

COA NO. 67959-7-1

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

REC'D
MAY 18 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FRANCE,

Appellant.

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

The Honorable Steven Gonzalez, Judge

2012 MAY 18 PM 4:17

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	7
1. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.....	7
2. THE FREE CRIMES AGGRAVATOR DOES NOT SUPPORT IMPOSITION OF AN EXCEPTIONAL SENTENCE ON THREE OF THE NINE COUNTS.....	8
a. <u>An Exceptional Sentence Based On The Free Crimes Aggravator Cannot Apply To Crimes That Were Punished</u>	8
b. <u>The Appropriate Remedy Is Reversal Of The Sentence And Remand For Resentencing</u>	15
3. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE A NO CONTACT ORDER AS A CONDITION OF COMMUNITY CUSTODY.....	18
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Childers</u> 135 Wn. App. 37, 143 P.3d 831 (2006);.....	19
<u>In re Pers. Restraint of Hopkins</u> 137 Wn.2d 897, 976 P.2d 616 (1999).....	14
<u>In re Pers. Restraint of Mayer</u> 128 Wn. App. 694, 117 P.3d 353 (2005)	8
<u>In re Sentences of Jones</u> 129 Wn. App. 626, 120 P.3d 84 (2005).....	19
<u>State ex rel. McDonald v. Whatcom County Dist. Court</u> 92 Wn.2d 35, 593 P.2d 546 (1979).....	15
<u>State v. Alvarado</u> 164 Wn.2d 556, 192 P.3d 345 (2008).....	9, 10
<u>State v. Cardenas,</u> 129 Wn.2d 1, 914 P.2d 57 (1996).....	17
<u>State v. Hendrickson</u> 165 Wn.2d 474, 198 P.3d 1029 (2009).....	16
<u>State v. Hendrickson</u> 165 Wn.2d 474, 198 P.3d 1029 (2009).....	23
<u>State v. Holt</u> 63 Wn. App. 226, 817 P.2d 425 (1991).....	12
<u>State v. McClure,</u> 64 Wn. App. 528, 827 P.2d 290 (1992).....	14
<u>State v. Newlun</u> 142 Wn. App. 730, 176 P.3d 529 <u>review denied</u> , 165 Wn.2d 1007, 198 P.3d 513 (2008)	10

TABLE OF AUTHORITIES (CONT'D)

WASHINGTON CASES (CONT'D)

	Page
<u>State v. Paulson</u> 131 Wn. App. 579, 128 P.3d 133 (2006)	19
<u>State v. Raines</u> 83 Wn. App. 312, 922 P.2d 100 (1996)	18
<u>State v. Stephens</u> 116 Wn.2d 238, 803 P.2d 319 (1991)	11-13
<u>State v. Worl</u> , 91 Wn. App. 88, 95-96, 955 P.2d 814, <u>review denied</u> , 136 Wn.2d 1024, 969 P.2d 1064 (1998)	14

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 9.94A.360(9) (1988)	11
Former RCW 9.94A.390	11
RCW 9.94A.030(33)	10
RCW 9.94A.510	10
RCW 9.94A.525(1)	9
RCW 9.94A.525(7)	9
RCW 9.94A.535(2)(c)	8, 10
RCW 9.94A.589(1)(a)	8, 9
RCW 9.94A.701	18
Sentencing Reform Act	4, 14, 18

A. ASSIGNMENTS OF ERROR

1. The court erred in imposing an exceptional sentence.
2. The judgment and sentence erroneously indicates the "officer of the court" aggravator attaches to all the counts to which appellant pleaded guilty.
3. The court erred in basing an exceptional sentence on the "free crimes" aggravator for three of the nine counts.
4. The court lacked statutory authority to enter a no contact order as a condition of community custody.

Issues Pertaining to Assignments of Error

1. The court imposed exceptional consecutive sentences based on the "free crimes" aggravator. Did the court err in imposing exceptional sentences covering all counts where three of the nine counts did not qualify as free crimes?
2. The convictions carry no term of community custody. Must the community custody condition consisting of a no contact order be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

The State charged William France with 16 counts of felony harassment, alleging two aggravating circumstances: (1) deliberate cruelty; and (2) the offense was committed against a public official or

officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.¹ CP 8-18.

