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

STATE OF WASHINGTON,	)	
Respondent,	)	No. 67272-0-1
	)	
v.	)	STATEMENT OF ADDITIONAL
	)	GROUND FOR REVIEW
FAUSTO VEGA-FILIO,	)	PURSUANT TO RAP 10.10
Appellant.	)	

FILED  
 COURT OF APPEALS DIV I  
 STATE OF WASHINGTON  
 2011 OCT 21 AM 11:05

I, Fausto Vega-Filio, have recieved and reviewed the opening vrief prepared by my attorney. Below are the Additional Grounds for Review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

**A. ISSUES PRESENTED**

Petitioner contends that his conviction for both Robbery and Second Degree Assault, a necessary predicate for Robbery, violates the Constitutional prohibition against double jeopardy or at least the doctrine of merger. Community Custody exceeds the statutory maximum of sentence and is an erroneous sentence.

**B. STANDARD OF REVIEW**

Unchallenged findings of facts are verities on appeal. State v. Rodgers, 146 Wn.2d 55, 61, 43 P.3d 1 (2002). We review questions of Law such as merger and double jeopardy de novo. State v. Knutson, 88 Wn.App. 677, 680,

1 946 P.2d 789 (1997). A double jeopardy claim can be raised for the first  
2 time on appeal, Rap 2.5(a)(3); Winchester v. Stein, 86 Wn.App. 458, 463,  
3 937 P.2d 618 (1997), aff'd in part and rev'd in part on other grounds, 135  
4 Wn.2d 835, 959 P.2d 1077 (1998).

#### 5 DOUBLE JEOPARDY

6 No person may be "twice put in jeopardy of life or limb" for the same  
7 offense. In re Pers. Restraint of Fletcher, 113 Wn.2d 42, 46, 776 P.2d 114  
8 (1989). This is a Constitutional guaranty applied to the state's by the  
9 fourteenth Amendment. Id.; State v. Springfield, 28 Wn.App. 446, 449, 624  
10 P.2d 208 (1981). The Washington Constitution affords identical protection  
11 against double jeopardy. Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95,  
12 107, 896 P.2d 1267 (1995).

13 In order to be "the same offense" for Constitutional double jeopardy  
14 analysis, the offenses must be the same in law and in fact. Fletcher, 113  
15 Wn.2d 47, 49. Washington employs the "same evidence" test to determine this.  
16 State v. Roybal, 82 Wn.2d 577, 512 P.2d 718 (1973); State v. Calle, 125  
17 Wn.2d 769, 777, 888 P.2d 155 (1995). The offenses are the same in law if  
18 every element essential to prove one offense is also essential to the other.  
19 They are the same in fact if proof of the act charged in either count is  
20 sufficient to sustain a conviction under the other. Springfield, 28 Wn.App.  
21 at 451. But if an element in one offense which is not included in the other,  
22 and the facts establishing one offense would not necessarily also prove the  
23 other, then the offenses are not Constitutionally the same. And the double  
24 jeopardy bar does not apply. Fletcher, 113 Wn.2d at 47.

25 Roybal illustrates Washington's approach to double jeopardy analysis.  
26 The fact that a single unlawful act may be punished twice is not necessar-

1 ily a constitutional violation, if such was the Legislative intent. Roybal,  
2 82 Wn.2d 577. The Roybal defendant was convicted twice for the a single  
3 instance of carrying a gun. Once he was convicted for carrying a concealed  
4 weapon in violation of the Municipal code, and again for being a felon in  
5 possession of a firearm in violation of State law. There was no double  
6 jeopardy, because each element contains an element not essential to the  
7 other: It is possible, for example, for a nonfelon to carry a concealed  
8 weapon or a felon to carry an unconcealed weapon.

9 Here, the State correctly distinguishes the essential elements of Ass-  
10 ult and Robbery as a matter of law and fact. That does not end the inqui-  
11 ry, however. Whether two crimes constitute the same offense for double jeo-  
12 pardy purposes depends on the Legislative intent.

13 **MERGER**

14 Within Constitutional limits, Legislatures have the exclusive power to  
15 define crimes and punishments. State. v. Rivera, 85 Wn.App. 296, 298, 932  
16 P.2d 701 (1997); Calle, 125 Wn.2d at 776. The term "merger" is a doctrine  
17 of statutory interpretation. We apply the doctrine to determine whether the  
18 Legislature intended to impose multiple punishments for a single act that  
19 violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419  
20 n.2, 662 P.2d 853 (1983).

