NO. 282228-III
(Consolidated with 30001-3)

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF

SALVADOR NAVA
Consolidated with,

STATE OF WASHINGTON v. SALVADOR NAVA

RESPONSE TO PETITION BY YAKIMA COUNTY/ REPLY BRIEF

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PROCEDURAL HISTORY

This Court consolidated the Personal Restraint Petition (PRP) 30001-3 with the direct appeal and the cross appeal 28222-8. The State will reply to the Personal Restraint Petition and Appellant's response to the Cross- appeal issue in this document.

Subsequent to the filing of the Appellant's opening brief and the response thereto the Appellant filed a pro se PRP that included on new allegation. The State also petitioned this court to supplement the record subsequent to the filing of Appellant's Reply Brief which alleged the State had tailored the Findings of Fact and Conclusions of Law for several hearing to match the issues raised in the Appellant's opening brief. The record now includes a series of correspondence from the trial court trial to counsel for the State, Ken Ramm and Mr. Tim Cotterell for defendant/appellant Nava. Those letters detail the request by the trial court with regard to the entry of the Findings of Fact and Conclusions of Law. These are found in the record at CP 116-23.

The verbatim report of proceedings from four hearings regarding the entry of those findings were also filed with this court, they are for the dates July 31, 2009, August 7 and 21, 2009 and September 4, 2009. These four hearings address the actions between the court and the parties

regarding the entry of the Findings of Fact and Conclusions of Law which were filed.

PERSONAL RESTRAINT PETITION

A. AUTHORITY FOR RESTRAINT

The petitioner is under restraint pursuant to a felony conviction in the State of Washington. The petitioner was found guilty by a jury on February 6, 2009. He was found guilty of six counts – Count I – First Degree Murder; Count Two First Assault; Count Three First Degree Assault: Count Four – First Degree Assault; Count Five – First Degree Assault; Count Six Second Degree Unlawful Possession of a Firearm. Each of the first five counts included a special verdict for use of a firearm during the commission of the crime pursuant to RCW 9.94A.510, RCW 9.94A.602 and RCW 9.41.010. He was sentenced under that cause number, 01-1-00902-3 on June 12 and 15, 2009.

Petitioner appealed his conviction that appeal is pending. Nava is presently serving out his sentence in this case.

B. ISSUE PRESENTED BY PETITION

1. Jury instructions 30,31 and 32 erroneously required unanimity contrary to State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

ANSWER TO ISSUES PRESENTED BY PETITION

1. Petitioner is under restraint as defined by RAP 16.4. Bashaw, infra, has been overruled. This court has previously decided Bashaw's applicability to this type of allegation, State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), overruled by State v. Nunez, No. 85789-0, 2012 WL 2044377 (Wash. June 7, 2012). Because Nunez overruled Bashaw this allegation should be dismissed.

C. STATEMENT OF THE CASE

This Personal Restraint Petition (PRP) has been consolidated with the pending appeal. The case has been adequately set forth in that matter. Therefore the State shall not set forth and additional statement of the case.

D. ARGUMENT

1. Standards of Review.

RAP 16.4. PERSONAL RESTRAINT PETITION--GROUNDS FOR REMEDY

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section.

Petitioner is under restraint however he has not and can not demonstrate, based on what is contained in this petition, that the restraint is unlawful. The petitioner has not set forth any other basis in the petition which would allow him to, once again, use a personal restraint petition to address his allegation.

In re Personal Restraint of Dyer, 143 Wn.2d 384, 391, 20 P.3d 907 (2001) "To prevail on a PRP alleging constitutional error, the petitioner must show he or she is under restraint and the restraint is unlawful under the provisions of RAP 16.4(c). In re Addleman, 139 Wn.2d 751, 753, 991 P.2d 1123 (2000).

In re Personal Restraint of Cook, 114 Wn.2d 802 812, 792 P.2d 506 (1990) "In order to obtain relief by way of personal restraint petition, . . . a person must establish (1) he or she is being unlawfully restrained, (2) due to a 'fundamental defect which inherently results in a complete miscarriage of justice.'"

JURY INSTRUCTION ALLEGATION- BASHAW INSTRUCTION.

It is true that Petitioner is under restraint. However his one allegation based on the issue of unanimity on an instruction has been addressed and decided by this court and that ruling was affirmed by the Washington State Supreme Court.

This court decided this issue in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011) the analysis was correct and the facts presented by Nava are not distinguishable from Nunez. This court reaffirmed Nunez in State v. Bea, 28540-5-III (WACA)(July 12, 2011) were this court once again set forth an analysis which is dispositive of the issue raised by Nava.

Appellant relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) argued for the first time in this PRP that the trial court erred in instructing the jury that it must be unanimous to return a "yes" or "no" answer to the two special verdicts. The Supreme Court recently overruled Bashaw, and upheld this Court's decision in Nunez, State v. Nunez, ___P.3d ___, 2012 WL 2044377 at ¶ 27 (Wash. June 7, 2012).

