NO. 91985-2

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Plaintiff/Respondent
v.
SALVADOR S. NAVA
Appellant

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# ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY YAKIMA COUNTY

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David B. Trefry
WSBA #16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846 Spokane, WA 99220

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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A. INTRODUCTION

Petitioner Nava was convicted of one count of first degree murder, four counts of assault in the first degree, and one count of unlawful possession of a firearm in the second degree. The charges arose from the actions of the defendant wherein he walked up to a car in a public parking lot with numerous other people present and fired numerous shots into a car containing five individuals one of whom was Antone Masovero. Mr. Masovero was hit and killed by two of the bullets fired by the defendant.

The original sentencing court stated "[t]he court finds that the multiple offense policy permits the court to go below the standard range under RCW 9.94A.535" (CP 8 original appeal) The original sentence the court then imposed was two hundred and eighty months (280) which was significantly below the standard range sentence. This sentence included an exceptional sentence downward on the first degree murder charge, 220 months – the bottom of the standard range was 271 months, and the imposition of the sixty (60) month firearm enhancements for all five counts consecutive to this base sentence for a total of five hundred and twenty months (520).

There was a direct appeal which was consolidated with a Personal Restraint Petition (PRP) as well as a statement of additional grounds (SAG) filed after the trial. The State cross-appealed the trial court's

imposition of an exceptional sentence downward. In an opinion which was published in part the State prevailed on all issues on direct appeal, in the PRP and the SAG as well as the sentencing issue raised in the cross appeal. The Court of Appeals remanded the case to the trial court for resentencing stating; "We agree with the State's cross appeal that the trial court's exceptional sentence downward cannot stand."

The Court of Appeals in the first direct appeal concluded its analysis if this sentence as follows;

> The trial court might reasonably have concluded that the difference between the four assaults, by themselves, was trivial, justifying exceptional concurrent sentencing. The record provides no basis for finding that there was a nonexistent, trivial, or trifling difference between the murder of Mr. Masovero and the firing of four more shots into the occupied car, however. The provision that the murder sentence run concurrently with the assault sentences cannot stand. In order for the provision that the sentences for the four assaults run concurrently to stand, that departure must be supported by adequate findings and conclusions.
>
> We therefore reverse the sentence and remand for resentencing and entry of any necessary findings and conclusions.

On remand the trial court resentenced Nava. The trial court sentenced Nava to the low end of the standard range on all five counts and added the sixty month enhancement for the use of a firearm to each of those counts. The court then applied the statute and ran each of those five counts consecutively for a total sentence

of nine hundred and forty-three months. One count was run concurrent to the other charges.

Nava filed a direct appeal of this new sentence, the Court of Appeals upheld the sentence and denied this second appeal. Nava does not challenge the constitutionality of the statutes which were the basis for the sentence imposed and in fact Nava admits in his brief in the Court of Appeals and in his Petition for Discretionary Review that the trial court properly followed the edicts of the SRA. His argument is that the sentence imposed "exceeds the maximum punishment of life imprisonment with the possibility of parole on class A felonies." (Petition at 2)

B. ISSUE PRESENTED BY PETITION

Nava petitions this court requesting review of the decision of the Court of Appeals which upheld the sentence imposed by the trial court at resentencing.

Petitioners alleges;

1. That when a defendant is sentenced to a term of imprisonment that effectively precludes any potential possibility of his/her release, due to exceeding the individual's life expectancy, that resentencing is required and the court must impose a sentence of life with the possibility of parole.

ANSWER TO ISSUES PRESENTED BY PETITION

1. There is no legal basis for this court to accept review. The statutes

applicable to the sentence in this case have been upheld numerous times. The speculative nature of Nava's argument and lack of legal basis preclude review.

C. STATEMENT OF THE CASE

In addition the Court of Appeals set forth the facts in its decision, the State will also rely on that statement and shall address specific areas of the facts in the argument s section below.

