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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32842-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

SALVADOR S. NAVA,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

SALVADOR S. NAVA requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Nava seeks review of a decision of Division III of the Court of Appeals dated June 25, 2015 (Appendix "A" 1-6)

3. ISSUE PRESENTED FOR REVIEW

When a criminal defendant is sentenced to a term of imprisonment which effectively precludes any potential possibility for his/her release, due to exceeding the individual's life expectancy, is resentencing required to impose a sentence of life imprisonment with possibility of parole?

4. STATEMENT OF THE CASE

Mr. Nava was originally convicted of one (1) count of first degree murder, four (4) counts of first degree assault and one (1) count of unlawful possession of a firearm second degree. Judgment and Sentence was entered on June 15, 2009. He received a mitigated sentence totaling five hundred twenty (520) months. (CP 1; CP 4; CP 8)

The Court of Appeals issued a decision on October 22, 2013 remanding Mr. Nava's case to the trial court for resentencing. This occurred following appeals by both Mr. Nava and the State. A mandate was issued on February 28, 2014. (CP 16; CP 25; CP 27; CP 38; CP 40)

A resentencing hearing was conducted on August 19 and September 25, 2014. Mr. Nava was sentenced to a total of nine hundred and forty-three (943) months in prison. (CP 100)

Mr. Nava filed a Notice of Appeal on October 20, 2014. (CP 109) The Court of Appeals issued its unpublished opinion on June 25, 2015 affirming Mr. Nava's sentence.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals relied upon *State v. Thomas*, 150 Wn.2d 666, 80 P.3d 168 (2003) in countering Mr. Nava's argument that his sentence, though in compliance with the Sentencing Reform Act (SRA), exceeds the maximum punishment of life imprisonment with possibility of parole on class A felonies.

Mr. Nava contends that RAP 13.4(b)(2) and (3) are applicable to the Court of Appeals decision.

The *Thomas* decision involved class B felonies. The sentencing enhancements exceeded the maximum penalty of one hundred and twenty (120) months. However, the sentence did not preclude the possibility that Mr. Thomas could eventually secure his release. Mr. Thomas's sentence did not amount to a sentence of life imprisonment without possibility of parole.

RCW 9A.20.021(1) provides, in part:

Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

- (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment

Mr. Nava's statutory minimum sentence on the count of first degree murder is twenty (20) years. *See*: RCW 9.94A.540(1)(a) [formerly RCW 9.94A.120(4)]. (Appendix "B")

Mr. Nava was born on June 14, 1982. He was twenty-seven (27) years old at the time of the initial Judgment and Sentence. His current sentence includes three hundred (300) months (twenty-five (25) years) of mandatory time for firearm enhancements. He will be at least seventy-two (72) years old before he begins receiving earned early release credits. *See*: RCW 9.94A.533(3)(a); *see also*: *State v. Desantiago*, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003).

Mr. Nava, being an Hispanic male, has a current life expectancy of seventy-eight point nine (78.9) years.

(*See*: <http://www.ecology.com/2013/04/01/us-life-expectancy-mortality-rate> Appendix "C")

Mr. Nava contends that due to his current age that the sentence imposed by the trial court exceeds the statutory maximum sentence for these

offenses. The statutory maximum for first degree murder and first degree assault is life imprisonment.

Mr. Nava recognizes that the trial court followed statutory provisions when he was sentenced.

RCW 9.94A.589(1)(b) provides, in part:

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 **All sentences imposed under (b) of this subsection shall be served consecutively to each other** and concurrently with sentenced imposed under (a) of this subsection.

(Emphasis supplied.)

The trial court ordered each assault conviction to run consecutive to one another as well as to the first degree murder conviction. *State v. Wilson*, 125 Wn.2d 212, 221, 883 P.2d 320 (1994) (applies to consecutive sentences for assault counts.)

A sentence exceeding life imprisonment is not just. It is not fair. The only offense where a trial court may impose a sentence of life imprisonment without possibility of parole appears to be aggravated first degree murder. *See*: RCW 10.95.030(1).

Mr. Nava relies upon two (2) cases to support his position that the appropriate sentence in his case is life imprisonment with possibility of parole.

In *State v. Frampton*, 95 Wn.2d 469, 484, 627 P.2d 922 (1981) the Court held:

The legislature believed and we find the penalty of life imprisonment without hope of parole or release to be substantially different than life with the possibility of parole. This difference violates the principal enunciated in *United States v. Jackson*, 390 U.S. 570, 20 L. Ed.2d 138, 88 S. Ct. 1209 (1968).