The ruling in Nunez states that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence. Nunez, -- P.3d --, 2012 WL 2044377 at ¶ 7 (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). In Nunez, our Supreme Court held that the legislature intended complete jury unanimity to impose or reject an aggravating circumstance under the Sentencing Reform Act:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.
>
> Nunez, ___ P.3d ___, 2012 WL 2044377 at ¶ 17 (quoting RCW 9.94A.537(3)).

The court rejected the Bashaw rule that previously approved of a non-unanimous jury decision for an aggravating circumstance. Nunez, ___

P.3d___, 2012 WL 2044377 at ¶ 26. The court concluded that the nonunanimity rule in Bashaw "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." Nunez, 2012 WL 2044377, at *1. In reaching this decision, the court noted that under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the legislature "intended complete unanimity to impose or reject an aggravator." Nunez, 2012 WL 2044377, at *4 (citing RCW 9.94A.537(3)). The trial court did not err in instructing the jury on the aggravating factor. Therefore this issue has been decided and needs no further review by this court.

E. CONCLUSION- PRP

The allegation set forth by Nava was decided by the Washington State Supreme Court. The case he has based his PRP on has been overruled. This petition should be dismissed.

REPLY TO RESPONDENTS OPENING BRIEF – SENTENCING.

The State filed a notice of appeal. In that notice the State indicated "...Plaintiff, seeks review pursuant to RAP 2.2(b)(6), by the designated appellate court, of the Judgment and Sentence, entered on June 12, 2009. A copy of the Judgment and Sentence is attached. (CP 125-36) The State has and is challenging both the exceptional sentence downward on the

Homicide conviction as well as the trial court's determination to run all of the First Degree Assault convictions concurrent to the Homicide count this is apparent throughout the argument section of the brief.

The law is clear that the trial judge has the authority to impose and exceptional sentence downward it is also clear that it can not impose a sentence below the mandatory minimum. The court imposed only 220 months on the murder and mathematically justified the act as within the mandatory minimum by adding in the mandatory weapon enhancement.

As indicated in the State's opening brief trial court in this matter did not make any written findings to support this downward departure from the Standard range sentence.

> RCW 9.94A.535. Departures from the guidelines The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

The oral conclusion is more supportive of an exceptional sentence upward or a standard range sentence. The written basis set forth in the Judgment and Sentence is "[t]he court finds that the multiple offense

policy permits the court to go below the standard range under RCW 9.94A.535."

Nava quotes State v. Hortman, 76 Wn.App. 454, 886 P.2d 234 (Wash.App. Div. 1 1994), review denied, 126 Wn.2d 1025, 896 P.2d 234 (1994) indicating that "a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling) Apparently indicating that to the four other persons seated in the car with Mr. Masovero who was gunned down at close range by the defendant who fired five or six shots into this obviously full car this shooting was "nonexistent, trivial or trifling."

This case is factually distinguishable from Hortman, supra, and Sanchez, infra, in that those cases were purchases of controlled substances in small quantities in a short period of time, not the intentional murder and assault, from close range, of a group of young men who had no connection to the alleged reason for this retaliatory killing.

The court literally interrupted trial counsel argument for an exceptional sentence downward with the following:

THE COURT: But the defendant stood there with a gun and pulled the trigger multiple times. Is there any doubt about that?
MR. COTTERELL: No, there's no doubt that --
THE COURT: I asked Mr. Ramm how many bullets were fired.
MR. RAMM: It appears to be between five and six, either five or six.

THE COURT: That's my recollection.
MR. RAMM: (Inaudible) revolver, there weren't any spent shell casings. They recovered two bullets from (inaudible -- talking over each other).
THE COURT: Which means that Salavador stood there outside the car and pulled the trigger and at least five bullets were fired at that car.
MR. COTTERELL: Yes. There's no indication that any of the other people in the car were the object of the shooter in this situation.
THE COURT: But they were human beings sitting in the car.
MR. COTTERELL: Yes, they were. There's no doubt about that, Your Honor,...

The court itself states that was not the fact here "Firing a weapon at a vehicle under the facts in this case has a tremendous impact on public safety. Such behavior is dramatic and brutal in its effect. A young man's life was lost. Other people in that car were put in the gravest of danger." But this is apparently trivial, trifling and nonexistent in Nava's world. RCW 9.94A.535. Departures from the guidelines further mandates in subsection, (1) Mitigating Circumstances - Court to Consider "The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

The statements of the trial court if taken in total are far more supportive of a standard range sentence or a exceptional sentence upward.