As part of a plea deal, the prosecutor recommended 180 months total confinement time, consisting of exceptional consecutive sentences grouped as follows: 60 months on counts 3, 4, 6 concurrent to each other; 60 months on counts 7, 8, 9 concurrent to each other; 60 months on counts 12, 14, 15 concurrent to each other; and the three groups to run consecutive for a total of 180 months. CP 23. The prosecutor also recommended dismissal of the remaining seven counts and removal of the deliberate cruelty aggravator. CP 23.

The State's recommendation form indicated its intent to seek an exceptional sentence based on the "free crimes" aggravator for all counts and the "officer of the court" aggravator for unspecified counts. CP 38.

The probable cause certification describes various threats that France made to three employees of The Defender Association. CP 5. As a factual basis for the plea in relation to counts 3, 4 and 6, France stated, "this offense was against my prior attorney, a public official or officer of the court in retaliation of the performance of her duty to the criminal justice system." CP 28-29. In relation to counts 7, 8 and 9, France

¹ Counts 1 through 11 alleged both aggravators. CP 8-15. Counts 12 through 16 only alleged the deliberate cruelty aggravator. CP 15-18.

similarly stated, "this offense was against my prior attorney's supervisor, an officer of the court in retaliation of the performance of her duties to the criminal justice system." CP 29.

The plea statement provides "The judge must impose a sentence within the standard range unless there is a finding of substantial and compelling reasons not to do so or both parties stipulate to a sentence outside the standard range." CP 23. The plea statement further provides "The sentences imposed on counts 3, 4, 6, 7, 8, 9, 12, 14, 15 . . . will run concurrently unless there is a finding of substantial and compelling reasons to do otherwise." CP 24.

France pleaded guilty to nine counts (3, 4, 6, 7, 8, 9, 12, 14, 15). CP 28; 1RP² 26-27, 31-32. Six of those counts included the court officer aggravator as part of the plea (3, 4, 6, 7, 8, 9). CP 28-29; 1RP 23, 26. The other three counts referenced in the plea statement did not include any charged aggravator (counts 12, 14, 15). CP 29.

At the plea colloquy hearing, the prosecutor stated, "As part of our agreement, then, as well, there is also -- there is the issue of these aggravators. Do you understand that in counts 3, 4, 6, 7, 8 and 9, each of those six counts, you are also pleading guilty or you are agreeing with the

² The verbatim report of proceedings is referenced as follows: 1RP – 10/18/11 and 10/19/11; 2RP – 11/10/11.

fact that this was a crime against an officer of the court and that your acts in making those calls was in retaliation for their services to you as lawyers?" 1RP 27-28. France answered, "Yes." 1RP 28.

The prosecutor continued, "So on the remaining counts 12, 14, 15, there is no aggravator. There is no statutory aggravator that's been added on the calls you made to Ms. Beach. Do you understand that?" 1RP 28. France responded, "Yes, I do." 1RP 28.

The prosecutor explained "the way that we're running it is on -- basically on counts 12, 14 and 15, there would be a base sentence of 60 months with no aggravator, Counts 3, 4 and 6 would be 60 months consecutive based on the aggravator of officer of the court, and then Counts 7, 8 and 9 would run consecutive to both of those based on the aggravator of officer of the court." 1RP 30.

The prosecutor then stated:

However -- and this is the thing that is not really a part of our plea agreement here, but I want to make sure is clear as well -- and we have talked about that, and I suspect you have as well. Because of your offender score being 14, there is another basis for your sentence to be elevated, and that is because of essentially you are so far -- you are beyond the score of nine, which is the maximum under the Sentencing Reform Act, the grid that exists. So because you are beyond nine, because the number of counts here, the court can also consider that as a basis for an exceptional sentence, and the State's going to be seeking an exceptional sentence on that basis as well. So there's two bases, Mr. France. I want to make sure you understand. One is that

for two of the victims, they were lawyers/officers of the court, which we talked about, but also in the aggregate, that because of your offender score, that is separately a basis for the State to ask for an exceptional sentence. Do you understand what the State will be asking?

