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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. MARIO NOYOLA APPELLANT.	NO. 30736-1-III STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, MARIO NOYOLA, HAVE RECEIVED AND REVIEWED THE OPENING BRIEF PREPARED BY MY ATTORNEY. SUMMARIZED 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. THE FOLLOWING ADDITIONAL GROUNDS ARE AS FOLLOWS:

ADDITIONAL GROUND 1

THE CONVICTIONS FOR CUSTODIAL ASSAULT RCW 9A.36.100 AND 9A.36.031 THIRD DEGREE ASSAULT VIOLATE MY CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY, WHERE THE CONVICTIONS FALL UNDER THE SAME CRIMINAL CONDUCT AND THE EVIDENCE REQUIRED TO SUPPORT A

CONVICTION UPON ONE OF THE CHARGED CRIMES WOULD HAVE BEEN SUFFICIENT TO WARRANT A CONVICTION UPON THE OTHER.

THE DOUBLE JEOPARDY CLAUSES OF THE FIFTH AMENDMENT AND CONST. ART. I SECTION 9 PROTECT A DEFENDANT AGAINST MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE. STATE V. NOLTIE, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); STATE V. VLADOVIC, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

DESPITE THIS PROTECTION, THE RULE IN THIS STATE HAS LONG BEEN THAT WHERE SEVERAL CHARGES ARE AGAINST A DEFENDANT FOR THE SAME ACT OR TRANSACTION AND CONVICTIONS ARE OBTAINED ON ALL COUNTS, IF THE SENTENCES ARE MADE TO RUN CONCURRENTLY AND DO NOT EXCEED THE PENALTY ~~ONE~~ FOR ONE OF THE OFFENSES WHICH THE DEFENDANT WAS PROPERLY CONVICTED, THEN THAT DEFENDANT IS BEING PUNISHED "BUT ONCE FOR HIS UNLAWFUL ACT" AND DOUBLE JEOPARDY IS NOT AT ISSUE. STATE V. JOHNSON, 96 Wn.2d 926, 931, 639 P.2d 1332 (1982)(QUOTING IN RE RICE, 24 Wn.2d 118, 124, 163 P.2d 583 (1945)

THIS IS NO LONGER THE CASE. IN 1985, THE UNITED STATES SUPREME COURT OBSERVED THAT MULTIPLE CONVICTIONS WHOSE SENTENCES ARE SERVED CONCURRENTLY MAY STILL VIOLATE THE RULE AGAINST DOUBLE JEOPARDY. BALL V. UNITED STATES, 470 U.S. 856, 864-65, 84 L.Ed.2d 740, 105 S.Ct. 1668 (1985) THE COURT STATED:

"THE SECOND CONVICTION, WHOSE CONCOMITANT SENTENCE IS SERVED CONCURRENTLY, DOES NOT EVAPORATE SIMPLY BECAUSE OF THE CONCURRENCE OF THE SENTENCE. THE SEPARATE CONVICTION, APART FROM THE CONCURRENT SENTENCE, HAS POTENTIAL ADVERSE COLLATERAL CONSEQUENCES THAT MAY NOT BE IGNORED. FOR EXAMPLE, THE PRESENCE OF TWO CONVICTIONS ON THE RECORD MAY DELAY THE DEFENDANT'S ELIGIBILITY FOR PAROLE OR RESULT IN AN INCREASED SENTENCE UNDER A RECIDIVIST STATUTE FOR A FUTURE OFFENSE. MOREOVER, THE SECOND CONVICTION MAY BE USED TO IMPEACH THE DEFENDANT'S CREDIBILITY AND CERTAINLY

CARRIES THE SOCIETAL STIGMA ACCOMPANYING ANY CRIMINAL CONVICTION. BALL, AT 864-65.

ACCORDINGLY, THE COURT CONCLUDED THAT THE MERE FACT THAT THE SENTENCES ARE CONCURRENT WILL NOT SHIELD MULTIPLE CONVICTIONS FROM SCRUTINY UNDER THE DOUBLE JEOPARDY CLAUSE.