This court has often found that the failure of a court to enter written findings and conclusions is not fatal to review. However, that

review is only possible if the court's oral pronouncements are clear. State v. Faagata, 147 Wn.App. 236, 242 n.4, 193 P.3d 1132 (2008), rev'd on other grounds sub nom., State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). However, remand for entry of findings normally is required. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

Here the oral ruling is unclear. The court initially states;

> My job is to hold Salvador accountable for something that he did. Firing a weapon at a vehicle under the facts in this case has a tremendous impact on public safety. Such behavior is dramatic and brutal in its effect. A young man's life was lost. Other people in that car were put in the gravest of danger. The behavior that's before the court calls for extremely serious penalties to hold this defendant accountable for what he did and to send a message to the community that senseless acts of violence will be dealt with seriously and hopefully we'll be able to work with our young people and convince them that there is a better way to live. I don't have the answers on that. All I know is that those of us who are responsible as adults have to keep working with our young people. We can't give up. We won't. It's not in our nature as Americans to give up, so it's not going to happen. But the young man who's before me today, it's time to be held accountable.

Which is then immediately followed by the courts statement that it felt that the sentence would be clearly excessive. The court then fashioned a sentence that would meet the predetermined goal of the court, 520 months. The court then states "Given his age, background, experience an and the nature of the harm that was done here, it seems to

me after carefully thinking about this that I balance the equities that have been presented and I find that this would be an appropriate sentence."

An exceptional sentence may be imposed if the trial court finds "substantial and compelling" reasons to go outside the standard range. RCW 9.94A.535. The trial court must enter written findings of fact and conclusions of law if it does impose an exceptional sentence. *Id*. A nonexclusive list of mitigating factors is recognized by statute. RCW 9.94A.535(1). However, an exceptional sentence above the standard range must be based on a recognized statutory factor. RCW 9.94A.535(2), (3).

Either party may appeal an exceptional sentence. RCW 9.94A.585(2). The statutory scheme for review of an exceptional sentence has long been in place. An exceptional sentence is reviewed to see if either (a) the reasons for the exceptional sentence are not supported by the record or do not justify an exceptional sentence, or (b) the sentence imposed is clearly excessive or clearly too lenient. RCW 9.94A.585(4). Appellate courts review to see if the exceptional sentence has a factual basis in the record, is a legally justified reason, and is not too excessive or lenient. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Differing standards of deference or nondeference apply to those three issues. *Id*.

Mr. Nava argued in the trial court and the trial court found as a basis that the fact there were multiple people in the car at one time

resulting in the numerous charges and convictions for First degree assault in effect when added together resulted in a sentence that was excessive. (Sentencing VRP 16-18) The court stated "I'm going to find that the imposition of the presumptive sentences as described would clearly lead to an enormous set of penalties and I find that they would be excessive in light of the purpose of the chapter. If you add up all the enhancements and the recommended sentences by the State, it would lead to over a thousand months. I find that to be excessive." To the extent that this statement is a disagreement with the legislatively determined standard range, it is not a basis for an exceptional sentence. Judicial disagreement with presumptive punishment is not a basis for setting aside an exceptional sentence. Law, 154 Wn.2d at 95-96; State v. Pascal, 108 Wn.2d 125, 137-138, 736 P.2d 1065 (1987). The standard ranges reflect the legislative balancing of the purposes of the Sentencing Reform Act of 1981, chapter 9.94A RCW. *Id*.

When notified that the sentence that was imposed was not valid the court stuck with its predetermined number of forty-three years. The court finally settled on various reasons in the oral finding but only set forth one "written" finding, stating that the multiple offense policy permits the court to go below the standard range under RCW 9.94A.535. Cases such as Hortman, supra and State v. Sanchez, 69 Wash.App. 255, 848 P.2d 208, review denied, 122 Wash.2d 1007, 859 P.2d 604 (1993) as quoted in

Hortman set forth rationale for the multiple offense policy. This rationale is that there is a series of acts by the defendant that occur in a short period of time or that occur were there are multiple victims in one place, similar to the facts there. However those cases make it clear that the rationale is based on the fact that these cases result in numerical offender score that in one event, place the defendant in or near the top of the level of punishment possible for the charged crime. That obviously is not possible here because these crimes, due to the fact that they are serious violent offenses, must be scored with out any concurrent points. In this case of Nava that resulted in his point score for each of the four counts of Assault in the First degree of zero (0). There was no basis for the multiple offense policy to be used in Nava's case.

Even if this were a case where the multiple offense policy was applicable State v. Bridges, 104 Wn.App. 98, 15 P.3d 1047 (Div. 3 2001), review denied 144 Wn.2d 1005, 29 P.3d 717 (Wash. 2001) indicates:

> However, essentially arguing the sentence is "clearly too lenient," the State contends the Sanchez reasoning supports an exceptional sentence only if the sentence imposed is at least as great as the standard range for a single offense. The State is correct. In Sanchez, for example, the sentence imposed was greater than the presumptive sentence for a single delivery. Sanchez, 69 Wash.App. at 261, 848 P.2d 208; see Fitch, 78 Wash.App. at 554, 897 P.2d 424 (sentence at minimum of standard range for single offense); Hortman, 76 Wash.App. at 458, 886 P.2d 234 (sentence at high end of standard range for single offense). The distorting effect of the

multiple offense policy does not justify a sentence below the standard range for a single offense.