1RP 30.

France answered, "I understand, yes." 1RP 31.

As part of the plea agreement, France agreed he had six prior felony convictions that counted in his offender score. CP 32. France had an offender score of "14" for each of the nine counts to which he pleaded guilty. CP 33, 42. The standard range sentence for each count was 51-60 months. 2RP 24.

After noting this case involved threats against court officers, the court said the prosecutor's request for consecutive sentences was well taken. 2RP 24-26. The court imposed 60 months confinement for counts 3, 4, and 6 concurrent to each other and consecutive to all other counts. 2RP 26. The court also ordered counts "7, 8, and 9 are concurrent with each other, but consecutive to the previous three counts." 2RP 26. The court further specified counts 12, 14 and 15 "are 60 months concurrent with each other, but consecutive to the two prior groupings of counts[.]" 2RP 26.

The prosecutor asked the court to clarify whether the exceptional sentence was based on the court officer aggravator or the free crimes

aggravator. 2RP 26-27. The court responded, "Both of those bases form part of my rationale for imposing the steps in [sic] either standing alone would have been sufficient. And in this case we are dealing with the very underpinning of our democracy, and that is the right to protection and constitutional protection, and we have dedicated officers performing that duty, and we need to make sure that they are safe and able to perform that duty without such threats. The second, of course, is the free crime argument, which is very persuasive in this case as well." 2RP 27.

In the judgment and sentence, the court imposed exceptional consecutive sentences totaling 180 months in confinement. CP 41-42. 60 months were imposed on each count. CP 41. Counts 3, 4 and 6 "shall run concurrent to each other and consecutive to all others." CP 41. Counts 7, 8 and 9 "shall run concurrent to each other and consecutive to all others." CP 41. Counts 12, 14 and 15 "shall run concurrent to each other and consecutive to all others." CP 41. Counts 1, 2, 5, 10, 11, 13 and 16 were dismissed as per agreement of the parties. CP 42; 2RP 24.

Under the heading of "special verdict or findings," the judgment and sentence provides: " Aggravating circumstances as to count(s) III, IV, VI, VII, VIII, IX, XII, XIV, XV: OFFICER OF THE COURT AGGRAVATOR." CP 42.

Under the heading of "Exceptional Sentence," the judgment and sentence provides:

[] Findings of Fact and Conclusions of Law as to sentence above the standard range:

Finding of Fact: the jury found or the defendant stipulated to aggravating circumstances as to Count(s) 3, 4, 6, 7, 8, 9 see 9.94A.535(2) officer of the court.

Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) see above The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

CP 42.

There is, in fact, no "Appendix D" attached to the judgment and sentence. This appeal follows. CP 51-62.

C. ARGUMENT

1. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Under the heading of "special verdict or findings," the judgment and sentence provides: " Aggravating circumstances as to count(s) III, IV, VI, VII, VIII, IX, XII, XIV, XV: OFFICER OF THE COURT AGGRAVATOR." CP 42. We know from the record that the court officer aggravator did not attach to counts 12, 14 and 15. The court officer

aggravator was not charged for these counts. CP 15-18. France did not plead to that aggravator in relation to those counts. CP 28-29; 1RP 26-28, 32. The error is obvious. The remedy is to remand to the trial court for correction of scrivener's errors in the judgment and sentence. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

2. THE FREE CRIMES AGGRAVATOR DOES NOT SUPPORT IMPOSITION OF AN EXCEPTIONAL SENTENCE ON THREE OF THE NINE COUNTS.

The court erred in imposing an exceptional sentence covering all nine counts based on the "free crimes" aggravator where three of those counts were not free crimes. The sentence must be reversed.

a. An Exceptional Sentence Based On The Free Crimes Aggravator Cannot Apply To Crimes That Were Punished.

The court imposed consecutive sentences. CP 41-42. "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).