"THE UNITED STATES SUPREME COURT HAS HELD THAT, FOR PURPOSES OF DOUBLE JEOPARDY, THE TERM 'PUNISHMENT' ENCOMPASSES A CRIMINAL CONVICTION AND NOT SIMPLY THE IMPOSITION OF THE SENTENCE." CHAO V. STATE, 604 A.2d 1351, 1360 (DEL. 1992); UNITED STATES V. HILL, 971 F.2d 1461 (1992) (EMPHASIS ADDED)

WITHIN CONSTITUTIONAL CONSTRAINTS, THE LEGISLATIVE BRANCH HAS THE POWER TO DEFINE CRIMINAL CONDUCT AND ASSIGN PUNISHMENT FOR SUCH CONDUCT. WHALEN V. UNITED STATES, 445 U.S. 684, 688, 63 L.Ed. 2d 715, 100 S.Ct. 1432 (1980).

THEREFORE, THE QUESTION WHETHER PUNISHMENTS IMPOSED BY A COURT, FOLLOWING CONVICTION UPON CRIMINAL CHARGES, ARE UNCONSTITUTIONALLY MULTIPLE CANNOT BE RESOLVED WITHOUT DETERMINING WHAT PUNISHMENTS THE LEGISLATIVE BRANCH HAS AUTHORIZED. Id AT 688.

THE BLOCKBURGER "SAME ELEMENTS" AND "SAME EVIDENCE" TEST REMAINS A MEANS OF DETERMINING RULES OF STATUTORY CONSTRUCTION AND SERVE AS A MEANS OF DISCERNING LEGISLATIVE PURPOSE. BLOCKBURGER SHOULD NOT BE CONTROLLING WHERE THERE IS A CLEAR INDICATION OF CONTRARY LEGISLATIVE INTENT. SEE ALBERNAZ V. UNITED STATES, 450 U.S. 333, 340, 67 L.Ed. 2d 275, 101 S.Ct. 1137 (1981)

THE WASH. SUPREME COURT AND THIS COURT HAVE RELIED ON INDICIA OF LEGISLATIVE INTENT OTHER THAN THE BLOCKBURGER TEST TO DETERMINE WHETHER A DEFENDANT IS RECEIVING MULTIPLE PUNISHMENT FOR THE SAME OFFENSE. SEE STATE V. JOHNSON, 92 WN.2d 671, 600 P.2d 1249, CERT. DISMISSED, 446 U.S. 948 (1980).

IN JOHNSON THE COURT CITED, BUT DID NOT RELY ON, THE RESULTS OF THE BLOCKBURGER TEST IN DETERMINING WHETHER THE THREE CONVICTIONS COULD STAND. THE OFFENSES CLEARLY INVOLVED DIFFERENT LEGAL ELEMENTS, BUT THIS FACTOR WAS NOT DETERMINATIVE. Id AT 678.

NOR DID DIFFERING LEGAL REQUIREMENTS PREVENT THIS COURT FROM CONCLUDING THAT TWO OFFENSES WERE THE SAME IN STATE V. POTTER, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982)

IN STATE V. READ, 100 Wn. App. 776, 998 P.2d 897 (2000), DIVISION THREE FOUND CONVICTIONS FOR SECOND DEGREE MURDER AND FIRST DEGREE ASSAULTS VIOLATED DOUBLE JEOPARDY AND THE COURT VACATED THE ASSAULT CONVICTION. THE READ COURT DETERMINED THE OFFENSES WERE LEGALLY "THE SAME" UNDER THE "SAME EVIDENCE TEST" SINCE PROOF OF SECOND DEGREE INTENTIONAL MURDER NECESSARILY ALSO PROVES FIRST DEGREE ASSAULT. Id AT 791-92 THE COURT FOUND THE OFFENSES WERE THE SAME "IN FACT" BECAUSE THE OFFENSES WERE BASED ON THE SAME ACT DIRECTED TOWARD THE SAME VICTIM. Id AT 791. (EMPHASIS ADDED)

THE UNITED STATES SUPREME COURT STATED IN BROWN V. OHIO, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977):

"THE DOUBLE JEOPARDY CLAUSE IS NOT SUCH A FRAGILE GUARANTEE THAT PROSECUTORS CAN AVOID ITS LIMITATIONS BY THE SIMPLE EXPEDIENT OF DIVIDING A SINGLE CRIME INTO A SERIES OF TEMPORAL OR SPATIAL UNITS."