The base sentence imposed by the trial court is in and of itself an exceptional sentence downward. The law mandates that the sentence on the murder can be no less than 240 months. The standard range for this offense was 271-361 months. The court imposed 220 months then added the weapons enhancement into that to come to the base sentence of 280 months thereby manufacturing a sentence which the court believed was within the standard range for murder.

There are no provisions in the Revised Code of Washington and the State could find no similar cases where a court imposed or manufactured such a sentence. This is not a standard range sentence. It is an exceptional sentence based on the multiple offense policy which is not applicable, that the court then ran the weapons enhancement consecutive to come up with this new type of "hybrid" sentence.

With regard to the trial courts dogged adherence to the 520 month term of confinement; discretion means that the court listens to the input of the parties, the facts and the case law. The rote use of this number "forty-three" without any basis for the use of that number is not an act of discretion on the part of the trial court it is unreasonable and untenable.

The common meaning of untenable is that it is supported by reason. This sentence was imposed and then the court fit reasons to support it.

This court has noted in many other matters that, an "abuse of discretion" is considered to have occurred when the discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons". State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)

The argument is that this is an appropriate use of the "multiple offense policy" mitigating factor found in RCW 9.94A.535(1)(g): "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." The problem with this argument is that the multiple offense policy is not involved in RCW 9.94A.589(1)(b).

In relevant part, RCW 9.94A.589(1) provides:

> (a) Except as provided in (b) or (c) of this subsection, 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: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the

> exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct, " as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.
> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

The "multiple offense policy" refers to the trade-off recognized by the Legislature in the first subsection of this statute. State v. Batista, 116 Wn.2d 777, 786-787, 808 P.2d 1141 (1991). When dealing with most cases involving multiple crimes, the offenses are counted as if they were prior criminal history when calculating the offender score for each offense. Sentences computed in such a manner are then served concurrently unless a basis for an exceptional sentence exists. RCW 9.94A.589(1)(a).

However, this trade-off is nonexistent when sentencing serious violent offenses under RCW 9.94A.589(1)(b). Instead, multiple serious

violent offenses do not count in the offender score for any other serious violent offenses. The most serious crime is sentenced considering the defendant's whole criminal history, excluding other current serious violent offenses, and a standard range computed in the normal manner. For all other serious violent offenses, the crimes are scored with an offender score of zero and are directed to run consecutively to the most serious offense. (CP 14-22)

As defined in Batista, the multiple offense policy refers only to sentencing proceedings under subsection (1)(a); it does not apply to sentencing under subsection (1)(b). Mr. Nava's case doe not fit under the multiple offense mitigating factor fails with regard to counts 2, 3, 4, 5 and therefore on the record before this court this one factor enumerated by the court is not valid. The standard range for one count of first degree assault was not influenced by the other three counts. There was no trade-off that resulted in an overly harsh sentence. The multiple offense policy of subsection (1)(a) is not a basis for an exceptional sentence under subsection (1)(b).

CONCLUSION – CROSS APPEAL – EXCEPTIONAL SENTENCE.

This sentence is not supported by the very words of the sentencing magistrate. While it is obvious that the intent of the judge was that Nava would have some "light at the end of the tunnel" that is not a valid basis to

uphold this sentence neither is the one written finding "the multiple offense policy." This sentence is an exceptional sentence with no rational basis. The crimes charged and the resulting convictions were not trivial, trifling or nonexistent. The mandatory minimum sentence for murder it 20 years, the trial court imposed 18.3, the minimum standard range is 261 the court imposed 220 and made up the difference by adding in a mandatory enhancement. This is an abuse of discretion.

This sentence should be overturned. This matter should be remanded to the trial court with direction to the sentencing court that the multiple offense policy is not a valid basis for an exceptional sentence based on the crimes committed.

Obviously Mr. Nava has the right to petition the court for an exceptional sentence. However the basis and the reasoning by the trial court in the original sentencing are not a valid basis to impose such a sentence.

Respectfully submitted this 2nd day of October 2012.

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DECLARATION OF SERVICE

I, David B. Trefry state that on October 2, 2012, emailed a copy, by agreement of the parties, of the PRP/Reply Brief, to Eric Nielsen at SloaneJ@nwattorney.net. and to Salvador S. Nava DOC # 331749, Monroe Corrections Center, P.O. Box 7002, Monroe WA 98272.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2012 at Spokane, Washington.

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