21 Our sole inquiry is, then, whether the Legislature intended to define  
22 and punish certain conduct once as a single crime of a higher degree, or  
23 twice as two distinct crimes. Rivera, 85 Wn.App. at 298-99; Calle, 125 Wn.2d  
24 at 776. If, in order to prove a particular degree of a crime, the State must  
25 prove the elemnets of that crime and also that the defendant committed an  
26 act that is defined as a separate crime elsewhere in the criminal statutes,

1 the second crime merges with the first. Vladovic, 99 Wn.2d at 420-21; State  
2 v. Parmelee, 108 Wn.App. 702, 711, 32 P.3d 1029 (2001)(felon stalking), re-  
3 view denied, 146 Wn.2d 1009 (2002).

4 That is what we have here. The crime of Robbery is the taking of perso-  
5 nal property from the person of another or in her presence and against her  
6 will with either the use or threatened use of force or violence. RCW 9A.56.  
7 190. To prove first degree robbery, the state must prove the elements of  
8 robbery, plus bodily injury constituting assault. RCW 9A.56.200(1)(a)(iii).  
9 Second degree assault is defined elsewhere as the reckless or intentional  
10 infliction of substantial bodily harm, a separate crime. RCW 9A.36.021(1)(a).  
11 Thus, the state could not have convicted petitioner for first degree robber-  
12 y without proving the assault. And the only facts that elevated simple rob-  
13 bery to first degree robbery are the same facts underlying the separate as-  
14 sult charge.

15 Second degree assault is not identical in law to first degree robbery.  
16 It is possible to commit first degree robbery without committing second  
17 degree assault, and vice versa. Therefore, if separate acts of force are  
18 established, double jeopardy does not preclude two conviction. State v.  
19 Smith, 9 Wn.App. 279, 282-83, 511 P.2d 1032 (1973)(acts of force necessary  
20 to commit bank robbery different from acts of force committed against bank  
21 employees). But, if the unlawful force used in the robbery is the same  
22 conduct as that comprising the alleged assault, and if the force required  
23 for the assault had no separate purpose or effect, the charges merge and  
24 double jeopardy precludes separate convictions. In re Pers. Restraint of  
25 Butler, 24 Wn.App. 175, 176-77, 599 P.2d 1311 (1979); Springfield, 28 Wn.App.  
26 at 451; State v. Bresolin, 13 Wn.App. 386, 394, 534 P.2d 1394 (1975).



1 "Same criminal conduct"... means two or more crimes that require the  
2 same criminal intent, are committed at the same time and place, and involve  
3 the same victim." RCW 9.94A.589(1)(a), When determining whether two crimes  
4 share the same criminal intent, the only factor at issue here, courts focus  
5 on whether the defendant's intent, viewed objectively, changed from one cri-  
6 me to the next, and whether commission of one crime furthered the other.  
7 State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

8 Certainly, the evidence is sufficient to support petitioner's view of  
9 his own criminal conduct. By his theory, his only intent was to rob Lovejoy,  
10 and by use of force held her because she did not respond immediately to his  
11 demands; thus he contends that the assault was done in furtherance of the  
12 robbery-as evidence by petitioner's threat i Lovejoy did not turn over her  
13 cellphone. Petitioner asks to hold that the trial court erred when it found  
14 that his assault and robbery convictions constituted separate criminal con-  
15 duct for scoring purposes.

16 **PETITIONER WAS GIVEN A SENTENCE OF COMMUNITY CUSTODY WHICH EXCEEDED HIS**  
17 **STATUTORY MAXIMUM**

18 In light of RCW 9,9A.701(9) which states in pertinent part:

19 [T]he term of community custody specified by this section  
20 shall be reduced by the court whenever an offenders standard  
21 range term of confinement, is combination with the term of  
community custody exceeds the statutory maximum for the crime....

22 because this Amendment applies to all cases in which the community custody  
23 term has not been completed, Petitioner contends this court should remand  
24 petitioner back to court to be resentenced properly.

25 As in State v. Zavala-Reynoso, 127 Wn.App. 119, 110 P.3d 827 (2005) that  
26 opinioned that under RCW 9.94A.505(5):

1 "Except as [otherwise] provided...a court may not impose  
2 a sentence providing for a term of confinement or "community  
3 custody" which exceeds the statutory maximum for the crime.  
4 emphasis added....

5 Moreover, **RCW 9.94A.599 states:**

6 The total sentence, including enhancements and community  
7 custody remains presumptively limited by statutory  
8 maximum for the underlying offense unless the offender is  
9 a persistent offender. If the TOTAL SENTENCE exceeds the  
10 maximum sentence, not the enhancement must be reduced.

