

62164-5

62164-5

NO. 62164-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TODD OLSON,

Appellant.

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

The Honorable Bruce Weiss

BRIEF OF APPELLANT

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FILED
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STATE OF WASHINGTON
DIVISION ONE
2009 OCT 8 PM 4:50

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Todd Olson's due process right to a fair and impartial trial by denying his motion for a mistrial following improper and prejudicial testimony.

2. The trial court exceeded its statutory authority in imposing an indeterminate sentence.

3. The trial court's failure to impose a determinate sentence violated the Separation of Powers Doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process is violated and a motion for mistrial should be granted when prosecutorial misconduct or improper testimony prejudices the accused. Here, the court ruled that a police officer could testify about his observations of the field sobriety test he administered to Mr. Olson, but could not offer his ultimate opinion of Mr. Olson's intoxication based on that test. The prosecutor elicited the officer's testimony that he believed Mr. Olson was intoxicated, without excluding the impermissible basis as instructed by the court. The court denied Mr. Olson's motion for a mistrial. Did this ruling violate Mr. Olson's due process right to a fair and impartial trial? (Assignment of Error 1)

2. The Sentencing Reform Act (SRA) generally requires a sentencing court to impose a determinate sentence with respect to both confinement and supervision. RCW 9.94A.505 does not permit a court to impose a sentence in which the term of confinement plus the term of community custody exceeds the statutory maximum sentence for the offense. Where the trial court imposed a term of confinement of 60 months plus an additional term of community custody, does the sentence exceed the statutory maximum of 60 months for felony DUI? (Assignment of Error 2)

3. The Separation of Powers Doctrine of the state and federal constitutions prohibits (a) one branch of government from encroaching on the duties of another; (b) one branch from improperly ceding its duties to another, and (c) one branch from improperly delegating a second branch's duties to the third branch. Through the SRA the Legislature has established the appropriate sentences for crimes, and required sentencing courts to impose a determinate sentence within the general framework of the SRA and within the specific statutory maximum sentences for each offense. The Department of Corrections (DOC), in turn, is vested only with the authority to enforce the sentence imposed but cannot set the

terms of the sentence. Where a sentencing court imposes a sentence in which the total terms of confinement and community custody exceed the statutory maximum, and rather than reduce either term the sentencing court merely makes a notation that the offender should not serve a term beyond the statutory maximum, has the trial court improperly ceded its obligation to impose the sentencing terms to the executive branch? (Assignment of Error 3)

C. STATEMENT OF THE CASE

On March 24, 2008, Todd Olson was arrested at his apartment complex, following a traffic accident on nearby Highway 99 in Lynnwood. Lynnwood Police Officer Jacob Shorthill testified when he contacted Mr. Olson, his eyes appeared “glassy” and “watery,” his speech was “a little slurred,” and he “staggered.” RP 92-93, 129.

Lynnwood Police Officer Kenneth Harvey testified he took custody of Mr. Olson from Officer Shorthill and observed Mr. Olson “staggered” and had “watery, bloodshot, droopy” eyes and flushed cheeks, and smelled alcohol on him. RP146-47, 151. Officer Harvey testified he advised Mr. Olson of his *Miranda*¹ rights before

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966))” .

asking how much he had to drink. RP 148, 152. Mr. Olson said he had two beers about eight hours prior. RP 152. Mr. Olson then agreed to take a field sobriety test and his handcuffs were removed. RP 152. Officer Harvey administered a horizontal gaze nystagmus field sobriety test on Mr. Olson in the parking lot of the apartment complex. RP 152-53. Officer Harvey testified Mr. Olson did not follow his instructions precisely but displayed brief nystagmus in both eyes. RP 153-54. Mr. Olson declined further field sobriety tests. RP 154. Officer Harvey arrested Mr. Olson, transported him to the police station, and read him the implied consent warnings related to the blood-alcohol content test. RP 155. Mr. Olson refused the test. RP 157-58.

