense met the elements of the aggravating factor of domestic violence as codified in RCW 9.94A.535(3)(h). The jury was instructed that it could premise this aggravating factor on the alternative means of a pattern of abuse of the victim or having been committed in sight or sound of the victim or defendant's minor child. Supp. CP _, sub. no. 40 (Instruction 33). The jury was not asked to specify which alternative it found and was encouraged to premise its finding on either alternative. *Id.*; 7/20/11RP 211.

At sentencing, the State argued to the court that it should impose an exceptional sentence based on facts that were not presented to the jury. RP 32-33. It claimed that Mr. Aquiningoc's exceptional sentence was even more appropriate based on his sister's discussion at the earlier sentencing hearing of having been the victim of attempted strangulation by Mr. Aquiningoc in 1995. RP 33; 8/22/11RP 9-10. The prosecution insisted it was "very significant" that there was a pattern of similar assaults with "another victim," where the acts "were almost the same" and his sister "almost died." RP 33. This other assault was "much more significant" to the State in justifying Mr. Aquiningoc's exceptional sentence. *Id.*

But the prosecution had not pled or proved to the jury that this 1995 assault was part of a pattern of abuse. As the court explained in *State v. Sweat*, 180 Wn.2d 156, 163, 322 P.3d 1213 (2014), the prosecution may allege that repeated abuse of different victims constitutes this aggravating factor. Yet like any aggravating factor permitting an exceptional sentence, the factual allegations used for increased punishment must be proven to the jury. *Nunez*, 174 Wn.2d at 712; *Blakely*, 542 U.S. at 313.

The jury's finding of an aggravating factor based on domestic violence did not entitle the prosecution to argue that other similar incidents should also be considered part of this pattern and justify an exceptional sentence. Mr. Aquiningoc objected to the State's mischaracterization of the 1995 assault. His sister had also objected at the prior sentencing hearing, explaining that the incidents were very different, when the prosecutor had made a similar argument.8/22/11RP 13-14.

The judge did not explain the basis of his exceptional sentence beyond that it was based primarily on the domestic violence aggravating factor. RP 54, RP 55. He added that the appropriateness of an exceptional sentence was "compounded by the other things that were brought to the Court by Ms. Bracke," the prosecutor. RP 55. It agreed not to consider the allegation of a Canadian robbery conviction, which the Court of Appeals had ruled could not serve as a basis for an exceptional sentence absent a jury finding. *Id.* The court entered only boilerplate written findings of fact that contain no reference to the material facts used to justify the exceptional sentence. CP 94.

By improperly using the alleged similarity of a prior assault as a basis to justify an exceptional sentence, when the jury did not find that

the earlier offense was part of a pattern of domestic violence, the State sought an exceptional sentence for improper reasons. This case should be remanded for the court to reconsider the exceptional sentence based only upon permissible aggravating circumstances proven to the jury.

F. CONCLUSION.

Mr. Aquiningoc should receive a new sentencing hearing, at which he is permitted to have the representation of conflict-free counsel. In addition, the fourth degree assault conviction should be stricken because it violates double jeopardy.

DATED this 11th day of August 2014.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 71539-9-I
	)	
ANTHONY AQUININGOC,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	ANTHONY AQUININGOC 979919 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLE ROCK, WA 98556	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF AUGUST, 2014.

X_____

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