11 Accordingly, petitioner's judgment and sentence states he was given a  
12 standard range of 77-102 months. 102 months being the statutory maximum for  
13 his points and seriousness level.

14 The sentencing court imposed an 84 month sentence and by law gave  
15 petitioner an additional 36 months community custody for a total of 120  
16 months, which exceeds petitioner's statutory maximum.

17 Petitioner contends his underlying offense sentence of 84 months must  
18 be reduced to take into account the 36 months community custody imposed by  
19 the sentencing court, giving petitioner an 66 month base sentence.

20 With the addition of the 36 month community custody, petitioner will in  
21 essence serve 102 months.

22 **RCW 9.94A.701(9)** is clear and controlling in this particular case. The  
23 Legislature adopted that Amendment precisely because this Amendment applies  
24 to all cases in which the community custody term has not been yet completed.

25 **State v. Broadway**, 133 Wn.2d 118, 942 P.2d 363 91997) held that it would  
26 allow a defendant to appeal an erroneous sentence of community custody before  
serving the term of incarceration.

This holding is significant, because the Department of Corrections is  
not authorized to correct an erroneous judgment and sentence. **In re Davis**,

1 67 Wn.App. 183 P.2d (1992).

2 This court has the authority to correct an erroneous judgment and  
3 sentence. **State v. Hardesty**, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996);  
4 **State v. Pascal**, 108 Wn.2d 125, 134, 736 P.2d 1065 (1987); (quoting **State v.**  
5 **Pringle**, 83 Wn.2d 188, 193, 517 P.2d (1973)).

6 In a light most favorable to the State, the State may claim the additi-  
7 onal 36 months of community custody sentence is a ministerial error,  
8 however, a ministerial error involves the failure to perform an act the law  
9 prescribes and defines....with such precision and certainty as to leave no-  
10 thing to the exercise of discretion or judgment. **State v. Bepple**, 85 Wn.2d  
11 378, 380, 535 P.2d 813 (1975).

12 In the present case, the sentencing court did not fail to perform the  
13 act the law prescribed, petitioner recieved by law the 36 months community  
14 custody.

15 So, violation of petitioner's statutory maximum is not ministerial  
16 error, but procedural.

17 **Blakely v. Washington**, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403  
18 (2004), where the United States Supreme Court decision, that the State of  
19 Washington, acknowledged that "As a result of the blakely decision, 'The  
20 Courts hands are bound by the standard range'".

21 Blakely, just outlines the procedures by which a life sentence or  
22 additional sentence may be imposed, otherwise, the effective maximum for a  
23 Class A felony is the top end of the standard range. **State v. Knotex**, 136  
24 Wn.App. 412, 149 P.3d 676.

25 Blakely's decision "rejected the notion that a life term under RCW  
26 **9A.20** was the statutory maximum for a Class A offense".

1 With that being said, Petitioner's sentence of 102 months is the  
2 statutory maximum sentence allowed by law and since petitioner was given 84  
3 months plus 36 months community custody petitioner will in effect serve 120  
4 months total.

5 The proper remedy in this particular case is to remand petitioner back  
6 to the sentencing court for the proper sentence of 66 months plus the 36  
7 months community custody.

8 CONCLUSION

9 Petitioner respectfully asks this court to grant his motion of State-  
10 ment of Additional Grounds, and grant relief on the merits brought upon  
11 this court.

12 I, Fausto Vega-Filio, hereby swear under penalty of perjury of the laws  
13 of the State of Washington, that I have read the contents of the above  
14 motion, and it is true and correct to the best of my knowledge.

15 Sworn to this 27 day of October, 2011.

16   
17 \_\_\_\_\_  
Signature

18 FAUSTO - Vega-Filio  
19 Print Name

20 Subscribed and Sworn to before me, this 27 day of October 2011.

21   
22 \_\_\_\_\_

23 Notary Public in and for the  
24 State of Washington, My commission  
25 expires: 4/30/12  
26



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STATE OF WASHINGTON

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION ONE

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No: 67272-0-I  
 )  
 v. ) **CERTIFICATE OF SERVICE**  
 )  
 FAUSTO VEGA-FILIO )  
 Petitioner. )

---

I, FAUSTO VEGA-FILIO, Petitioner in the above entitled cause, under the penalty of perjury, do hereby certify that on the date noted below, I sent copies of: STATEMENT OF ADDITIONAL GROUNDS PURSUANT TO RAP 10.10

To: COURT OF APPEALS DIV ONE  
ONE UNION SQUARE  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

By processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001-2049.

Dated this 27th day of October, 2011.

Respectfully Submitted,



\_\_\_\_\_  
Petitioner