Following a jury trial before the Honorable Bruce Weiss, Mr. Olson was convicted of Felony Driving While Under the Influence (DUI), Hit and Run – Attended, and Driving While License Suspended. CP 33. The court imposed the maximum standard range for each offense: 60 months for Felony DUI, and one year for each of the misdemeanors, all to run consecutively. CP 33-45. The court also imposed 9 to 18 months of community custody for the felony. Mr. Olson timely appeals.

D. ARGUMENT

1. THE COURT ERRED IN DENYING A MOTION FOR MISTRIAL BASED ON THE STATE'S VIOLATION OF THE COURT'S RULING.

a. The court correctly excluded Officer Harvey's opinion of intoxication based on the field sobriety test. Here, the court correctly found pre-trial that Officer Harvey's determination of Mr. Olson's intoxication was an expert opinion because it was based on his specialized training and experience. 9/30/08RP 44. Because the State had not endorsed Officer Harvey as an expert, the court ruled he could testify as to Mr. Olson's intoxication based on his observations, but not his "training or expertise." 9/30/08RP 45.

Before Officer Harvey testified, the defense moved to exclude testimony regarding the nystagmus test or Officer Harvey's opinion of intoxication, if it was based on the results of the nystagmus test. 10/1/08RP 107. The court correctly ruled, consistent with its pre-trial ruling, that such opinion testimony would be inadmissible. *Id.* However, the court also ruled Officer Harvey could testify to his observations of the test. 10/1/08RP 108.

So to be clear, in relation to the other argument concerning the basis for his opinions related to intoxication, if the question is going to be asked... based on your observations, there's going to have to be a qualifier in the question, "Based upon your

observations, excluding the nystagmus gaze test.” I will not permit that to be a part of the basis for the opinion in relation to intoxication because that is outside the purview, I believe, of a lay witness. That is not something a lay witness would know. An expert would, and he’s not been endorsed.

10/1/08RP 108.

The court clarified it would permit

[t]he officer to talk about the gaze nystagmus test, allow[] the officer to tell the jury that that’s a standard field sobriety test, nationally and state recognized, ... explain what clues he looks for on that and then describe his observations.

10/1/08RP 109, 111. The court ruled such testimony is “not opinion-based testimony. It’s based on his training as a police officer.” *Id.* However, “[t]he difference... between expert testimony and lay testimony is in relation to the ability to state the opinion of the expert.” *Id.* Therefore, the court ruled the prosecutor could not ask Officer Harvey if, based on his observations of the nystagmus test, he believed Mr. Olson was intoxicated. 10/1/08RP 112, 117.

Officer Harvey testified that the horizontal gaze nystagmus test is one of three standardized field sobriety tests. 10/1/08RP 135. He testified the purpose of the test, which has three stages, is determine whether the suspect demonstrates “nystagmus” – involuntary jerking of the eye. 10/1/08RP 136. In the first stage, he

tests the suspect's "smooth pursuit" ability by holding a stimulus 12 to 15 inches away from the suspect's face, telling him to concentrate on the tip of the stimulus without moving his head, and running it from the middle of the suspect's nose to the edge of his right eye for two seconds, then to the edge of the left eye, back to the right eye, back to the left eye, and finally back to the nose.

10/1/08RP 136. Officer Harvey testified that the suspect's failure to hold his head still during this test can "raise concerns" about the validity of the results. 10/1/08RP 161. He also testified in detail to the procedures for the other two stages of the horizontal gaze nystagmus test and two other standardized field sobriety tests. 10/1/08RP 138-40.