IN THE CASE AT BAR, THE COURT HELD UP THE TWO CONVICTIONS WHERE I WAS CONVICTED BY A JURY.

RCW 9A.36.031 PROVIDES IN PART:

ASSAULT IN THE THIRD DEGREE. (1) A PERSON IS GUILTY OF ASSAULT IN THE THIRD DEGREE IF HE OR SHE, UNDER CIRCUMSTANCES NOT AMOUNTING TO ASSAULT IN THE FIRST OR SECOND DEGREE:

(c) ASSAULTS A LAW ENFORCEMENT OFFICER OR OTHER EMPLOYEE OF A LAW ENFOREEMENT AGENCY WHO WAS PERFORMING HIS OR HER OFFICIAL DUTIES AT THE TIME OF "THE ASSAULT."

RCW 9A.36.100 PROVIDES IN PART:

CUSTODIAL ASSAULT. (1) A PERSON IS GUILTY OF CUSTODIAL ASSAULT IF THAT PERSON IS NOT GUILTY OF AN ASSAULT IN THE FIRST OR SECOND DEGREE AND WHERE THE PERSON:

(b) ASSAULTS A FULL OR PART-TIME STAFF MEMBER OR VOLUNTEER, ANY EDUCATIONAL PERSONNEL, ANY PERSONAL SERVICE PROVIDER, OR ANY VENDOR OR AGENT THEREOF AT ANY ADULT CORRECTIONS INSTITUTION OR LOCAL ADULT DETENTION FACILITIES WHO WAS PERFORMING OFFICIAL DUTIES AT THE TIME OF "THE ASSAULT."

IT IS UNMISTAKABLE THAT THE LEGISLATURE INTENDED THESE STATUTES TO BE NOTHING MORE THAN THE SAME 'TYPE' OF ASSAULT. BOTH INDICATE THAT A PERSON IS GUILTY OF ASSAULT IF [redacted] FIRST OR SECOND DEGREE ASSAULT IS NOT WARRANTED.

FURTHER, EACH STATUTE GOES ON TO [redacted] IDENTIFY "OFFICIAL DUTIES AT THE TIME OF THE ASSAULT". THE PLACEMENT OF THE WORD "THE" CAN ONLY BE INFERRED THAT "ONE" ASSAULT CAN OCCUR.

THE LEGISLATURE DEVELOPED THE CUSTODIAL ASSAULT STATUTE TO HELP CURE THE ASSAULTS THAT OCCUR IN DETENTION AND CORRECTION FACILITIES.

THE STATUTE FOR THIRD DEGREE ASSAULT WAS DEVELOPED FOR LAW ENFORCEMENT OFFICERS IN THE FIELD TO HELP CURE THE ASSAULTS TO POLICE ON THE STREET.

THE VICTIM IN THIS CASE BRIAN KISLER, TESTIFIED HE IS A CORRECTIONS OFFICER NOT A POLICE OFFICER.

THE LEGISLATURE OBVIOUSLY MISTAKENLY CREATED THESE STATUTES WITHOUT REALIZING THAT A MAJORITY OF DETENTION FACILITIES ARE RUN BY A SHERIFF DEPARTMENT, THUS CREATING A POTENTIAL FOR CONFUSION AS TO WHAT CHARGES TO CHARGE.

THESE ASSAULTS ARE BASED ON THE SAME ASSAULT, THE SAME TIME AND PLACE, AND HAVE THE SAME VICTIM. THE COURT FOUND THAT FOR SENTENCING PURPOSES THE ASSAULT CONVICTIONS WERE SAME CRIMINAL CONDUCT AND RAN THEM CONCURRENT WITH INTIMIDATING A PUBLIC SERVANT.