D. ARGUMENT

In this case Nava argues that his petition falls within RAP 13.4(b)(2) and (3) as set forth below Nava's analysis is incorrect and the Court of Appeals correctly ruled that this court analysis in State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003) is controlling. Nave has not met any of the criterion set forth in RAP 13.4(b)

1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review;

RAP 13.4(2) - The ruling challenged does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court; RAP13.4(3) nor does the ruling of the Chief Judge does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years regarding the sentencing issue raised, the second time the sentence in this court has been address on review.

Nava's argument if it were to be applied to all defendants, as would be required by equal protection and due process, would mandate that if any defendant's combination of age, crime and life expectance were such that the offender would "effectively" not be eligible for release would have to be resentenced such that there was a "possibility" of parole. There is nothing it the laws of this state that would mandate such an outcome.

There is in this state a mandate from the legislature to impose harsher sentences on person who use any type of weapon in the commission of their crime and even more harshly punish those who choose to use as their weapon a firearm. There is no ambiguity in this section of our revised code as set forth by this court in the case cited by the Court of Appeals when it ruled in this latest appeal by Nava.

The ruling by this court in Thomas, supra, does not limit its application to only class C or Class B felonies. The analysis in Thomas is applicable to any criminal sentence as long as it falls within the specific sections that were the basis of the sentence in Thomas which is in fact the exact statutory basis for the sentence imposed in this case.

To use the system proposed by Nava would institute a biased race/age/gender based sentence that would require each court to engage in a system of judicial mathematics to determine what race and/or nationality

each offender is, the offenders current age, the life expectancy of each offender, the statutorily mandated sentence for the crime committed by the offender and then after those criterion were determined and only then would the court be able to render a sentence.

As is well documented different ethnicities and even different socioeconomic groups within a race or ethnic group may have a significantly shorter or longer life-span. If Nava was born in the United States or Mexico could affect this life-expectancy number by as much as six years.

Thus if two individuals from different ethnic groups or races or socioeconomic groups where to gather together and commit a crime together, as is so often the case, Nava would have this court require the sentencing courts to impose very dissimilar punishments because the life expectance of the defendants from this divergent groups were shorter or longer than other co-defendants.

"...he argues that the overall sentence exceeds the trial court's authority because it effectively extends incarceration beyond the statutory maximum of life. Such a sentence is unfair and illogical, he contends. (Slip opinion at 4. Emphasis mine.) Nava refers to an internet location that sets out what is purported to be his life expectancy. However the State accessed numerous other "studies" on the internet that set forth other

"life expectancies" for "Hispanic males." Setting up yet another variable for a trial court to determine if the method proposed by Nava were adopted.

Glaringly omitted from Nava's argument are the ten years that would have been factored into this rationale if the defendant had not fled the country after he executed his victim. If factored in that period alone negates most of Nava's argument.

What Nava is asking the court to do is the exact opposite of the intent of the SRA which was initiated to take this very type of judicial "discretion" the state legislature was limiting when they wrote and adopted the SRA.

State v. Nava, Slip opinion at 5;

> "The Thomas court held that the maximum sentence for each count is evaluated separately. This conclusion comports with the "plain, unambiguous language" of the SRA's sentencing statutes. Id. at 670-71. When a defendant is sentenced for multiple offenses and the individual sentences do not exceed the applicable statutory maximums for each count, the resulting total period of confinement is valid under the SRA.
>
> None of Salvador Nava's enhanced standard range sentences exceed their statutory maximums. Accordingly, the trial court committed no sentencing error."