Officer Harvey testified that after Mr. Olson agreed to take a field sobriety test, the officer removed Mr. Olson's handcuffs and administered the first portion of the horizontal gaze nystagmus test. 10/1/08RP 152. Although there were lights in the parking lot, it was beginning to get dark at this time. 10/1/08RP 153. Officer Harvey testified that he told Mr. Olson four times to keep his head straight and follow the stimulus with his eyes only because he repeatedly moved his head. 10/1/08RP 153, 160, 172. For brief periods of two seconds at a time between head movements, Officer Harvey

observed nystagmus in both eyes. 10/1/08RP 154, 167. Mr. Olson declined to take further field sobriety tests. 10/1/08RP 162

On direct examination, the prosecutor asked, "based on your observations of Mr. Olson on that day, did you have an opinion about whether he was under the influence or affected by alcohol?" 10/1/08RP 159. Officer Harvey testified, "My opinion is that he was intoxicated." *Id.* Defense began to object, but withdrew the objection.

Because of the violation of the court's ruling, the defense moved for a mistrial, which was denied. 10/1/08RP 180-84.

In closing, the prosecutor emphasized Officer Harvey's testimony on this issue.

You have the officer's attempt to do the field sobriety tests to make a better determination about what level of intoxication the defendant was displaying here.

And the defendant did agree to start these field sobriety tests. And the officer described the three standard tests that he does in DUI cases.

And they got started on the first test, that horizontal gaze nystagmus. And the officer described for you how you follow a stimulus. And he's looking for smooth pursuit with your eyes, or nystagmus, if your eye bounces as it's going side to side.

That's the clues you look for. And first thing, sure enough, the officer saw the clue that he was looking for. He saw the nystagmus as he was going from side to side.

Another thing you look for is whether the person can follow instructions. These instructions are supposed to be fairly straightforward: Keep your head still and look forward, watch the pen with your eyes, not your head.

The officer told him that. Told him again. Told him again. Told him again. And he still wouldn't keep his head straight and do that...

The officer gave you his opinion about the defendant, that the defendant was intoxicated, in fact, drunk.

10/2/08RP 39-40 (emphasis added).

b. The court violated Mr. Olson's due process right to a fair trial by denying his motion for mistrial. Due process guarantees accused persons a fair trial. U.S. Const. amends. 5, 14; Wash. Const. art. I, § 3. Due process is violated, requiring a new trial, when prosecutorial misconduct or improper testimony prejudices the accused. *State v. Stith*, 71 Wn.App. 14, 19, 856 P.2d 415 (1993).

Here, the prosecutor clearly violated the court's ruling by asking Officer Harvey for his ultimate opinion on intoxication. The defense moved for mistrial immediately after Officer Harvey's testimony. The defense acknowledged withdrawing his objection, but explained that "to have even objected at that point would have simply underscored the problem in front of the jury." 10/1/08RP 182. Judge Weiss agreed that the prosecutor's question was

improper and he would have sustained an objection to the form of the question. *Id.* However, he denied the motion for mistrial, stating his prior remarks were, “as opposed to an actual ruling, it was more from the standpoint of instructions for how to avoid the issue.” 10/1/08RP 183. The court’s explanation is unclear and illogical. If the court’s prior ruling was not an “actual ruling,” then there is no record as to what the actual ruling was.

In his ruling, the court had stated:

there’s going to have to be a qualifier in the question, “Based upon your observations, excluding the nystagmus gaze test.” *I will not permit that to be a part of the basis for the opinion in relation to intoxication because that is outside the purview, I believe, of a lay witness. That is not something a lay witness would know. An expert would, and he’s not been endorsed.*

10/1/08RP 108 (emphasis added). The court further clarified, at several distinct points, that although Officer Harvey could testify about the test generally and his observations from the test, he could *not* give his ultimate opinion of intoxication based on the results of the test. 10/1/08RP 109, 11-12, 117. The ruling could not have been more specific. The prosecutor was specifically ordered to exclude the nystagmus test from the officer’s observations, and did not do so.

As the court's earlier ruling anticipated, the testimony was prejudicial. The Supreme Court has observed, "when a law enforcement officer gives opinion testimony, the jury is especially likely to be influenced by that testimony," thereby denying the defendant a fair and impartial trial. *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (quoting *State v. Carlin*, 40 Wn.App. 698, 703, 700 P.2d 323 (1985) (overruled on other grounds by *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993))). An officer's live testimony at trial "may often carry an aura of special reliability and trustworthiness." *Demery*, 144 Wn.2d at 762 (internal quotations omitted).