"TWO OFFENSES SHARE THE SAME CRIMINAL INTENT WHEN THE OFFENDER'S INTENT, OBJECTIVELY VIEWED, DOES NOT CHANGE FROM ONE CRIME TO THE NEXT." STATE V. VIKE, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)

COURTS SHOULD LOOK AT THE UNDERLYING STATUTES AND THE INTENT NECESSARY TO COMMIT EACH CRIME. STATE V. RODRIGUEZ, 61 Wn.App. 812, 816, 812 P.2d 868 (1991).

THE INTENT FOR EITHER CHARGE IS THE "ASSAULT" ITSSELF. HERE, THERE WAS NO SUBSTANTIAL CHANGE IN THE NATURE OF THE CRIMINAL OBJECTIVE.

THE THIRD DEGREE ASSAULT CONVICTION SHOULD BE VACATED BECAUSE THE CUSTODIAL ASSAULT CONVICTION IS THE MORE SPECIFIC OFFENSE, BECAUSE IT APPLYS TO DETENTION OR CORRECTIONAL FACILITIES. WHEN A GENERAL AND A SPECIFIC STATUTE ARE CONCURRENT, THE MORE SPECIFIC LAW APPLIES TO EXCLUDE THE GENERAL. STATE V. CANN, 92 Wn.2d 193, 197, 595 P.2d 912 (1979) THE THIRD DEGREE ASSAULT CONVICTION SHOULD BE VACATED.

ADDITIONAL GROUND 2

THE SENTENCING COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED DOUBLE JEOPARDY WHEN IT IMPOSED 18 MONTHS OF COMMUNITY CUSTODY AFTER IMPOSING THE STATUTORY MAXIMUM OF 60 MONTHS ON COUNTS ONE AND THREE.

SENTENCING IS A LEGISLATIVE POWER, NOT A JUDICIAL POWER. STATE V. BRYAN, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980)

IT IS THE FUNCTION OF THE LEGISLATURE AND NOT THE JUDICIARY TO ALTER THE SENTENCING PROCESS. STATE V. MONDAY 85 WN.2d 906, 909-10, 540 P.2d 416 (1975). A TRIAL COURT'S DISCRETION TO IMPOSE A SENTENCE IS LIMITED TO WHAT IS GRANTED BY THE LEGISLATURE, AND THE COURT HAS NO INHERENT POWER TO DEVELOP A PROCEDURE FOR IMPOSING A SENTENCE UNAUTHORIZED BY THE LEGISLATURE. STATE V. AMMONS, 105 WN.2d 175, 713 P.2d 719 (1986) A TRIAL COURT MAY ONLY IMPOSE A SENTENCE THAT IS AUTHORIZED BY STATUTE. IN RE PERS. RESTRAINT OF CARLE, 93 WN. 2d 31, 604 P.2d 1293 (1980).

RCW 9.94A.701(9) PROVIDES IN PART:

"THE TERM OF COMMUNITY CUSTODY SPECIFIED BY THIS SECTION SHALL BE REDUCED BY THE COURT WHENEVER AN OFFENDERS STANDARD RANGE TERM OF CONFINEMENT IN COMBINATION WITH THE TERM OF COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME AS PROVIDED IN RCW 9A.20.021." (EMPHASIS ADDED)

BOTH ASSAULT CONVICTIONS HAVE A STATUTORY MAXIMUM OF 60 MONTHS. I WAS GIVEN THIS 60 MONTH MAXIMUM. THE COURT IMPOSED AN ADDITIONAL 18 MONTHS COMMUNITY CUSTODY. THIS COMBINATION EXCEEDS THE STATUTORY MAXIMUM. THESE CRIMES ARE NOT CONSIDERED VIOLENT OFFENSES. RCW 9.94A.030(54) THEY ARE CRIMES AGAINST PERSONS. RCW 9.94A.411(2) THOUGH THE APPLICATION SHOULD HAVE BEEN 12 MONTHS COMMUNITY CUSTODY IT WOULD HAVE STILL VIOLATED THE STATUTE AND DOUBLE JEOPARDY PRINCIPLES.