We hold the State may not constitutionally seek life imprisonment without possibility of release or parole for those who are found guilty of aggravated first degree murder

The *Frampton* Court recognized that there is a difference between life in prison without possibility of parole and life in prison with the opportunity to obtain earned early release credits.

“... [C]ourts may sentence defendants to life imprisonment when convicted of multiple serious violent offenses.” *State v. Whitfield*, 132 Wn. App. 878, 902, 134 P.3d 1203 (2006), *review denied* 159 Wn.2d 1012 (2007).

Mr. Nava asserts that the *Whitfield* case stands for the proposition that a sentencing court has discretionary authority to impose life imprisonment as opposed to a sentence which far exceeds any offender’s life expectancy.

RCW 9.94A.729(2) provides:

In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 2003, the aggregate earned release time may not exceed ten percent of the sentence.

Mr. Nava would be entitled to receive ten (10%) percent earned early release credits once his mandatory minimum sentence and enhancements have been served. As previously indicated he would be seventy-two (72) years old before any earned early release credits could be acquired.

Even if a defendant has only a slight chance of being released from prison when an error is corrected, he/she is entitled to have a sentencing court reevaluate the sentence imposed. *See: Personal Restraint of Mulholland*, 161 Wn.2d 322, 334-35, 166 P.3d 677 (2007)

CONCLUSION

Mr. Nava contends that a contradiction exists when the *Thomas*, *Mulholland*, *Frampton* and *Whitfield* cases are read together. No sentence should exceed life imprisonment without possibility of parole.

A sentencing court must take into consideration the following factors when imposing a sentence:

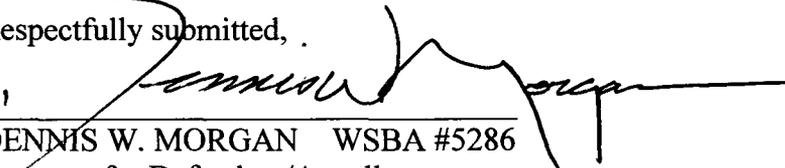
1. The defendant's age;
2. The number of sentence enhancements;
3. The offender score;
4. The number of current offenses;

5. The defendant's life expectancy;
6. Mitigating factors;
7. Aggravating factors;
8. Victim impact statements;
9. Failed defenses; and
10. The purposes behind the SRA.

Mr. Nava urges that review be accepted in order to clarify the interrelationship between the existing case law, statutory provisions and discretionary authority of a trial court when there are multiple offenses and multiple enhancements.

DATED this 17th day of July, 2015.

Respectfully submitted, .


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APPENDIX “A”

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 32842-2-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
SALVADOR S. NAVA,)	
)	
Appellant.)	

FEARING, J. — A jury convicted Salvador Nava of one count of first degree murder, four counts of first degree assault, and one count of second degree unlawful possession of a firearm. The trial court imposed a sentence of seventy-eight years and seven months, a sentence within the standard range. He challenges this sentence by contending that the sentence in practical effect exceeds the maximum sentence of life allowable for a class A felony conviction, since he is not entitled to early release credits until after his life expectancy. Nava seeks a term of life with the possibility of release. We hold that the sentence imposed is lawful and affirm.

FACTS

In May 2001, in Yakima, Salvador Nava fired several shots into a car ferrying five men. The shots killed one of the men. Texas authorities apprehended Nava years after the shooting

and extradited Nava to Yakima. The State of Washington charged Nava with one count of first degree murder, four counts of first degree assault, and one count of second degree unlawful possession of a firearm. The murder and assault charges alleged he was armed with a firearm. The jury found him guilty on all charges.

The trial court first sentenced Salvador Nava to two hundred and twenty months for the murder conviction and ran that sentence concurrently with the remaining counts. This sentence was five hundred and twenty months below the standard range sentence. On appeal, this court affirmed his convictions, but remanded for resentencing to a term that included a standard enhanced sentence on the murder count to run consecutively with standard enhanced sentences on the assault convictions. *State v. Nava*, 177 Wn. App. 272, 298, 311 P.3d 83 (2013), *review denied*, 179 Wn.2d 1019 (2014).