In *State v. Escalona*, this Court reversed a trial court's denial of a mistrial where a prosecution witness had testified that the defendant "already has a record and has stabbed someone." 49 Wn.App. 251, 253, 742 P.2d 190 (1987). The Court found that because the statement was "extremely serious," not cumulative, and inherently prejudicial such that it could not be cured by a limiting instruction, the trial court had abused its discretion and mistrial was required. *Id.* at 254-56 (citing *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

Here, the officer's improper testimony was also extremely serious, as it addressed the critical issue of Mr. Olson's intoxication. It was not cumulative with regard to the nystagmus test results; no other witness testified about the field sobriety test. As in *Escalona*, the statement directly violated the court's prior ruling. *Id.* at 255. Because of the special weight of a police officer's testimony, discussed above, it is unlikely that any limiting instruction could have reduced, in the jury's minds, his ultimate opinion that Mr. Olson was intoxicated. See *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968) (where police officer testified defendant planned to commit a robbery other than the one charged, no instruction could "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors"). As in *Escalona*, the testimony, although legally inadmissible, would seem to be "logically relevant." 49 Wn.App. at 256 (citing *State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *rev. denied*, 106 Wn.2d 1003 (1986)). The jury might not understand the fine line drawn by the ruling between lay testimony based on observations, and expert opinion based on specialized training and expertise. Therefore, as in *Escalona*, "it would be extremely difficult, if not

impossible... for the jury to ignore this seemingly relevant fact.” 49 Wn.App. at 256.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *Miles*, 73 Wn.2d at 70 (quoting *State v. Devlin*, 145 Wash. 44, 258 P. 826 (1927)).

Because the officer’s improper testimony and the court’s denial of a mistrial violated Mr. Olson’s right to a fair and impartial trial, reversal is now required.

2. BY IMPOSING A SENTENCE GREATER THAN THE STATUTORY MAXIMUM, THE COURT EXCEEDED ITS AUTHORITY AND VIOLATED THE SEPARATION OF POWERS DOCTRINE

a. A valid sentence must be authorized by statute. It is well-established that a sentence which lacks statutory authority cannot stand. *State v. Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002), citing *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). “A trial court only possesses the power to impose sentences provided by law... When a sentence has been imposed for which there is no authority in law, the trial court has the *power and duty to correct the erroneous sentence when the error is discovered.*” *In re Personal Restraint of Carle*,

93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (italics in original), quoting *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *overruled in part by State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973).

b. The SRA requires a sentencing court to impose a determinate sentence in which the combined terms of confinement and supervision do not exceed the statutory maximum. Where a statutory term, phrase or directive is unambiguous, its meaning must be taken from its plain language. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)).

RCW 9.94A.505(5) provides:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4) a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

The plain language of this statute bars a court from imposing a total term of confinement plus community custody which exceeds the statutory maximum for the offense. *State v. Zavala-Reynoso*, 127 Wn.App. 119, 123, 110 P.3d 827 (2005).

In addition, the SRA requires a trial judge to impose a determinate sentence, which is defined as follows:

a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence, defined as a specific time period of total confinement, partial confinement, community supervision, or community service work, and/or a fine of a specified amount.

RCW 9.94A.030(18).

c. Mr. Olson's sentence is not determinate and violates

RCW 9.94A.505. In the present case, the trial court imposed a term of confinement of 60 months as well as a community custody term of nine to 18 months. CP 33-45. Yet the Judgment and Sentence states, "The combined term of community placement or community custody and confinement shall not exceed the statutory maximum for each offense." CP 39. Mr. Olson was convicted of Felony Driving While Under the Influence, a class C felony with a maximum sentence of 60 months. RCW 9A.20.201(1)(c); 46.61.502(1)(a), (6).