RCW 9.94A.701(9) INDICATES THAT COMMUNITY CUSTODY SHALL BE REDUCED BY THE COURT, NOT MODIFIED. NO COMMUNITY CUSTODY SHOULD BE IMPOSED AND ALL CONVICTIONS WERE RUN CONCURRENTLY. THOUGH COUNT 2 HAS A HIGHER STATUTORY MAXIMUM THAN THE ASSAULTS, TO IMPOSE ANY COMMUNITY

CUSTODY WOULD STILL VIOLATE THE STATUTE. THEREFORE, THE COURT EXCEEDED ITS STATUTORY AUTHORITY AND NO COMMUNITY CUSTODY CAN BE IMPOSED.

ADDITIONAL GROUND 3

THE ASSAULT CONVICTIONS ARE INVALID BECAUSE THE JUDGMENT AND SENTENCE IS FACIALLY ERRONEOUS.

WHETHER A PERSON CONVICTED OF A CRIME WAS GIVEN A LAWFUL SENTENCE IS A QUESTION OF LAW THAT IS REVIEWED DE NOVO. STATE V. MILLER, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) THE SRA DIRECTS THAT "A COURT MAY NOT IMPOSE A SENTENCE PROVIDING FOR A TERM OF CONFINEMENT OR COMMUNITY... CUSTODY WHICH EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME AS PROVIDED IN 9A.20, 9.94A.505(5)

IN BROOKS THE SUPREME COURT HELD THAT WHERE THE SENTENCE SPECIFICALLY DIRECTS DOC TO ENSURE THAT WHATEVER RELEASE DATE IT SETS, UNDER NO CIRCUMSTANCES MAY THE OFFENDER SERVE MORE THAN THE STATUTORY MAXIMUM. IN RE BROOKS, 166 Wn.2d 664, 211 P.3d 1023 (2009)

IN STATE V. FRANKLIN, 172 Wn.2d 831, 836, 263 P.3d 585 (2011) OUR SUPREME COURT HELD THAT THE LEGISLATURE'S 2009 AMENDMENTS TO FORMER RCW 9.94A.701 (2008) REQUIRED TRIAL COURTS TO SET A FIXED TERM OF COMMUNITY CUSTODY THAT, WHEN COMBINED WITH THE SENTENCE, DID NOT EXCEED THE STATUTORY MAXIMUM SENTENCE.

IN STATE V. WINBORNE, ___ Wn.App.___ 2012 DIVISION THREE OF THE COURT OF APPEALS STATED THE "AMENDMENTS TO 2009 NO LONGER ENABLED A SENTENCING COURT TO MAKE THE FORM OF JUDGMENT NOTATION APPROVED IN BROOKS. SEE ALSO STATE V. BOYD, ___Wn.2d___, 215 P.3d 321, 322 (2012)

THE SENTENCE IMPOSED ON THE ASSAULTS IS INVALID AND ERRONEOUS BECAUSE THE JUDGMENT AND SENTENCE IS FACIALLY INVALID. THE JUDGMENT AND SENTENCE SHOULD THEREFORE BE CORRECTED OR AMENDED.

CONCLUSION

FOR THE REASONS STATED, THE THIRD DEGREE ASSAULT CONVICTION SHOULD BE VACATED AND REMANDED TO REDUCE THE COMMUNITY CUSTODY TO ZERO AND AMEND THE JUDGMENT AND SENTENCE.

RESPECTFULLY SUBMITTED DECEMBER 28TH, 2012.

MARIO NOYOLA
APPELLANT

12-28-12

Renee S tamsley
Appeals court clerk
500 N. cedar St.
Spokane, WA. 99201

RE: Statement of Additional Grounds
State v. Mario Noyola No. 30736-1-III

Dear Mrs tamsley.

I have sent my (SAG) in order to have it filed. there was no indication that I needed to file proof of service nor a copy.

If I have failed to do a certain thing please excuse the inconvience as this is not something I have filed before.

Sincerely

MARIO NOYOLA