The trial court relied on the free crimes aggravator to impose consecutive exceptional sentences.³ 2RP 27. Under RCW 9.94A.535(2)(c), the judge may impose an exceptional sentence if "The defendant has committed multiple current offenses and the defendant's

³ The court also relied on the "officer of the court" aggravator for counts 3, 4, 5, 7, 8, and 9. CP 42; 2RP 27. The significance of that additional aggravator is addressed in section C. 2. b., infra.

high offender score results in some of the current offenses going unpunished."

The court ran counts 12, 14 and 15 concurrent to each other but consecutive to all others. CP 41. In so doing, the court imposed an exceptional sentence on counts 12, 14, 15. RCW 9.94A.589(1)(a). The only aggravator potentially applicable to these counts is the free crimes aggravator, given that the court officer aggravator did not attach to these counts. See section C. 1., supra. The court erred in relying on the free crimes aggravator to impose an exceptional sentence for counts 12, 14 and 15 because those three counts did not escape punishment.

For purposes of imposing an exceptional sentence, the offender score is computed based on both prior convictions and current convictions. State v. Alvarado, 164 Wn.2d 556, 567, 192 P.3d 345 (2008); RCW 9.94A.589(1)(a); RCW 9.94A.525(1). France's six prior offenses counted as one point each and contributed six points total to the offender score. The nine current offenses to which France pleaded guilty counted as one point each and added eight points to each offense for a total score of 14 points on each count. See RCW 9.94A.525(1) (current offenses are treated as prior convictions for purposes of computing the offender score); RCW 9.94A.525(7) (count one point for each adult prior felony conviction

if present conviction is for nonviolent offense); RCW 9.94A.030(33) (felony harassment is a non-violent offense).

The sentencing grid used in calculating the standard range sentence for an offense tops out at "9 or more." RCW 9.94A.510. Where a defendant has multiple current offenses that result in an offender score greater than 9, further increases in the offender score do not increase the standard range.

The free crimes aggravator described in RCW 9.94A.535(2)(c) simply requires an objective mathematical application of the sentencing grid to the current offenses. State v. Newlun, 142 Wn. App. 730, 742-43, 176 P.3d 529, review denied, 165 Wn.2d 1007, 198 P.3d 513 (2008). "This provision was designed to codify the 'free crimes' factor as an automatic aggravator without the need for additional fact finding as to whether the existence of 'free crimes' results in a 'clearly too lenient' sentence." Alvarado, 164 Wn.2d at 567. "If the number of current offenses, when applied to the sentencing grid, results in the legal conclusion that the defendant's presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed." Newlun, 142 Wn. App. at 743.

The court in France's case could lawfully find the free crimes aggravator attached to six of the nine counts to which France pleaded guilty. But that aggravator does not attach to three counts as a matter of law. Three current offenses are being punished.

State v. Stephens, 116 Wn.2d 238, 803 P.2d 319 (1991) shows why. Stephens pleaded guilty to eight counts of second degree burglary and his offender score, including present and prior convictions, was 19. Stephens, 116 Wn.2d at 239. The current offenses for burglary counted as two points toward his offender score. Former RCW 9.94A.360(9) (1988). To reach a total of 19 for the offender score, five points were based on prior offenses.

The standard sentence range for second degree burglary with "9 or more" offender points was 43 to 57 months. Stephens, 116 Wn.2d at 239. The Court recognized "Stephens' presumptive sentence would have been 43 to 57 months had he only committed two of the eight burglaries for which he was being sentenced." Id. at 242.

Addressing the "clearly too lenient" factor under former RCW 9.94A.390(2)(g), the Supreme Court held "an exceptional sentence above the standard SRA range may be justified when a defendant's multiple current convictions, combined with his high offender score, would otherwise result in there being no additional penalty for some of his

crimes." Stephens, 116 Wn.2d at 240, 243. The Court reasoned "The fact that defendant committed eight burglaries yet, under the multiple offense policy, would presumptively receive the same sentence as if he had committed only two burglaries, satisfies this test. *Any other rule would mean that all additional counts, whether 6 (as in this case) or 60, would be free from additional punishment.*" Id. at 244-45 (emphasis added).