The Introduction of the 2013 Adult Sentencing Manual sets forth the reasoning and purpose of the SRA;

> Adult offenders who committed felonies on or after July 1, 1984, are subject to the provisions of the Sentencing Reform Act of 1981, as amended (SRA). The goal of Washington's sentencing system, which is based on a determinate sentencing model and eliminates parole and probation, is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. The enabling legislation, RCW Section 9.94A *et seq.,* contains guidelines and procedures used by courts to impose sentences that apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or to a defendant's previous criminal record. The SRA guides judicial discretion by providing presumptive sentencing ranges for the courts to follow. The ranges are structured so that offenses involving greater harm to a victim and to society result in greater punishment. Sentences that depart from the standard presumptive ranges must be based upon substantial and compelling reasons and may be appealed by either the prosecutor or the defendant.
> *2013 Washington State Adult Sentencing Guidelines Manual Version 20140301*

Mr. Nava's crime was addressed by the trial court which took into account the factors that are allowed according to the Washington State Legislature, the body that literally makes the law the court must follow. The legislature further made the desire of the citizenry of this stated known when it enacted Initiative 159, "Armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death." "*Hard Time for Armed Crime Act.*" Laws of 1995, ch. 129, § 1(1)(a) (Initiative 159 (I-159)).

Both legislative enactments came into play in the sentence handed down for the heinous crime committed by Nave. There was no error on

the part of the sentencing court, a court that was following the edict of the Court of Appeals to correct the improper sentence which was initially imposed. Nor was there error on the part of the Court of Appeals when it rendered the opinion now challenged by Nava.

Nava states that State v. Frampton, 5 Wn.2d 469, 484, 627 P.2d 922 (1981) supports his argument. The error in his analysis is that Nava was not sentenced to a term of incarceration without the possibility of parole. He was sentenced to a standard range sentence with the possibility of release. Nava attempts to boot-strap this into a life sentence through the use of actuarial tables. Frampton is clearly distinguishable.

State v. Whitfield, 132 Wn. App. 878, 902, 134 P.3d 1203 (2006), review denied 159 Wn.2d 1012 cited by Nava is applicable in that the court upheld the term of confinement for multiple offenses, as is the case here, and the analysis to determine if a sentence is appropriate. When considering whether a sentence is cruel, this court will consider (1) the nature of the crime, (2) the legislative purpose behind the criminal statute, (3) sentences for similar crimes in other jurisdictions, and (4) sentences for similar crimes in our jurisdiction. State v. Whitfield, 132 Wn.App. 878, 134 P.3d 1203 (2006), review denied, 159 Wn.2d 1012, 154 P.3d 919 (2007). Nava callously executed one man, assaulted with a firearm four other men in a parking lot in front of numerous other people then fled the

country. This sentence clearly is appropriate for the crime and reflect the intent of the legislature.

And finally Nava cites to In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007) as indicating that even if there is a chance that the defendant would be released then there is a meaningful basis for review in a PRP, however once again the fact remains that Nava as presently sentenced does have a possibility of release. The State too would quote from Mullholland "[w]hile it is possible that Mulholland will die before he serves the sentence, that is not a certainty." That is exactly the case for Nava, there is no review needed of the decisions of the trial court nor the Court of Appeals. Mulholland at 335.

E. CONCLUSION

This court should not accept review of the Court of Appeals decision denying and dismissing the personal restraint petition.

Respectfully submitted this 18th day of August, 2015.

s/ David B. Trefry
David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent
Telephone: (509) 534-3505
P.O. Box 4846, Spokane, WA 99220
David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry, state that on August 18, 2015, I emailed, by agreement of the parties, a copy of the State's Response to Mr. Dennis Morgan at nodblspk@rcabletv.com

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

DATED this 18th day of August, 2015 at Spokane, Washington,

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
Fax: (509) 534-3505
David.Trefry@co.wa.yakima.us

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To Whom It May Concern;
Please find attached the State's answer to Mr. Nava's petition for review.

David B. Trefry
Senior Deputy Prosecuting Attorney
Appellate Division
Yakima County Prosecutors Office
P.O. Box 4846
Spokane, WA 99220
(509) 534-3505
FAX: (509) 534-3505
David.Trefry@co.yakima.wa.us