As this Court recently found in *State v. Linerud*, "a sentence

is indeterminate when it puts the burden on the DOC rather than the sentencing court to ensure that the inmate does not serve more than the statutory maximum.” 147 Wn. App. 944, 948, 197 P.3d 1224 (2008).

In *Linerud*, the defendant was convicted of failure to register as a sex offender. *Id.* at 946. As here, the court imposed a standard-range sentence which exceeded the statutory maximum, but included a notation instructing the Department of Corrections (DOC) that he was not to serve time beyond the statutory maximum. *Id.* This Court observed that the SRA does not authorize such a sentence. *Id.* at 949.

The SRA allows the DOC to determine when an inmate earns early release time and when, within the community custody range imposed by the court, to release an inmate from community custody. But the SRA does not authorize the DOC to determine how long the sentence *imposed* will be. Rather, the SRA mandates that *courts impose* a determinate sentence—a sentence that states, with exactitude, the total time of confinement and community supervision. Because a court may not impose a sentence that exceeds the statutory maximum and must impose a determinate sentence, it may not sentence a defendant to a term that, on its face, exceeds the statutory maximum and leave to the DOC responsibility for assuring that the sentence is lawful.

Id. at 940-950 (emphasis in the original). *Linerud*’s sentence was indeterminate and therefore invalid on its face, and was reversed.

Id. at 948, 950-51; *see also State v. Berg*, 147 Wn. App 923, 198 P.3d 529 (2008) (affirming that the courts, not DOC, bear the responsibility of ensuring that the sentence does not exceed the statutory maximum).

In *Linerud*, this Court relied on *Zavala-Reynoso*, holding that a judgment and sentence where community custody plus confinement exceeded the statutory maximum violated RCW 9.94A.505(5) and was therefore invalid on its face. 127 Wn.App. at 124. *Zavala-Reynoso* rejected the State's argument that Mr. Zavala-Reynoso would likely receive good time credit, which would result in him not being sentenced for the full term of incarceration provided for by the standard range and the maximum term, and that therefore it could not be said that his total sentence yet violated the statutory maximum.

[T]he State argues because Mr. Zavala-Reynoso will likely receive good time credit, reducing his sentence, he may still not be incarcerated for the full standard range sentence. Therefore, the State reasons this issue is not ripe. We disagree. *Viewed from the outset, the sentence exceeds the maximum term.*

Id. at 124 (emphasis added).

The *Linerud* Court also explained the "practical problems" with the approach utilized here and in that case, where the

judgment and sentence includes a notation placing the onus on DOC to ensure the sentence complies with the statute. 147 Wn.App. at 950. This Court observed such a directive may easily be overlooked, lost, or ignored. *Id.* (citing *In re Personal Restraint of Dutcher*, 114 Wn.App. 755, 757, 60 P.3d 635 (2002) (DOC ignored mandate to evaluate inmate for community custody and instead referred him for civil commitment); *In re Personal Restraint of Liptrap*, 127 Wn.App. 463, 466, 111 P.3d 1227 (2005) (DOC delayed evaluation of offender's proposed release plan instead of timely complying with statute and due process); *In re Personal Restraint of Mattson*, 142 Wn.App. 130, 172 P.3d 719 (2007) (DOC foreclosed community custody based on forensic evaluation instead of considering proposed release plan on its merits, as required by statute).

This Court previously held,

We believe it is better for both the offender and the DOC to have the court impose a sentence that is clear to all from the outset. Given the number of offenders and the complexity of many sentences imposed under the SRA, *a clear mandate from the trial court eliminates the chance of legal errors in implementing the trial court's sentence.*

State v. Davis, 146 Wn.App. 714, 724, 192 P.3d 29 (2008)

(emphasis added), affirming *State v. Hudnall*, 116 Wn. App. 190,

192, 64 P.3d 687 (2003) (holding trial court's reduction of community custody term so entire sentence would fit within statutory maximum was substantial and compelling reason for exceptional sentence)).