In other words, two of the eight current offenses were punished because they were accounted for in the sentencing grid. Starting with an offender score of five based on prior offenses and factoring in two points for each current burglary offense yields the conclusion that two of the current offenses were punished while six went unpunished. "[I]n the instant case, although the crimes were counted in calculating the offender score, *most of them* had no effect on the sentence because Stephens' score was '9 or more' already." Id. at 244 (emphasis added). But two of the current crimes did affect the offender score and therefore did not go unpunished. Id. at 244-45.

State v. Holt, 63 Wn. App. 226, 817 P.2d 425 (1991) applies the same analysis. Holt pleaded guilty to four counts of second degree burglary and his offender score was 12. Holt, 63 Wn. App. at 227. In upholding the exceptional sentence based on the free crimes aggravator, the court reasoned, "the defendant's offender score here would have been 6

before inclusion of the four current burglaries. If the standard sentencing range were applied, it would result in one and one-half 'free' burglaries under the Stephens analysis. Stated differently, the defendant would presumptively receive the same sentence for three burglaries as he would for four burglaries." Id. at 230-31.

Applying this logic to France's case yields the conclusion that three of his current offenses were punished. France started out with an offender score of 6 based on prior offenses. Each current offense contributed one point to the offender score. Three of the current offenses thus contributed to reaching the maximum of 9 points on the offender grid. Three of the nine offenses were punished in the same manner as two of the eight burglaries were punished in Stephens. France committed nine harassment offenses, yet would receive the same presumptive sentence as if he had committed only three offenses. Six offenses are free crimes. But three offenses are punished.⁴

The only aggravator that could attach to counts 12, 14 and 15 in this case was the free crimes aggravator because the court officer aggravator was not applicable to those counts. See section C. 1., supra.

⁴ According to the prosecutor, "there are five charged crimes to which Mr. France plead [sic] guilty, which by the operation of the SRA, and but for this operation they would go unpunished today." 2RP 5.

Because three of France's current offenses were punished, the court erred in imposing an exceptional consecutive sentence for counts 12, 14 and 15 based on the free crimes aggravator. See State v. Worl, 91 Wn. App. 88, 95-96, 955 P.2d 814 (upholding multiple consecutive exceptional sentences where both aggravating factors applied to both offenses, recognizing "two exceptional sentences are improper when based on one aggravating factor that only applies to one of the offenses") (citing State v. McClure, 64 Wn. App. 528, 534, 827 P.2d 290 (1992)), review denied, 136 Wn.2d 1024, 969 P.2d 1064 (1998).

The Sentencing Reform Act does not specify which current offenses should be deemed unpunished when the offender score for all current offenses is greater than 9 but some of the current offenses are punished. In such a situation, some current offenses constitute free crimes but not all of them do. There is no standard for determining which current offenses go unpunished and which go punished. The manner in which punished and unpunished offenses are separated from one another in such a circumstance is ambiguous.

"[I]n criminal cases the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). The rule of lenity

requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). The rule of lenity requires the statute be interpreted in France's favor. No exceptional sentence can be imposed on counts 12, 14 and 15 because they are not free crimes.

b. The Appropriate Remedy Is Reversal Of The Sentence And Remand For Resentencing.

The State may argue remand for resentencing is not required because the same aggregate sentence of 180 months remains even though no exceptional sentence could be imposed for counts 12, 14 and 15. In support, the State will cite that portion of the judgment and sentence that states counts 3, 4 and 6 "shall run concurrent to each other and consecutive to all others" and that counts 7, 8 and 9 "shall run concurrent to each other and consecutive to all others." CP 41.

But running counts 7, 8, 9 consecutive to all other counts cannot be reconciled with the court's oral ruling that counts "7, 8, and 9 are concurrent with each other, *but consecutive to the previous three counts.*" 2RP 26 (emphasis added). If counts 7, 8, and 9 only run consecutive to counts 3, 4, and 6 as specified in the oral opinion, then the aggregate sentence would be 120 months, not 180 months. Counts 12, 14 and 15 run concurrent, not consecutive to the other six counts because a valid

aggravator does not support counts 12, 14 and 15. We are left with counts 3, 4 and 6 running consecutive to all other counts, counts 7, 8 and 9 running consecutive to counts 3, 4 and 6, and counts 12, 14 and 15 running concurrent with all other counts. The total aggregate sentence, then, is 120 months.