Upon resentencing, the Yakima County Superior Court sentenced Salvador Nava to the low end of the standard range on the murder and assault convictions, added sixty month firearm enhancements to each murder and assault conviction, and decreed that all of these convictions run consecutively for a total of nine hundred and forty three months. The court also imposed the high end of the sentence range for the second degree unlawful possession of a firearm conviction, to run concurrently with the other sentences.

ANALYSIS

Salvador Nava was twenty-seven years old at the time of conviction. He contends a 943-month sentence exceeds the maximum sentence allowable for a class A felony because he will be at least seventy-two years old before he can begin earning early release credits. Thus, he asserts he has been sentenced beyond his life expectancy, which he alleges is 71.6 years.

Generally the length of a criminal sentence is not subject to review if the punishment falls within the standard sentencing range established by the Sentencing Reform Act of 1981 (SRA) ch. 9.94A RCW. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003); RCW 9.94A.585(1). We will review, however, a trial court's underlying legal conclusions and determinations in order to correct legal errors or abuses of discretion. *State v. Williams*, 149 Wn.2d at 147; *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Consequently, we examine whether the trial court imposed a standard range sentence using the correct legal standards and considerations.

Under former RCW 9.94A.400(1)(b) (1999) (now RCW 9.94A.589(1)(b)), whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences imposed under this subsection are served consecutively to each other and concurrently with other sentences. Both first degree murder and first degree assault, class A felonies, are serious violent offenses. Former RCW 9.94A.030(34)(a) (1999). For each

class A felony committed while armed with a firearm, a five year firearm enhancement is added to the standard range. RCW 9.94A.533(3). The firearm enhancements run consecutively to all other sentencing provisions, and the offender is not eligible for earned release credits during the time served for the firearm enhancements. Former RCW 9.94A.150(1) (1999); RCW 9.94A.533(3)(e). For first degree murder and first degree assault, the statutory maximum sentence is life. RCW 9A.20.021(1)(a). Salvador Nava's trial court imposed standard range sentences on all counts, properly enhanced each murder and assault sentence by five years for committing the crimes with a firearm, and ran each firearm enhancement and the murder and assault sentences consecutively as directed by RCW 9.94A.533(3)(e) and former RCW 9.94A.400(1)(b).

Salvador Nava admits that the trial court followed the SRA when it imposed the sentence, and he agrees that the firearm enhancements do not exceed the statutory maximum for each separate offense. But 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.

Our state high court considered and rejected an analogous contention in *State v. Thomas*, 150 Wn.2d 666, 80 P.3d 168 (2003). Gregory Thomas was convicted of two counts of second degree robbery, a class B felony, and one count of second degree unlawful possession of a

firearm, a class C felony. The statutory maximum sentence for each robbery was one hundred twenty months and for the unlawful possession was sixty months. With the appropriate thirty six-month firearm enhancement added to each robbery sentence, the standard range for each robbery count was ninety nine to one hundred twenty months. The trial court imposed concurrent standard range sentences on each count, and the two firearm enhancements consecutive to each other and to the longest concurrent base sentence, for a total confinement of thirteen years. Each of the sentences was at the statutory maximum. Thomas argued that his total enhanced sentence unlawfully exceeded the statutory maximum for the highest level offense, which was ten years for the second degree robberies.

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.

Salvador Nava also contends his overall sentence violates the purpose of the SRA as expressed in RCW 9.94A.010. He neglects, however, to explain how his sentence violates any

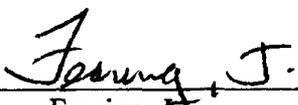
portion of RCW 9.94A.010. Therefore, we reject this contention.

Salvador Nava finally argues that he must serve a mandatory twenty years without earning early release credits for the murder conviction. In support of this argument, he cites RCW 9.94A.540(1)(a), (2). This statute, formerly RCW 9.94A.590, was effective July 1, 2001, after Nava committed his crimes. Under RCW 9.94A.345, the trial court imposes sentences in accordance with law in effect when the offense was committed. Therefore, Nava's argument is misplaced.

CONCLUSION

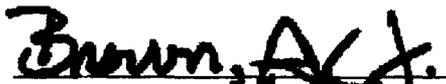
We affirm the resentencing of Salvador Nava.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Fearing, J.

WE CONCUR:



Brown, A.C.J.



Lawrence-Berrey, J.