Here, regardless of the notation in the judgment and sentence, the trial court "imposed" an indeterminate sentence which exceeds the statutory maximum. As *Linerud* and *Berg* make clear, this sentence is invalid on its face and must be reversed.

d. Imposing an unlawful sentence in the hope that DOC will not enforce it violates the Separation of Powers Doctrine. The separation of powers doctrine is derived from the Constitution's distribution of governmental authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Each branch of government may only exercise the powers it is given. One branch is not permitted to encroach upon the fundamental function of another. *Id.*

Like the federal constitution, Washington's constitution does not contain a formal separation of powers clause. *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). Instead, the state constitution's division of political power among the people, legislature, executive, and judiciary has been presumed to embody

vital constitutional separation of powers principles. See *In Re Juvenile Director*, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976); Wash. Const. art. I, § 1 , art. II, § 1 , art. III, § 2 , art. IV, § 1 . The doctrine serves to ensure that the “fundamental functions” of each branch remain inviolate. *Carrick*, 125 Wn.2d at 135.

“The fixing of legal punishments for criminal offenses is a legislative function.” *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). In Washington, the Legislature delegated sentencing authority to the court in the SRA within the limits set by the statute. *Id.* at 181. The constitutional separation of powers doctrine precludes the judiciary or executive branch from asserting sentencing powers not expressly granted by the Legislature. *Id.* at 180.

The Legislature historically has set the parameters of sentencing laws and granted the court specific authority to impose sentences within its guidelines. See *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909) (legislature exercises control over sentences by setting minimum and maximum terms and giving court broad discretion within these limits); *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937) (legislative function to fix penalties); *State v. Monday*, 85 Wn.2d 906, 909-10, 540 P.2d 416

(1975) (legislature not judiciary has power to alter sentencing process).

Nothing in the SRA suggests the Legislature intended sentencing courts to permit the executive branch, DOC, to set the term of the sentence.² DOC's duty and function is to enforce the sentence imposed. *See State v. Chapman*, 105 Wn.2d 211, 713 P.2d 106 (1986). Thus, the fact that DOC may or may not find an inmate qualifies for earned early release does not alleviate the sentencing court's obligation to impose a determinate sentence, and in this case, one that complies with RCW 9.94A.505.

In the absence of a delegation of authority to DOC to fix the term of the sentence, DOC may not presume it has such power. RCW 9.94A.585(7) was enacted for the purpose of stopping DOC from disregarding sentences it did not believe were correctly imposed. *In re Sentence of Chatman*, 59 Wn.App. 258, 264, 796 P.2d 755 (1990). The statute was intended to provide a mechanism for addressing sentencing errors, because courts had "repeatedly admonished the department for disregarding sentences." *Id.*

² An obvious exception, expressly permitted by statute and not relevant to this case, is the imposition of indeterminate sentences for certain sex offenders pursuant to RCW 9.94A.712.

Although the *Linerud* Court, having reversed the sentence on other grounds, did not reach this issue, the “practical problems” described above illustrate its importance. 147 Wn.App. at 950-51. In each of those cases, the executive branch, through DOC, was crossed over into the judiciary function of imposing criminal sentences, with disastrous results.

By imposing a sentencing in excess of its statutory authority, and then delegating to DOC the authority to fix the actual term, the trial court here violated the Separation of Powers Doctrine.

E. CONCLUSION.

Because the trial court violated Mr. Olson’s due process right to a fair trial in denying his motion for a mistrial, he respectfully asks that this Court to reverse the ruling and remand for a new trial. In the alternative, because the sentence imposed exceeds the statutory maximum, he respectfully asks that it be vacated and remanded for resentencing within the statutory parameters.

Respectfully submitted this 18th day of June, 2009.


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Attorneys for Appellant

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

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 62164-5-I
)
 TODD OLSON,)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF OCTOBER, 2009, 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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