That portion of the judgment and sentence indicating counts 7, 8 and 9 "shall run concurrent to each other and consecutive to all others" is a clerical error. CP 41. Clerical errors are mistakes in a document that do not reflect the trial court's actual intention. State v. Hendrickson, 165 Wn.2d 474, 478-79, 198 P.3d 1029 (2009). "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." Hendrickson, 165 Wn.2d at 479.

The judgment and sentence here does not reflect the court's intention, expressed at the sentencing hearing, that counts 7, 8 and 9 should run consecutive to counts 3, 4, 6 as opposed to all other counts. 2RP 26. Remand for resentencing is required to rectify the error.

Another portion of the judgment and sentence support the clerical error argument. As pointed out in section C. 1., supra, the judgment and sentence erroneously states the "officer of the court" aggravator applies to

counts 12, 14 and 15. CP 42. That is a clerical error as well. The judgment and sentence in this case is not an accurate reflection of the trial court's actual intent.

The State may also argue remand for resentencing is not required because the trial court indicated it would impose the same exceptional sentence on the basis of any one of the aggravating factors. 2RP 27; CP 42; see State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (appellate court satisfied trial court would have imposed same exceptional sentence where it stated any of the factors standing alone would be a substantial and compelling factor justifying the exceptional sentence and indicated in its oral opinion that the primary reason for imposing the exceptional sentence was based on the remaining valid aggravator). But as set forth above, the same sentence of 180 months cannot be maintained as a matter of law in the absence of valid aggravators supporting the consecutive exceptional sentence in relation to counts 12, 14 and 15.

Even if this Court concludes there is no need to remand for resentencing, remand is still appropriate to remove the free crimes aggravator from three of the nine counts. Their continued existence could be used against France in a future legal proceeding. For example, a future sentencing court could take the invalid aggravators into account in fashioning a future sentence that is more severe than it otherwise would

be. See State v. Raines, 83 Wn. App. 312, 315, 922 P.2d 100 (1996) (holding meaningful relief was available for sentencing error even though appellant had served sentence because he could potentially suffer future adverse consequences if challenged sentence remained in effect, reasoning "a future sentencing court could impose additional demanding conditions of community placement. Likewise, the modified sentence could sway a future sentencing court to impose the high end of the standard range.").

3. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE A NO CONTACT ORDER AS A CONDITION OF COMMUNITY CUSTODY.

The box for imposition of a community custody term is not checked in the judgment and sentence. CP 43. This is appropriate because the Sentencing Reform Act does not authorize a term of community custody for the offense of felony harassment. See RCW 9.94A.701 (specifying categories of offenses and sentences subject to community custody).

The judgment and sentence, however, provides "Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court. APPENDIX H for Community Custody conditions is attached and incorporated herein." Appendix H is a no-contact order prohibiting France from contacting the victims of the crimes. CP 48-49. Another part of the judgment and sentence states :NO

CONTACT: For the maximum term of 15 years, the defendant shall have no contact with see attached appendix H." CP 41.

A court cannot impose conditions of community custody where it is unauthorized by statute to impose a term of community custody. In re Pers. Restraint of Childers, 135 Wn. App. 37, 41, 143 P.3d 831 (2006); In re Sentences of Jones, 129 Wn. App. 626, 631, 120 P.3d 84 (2005). The court lacked authority to include the no contact order as a condition of community custody. This portion of the sentence must be vacated because it is unauthorized by law. A court may only impose a sentence authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." Paulson, 131 Wn. App. at 588.

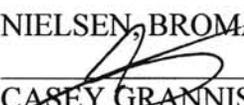
D. CONCLUSION

For the reasons set forth above, this Court should reverse the sentence and remand for resentencing.

DATED this 18th day of May 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67959-7-1
)	
WILLIAM FRANCE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18^H DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM FRANCE
DOC NO. 626275
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 18^H DAY OF MAY 2012.

x *Patrick Mayovsky*