APPENDIX “B”

MURDER, FIRST DEGREE

(RCW 9A.32.030)

CLASS A FELONY

SERIOUS VIOLENT

(If sexual motivation finding/verdict, use form on page III-31)

I. OFFENDER SCORING (RCW 9.94A.360 (9))

In the case of multiple prior convictions for offenses committed before July 1, 1986, for purposes of computing the offender score, count all adult convictions served concurrently as one offense and all juvenile convictions entered on the same date as one offense (RCW 9.94A.360).

ADULT HISTORY:

Enter number of serious violent felony convictions _____ x 3 = _____
 Enter number of violent felony convictions _____ x 2 = _____
 Enter number of nonviolent felony convictions _____ x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent felony dispositions _____ x 3 = _____
 Enter number of violent felony dispositions _____ x 2 = _____
 Enter number of nonviolent felony dispositions _____ x 1/2 = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of violent felony convictions _____ x 2 = _____
 Enter number of nonviolent felony convictions _____ x 1 = _____

STATUS: Was the offender on community placement on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the Offender Score
 (Round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL XV)	240 - 320 months	250 - 333 months	261 - 347 months	271 - 361 months	281 - 374 months	291 - 388 months	312 - 416 months	338 - 450 months	370 - 493 months	411 - 548 months

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).
- C. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 24 to 48 months, or to the period of earned release, whichever is longer (9.94A.120).
- D. Statutory minimum sentence is 240 months (20 years) (RCW 9.94A.120(4)).
- E. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-14 or III-15 to calculate the enhanced sentence.

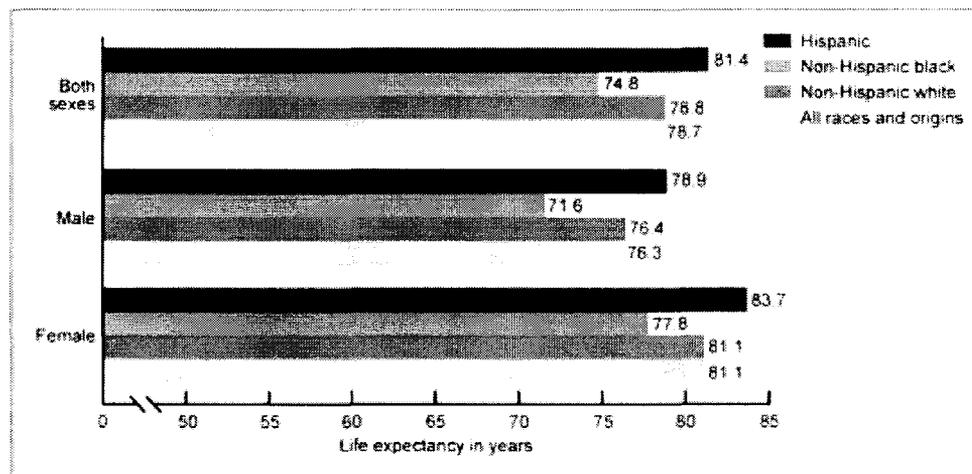
APPENDIX “C”

Life Expectancy

Life expectancy at birth for the overall U.S. population was 78.7 years in 2011 — unchanged from 2010. Across all races and ethnicities, life expectancy for women (81.1) exceeded that for men (76.3) by nearly five years.

Among racial and ethnic groups, Hispanics showed the highest life expectancy (81.4), followed by non-Hispanic whites (78.8) and non-Hispanic blacks (74.8).

Figure 1. U.S. Life Expectancy by Gender and Race/Ethnicity:
Preliminary 2011

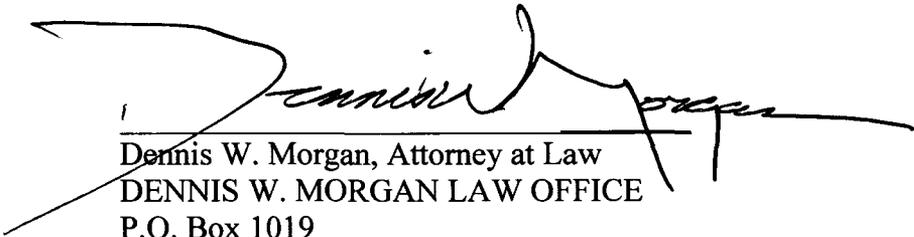


NOTE: Life expectancies for the Hispanic population are adjusted for underreporting of Hispanic ethnicity but are not adjusted to account for the potential effects of reverse migration.

SOURCE: National Vital Statistics System, Mortality.

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