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NO. 37621-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SAUNDERS,

Appellant.

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

The Honorable Rosanne Buckner

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In Christopher Saunders's trial for his failure to register as a sex offender, his attorney's failure to call critical witnesses denied Mr. Saunders effective assistance of counsel. Furthermore, the trial court impermissibly imposed a sentence that exceeded the statutory maximum and directed the Department of Corrections to modify the sentence to fit within the limits of the statutory maximum, which was an improper delegation of sentencing authority.

B. ASSIGNMENTS OF ERROR

1. Mr. Saunders was deprived of his right to effective assistance of counsel by his attorney's failure to call or subpoena critical witnesses.

2. Mr. Saunders' was deprived of his right to effective assistance of counsel by his attorney's failure to propose a missing witness instruction.

3. The trial court exceeded its statutory authority in imposing Mr. Saunders's sentence.

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

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A claim for ineffective assistance of counsel requires the defendant to show that the attorney's performance fell below an objective standard of reasonableness and that his deficiency resulted in prejudice to the defendant. Defense counsel failed to call two critical witnesses, one due to an erroneous belief that her testimony would necessarily be inadmissible hearsay, and the other due to an erroneous belief that the court's permission was required in order to subpoena an out-of-state witness. Did defense counsel's omissions violate Mr. Saunders's right to effective assistance of counsel? (Assignment of Error 1)

2. Having failed to call the critical out-of-state witness, either before or during trial, defense counsel failed to offer a missing witness instruction. Did this omission violate Mr. Saunders's right to effective assistance of counsel? (Assignment of Error 2)

3. 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 57 months plus a term of community custody of 36 to 48 months, does the sentence imposed by the trial court exceed the statutory maximum of 60 months for failure to register? (Assignment of Error 3)

2. 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. By way of the SRA the Legislature has established the appropriate sentences for crimes, and required sentencing court 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 DOC should not require the offender to 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 4)

D. STATEMENT OF THE CASE

The prosecuting attorney for Pierce County charged Mr. Saunder with failing to register as a sex offender, as required by RCW 9A.44.130(6)(b). CP 13-14.

In a jury trial before the Honorable Roseanne Buckner, Mr. Saunders stipulated to his conviction on the underlying offense. CP 10-12. Gay Lynn Wilke, office assistant for the Pierce County Sheriff's Department Sex Offender Registration Unit, testified that registered transient sex offenders are required to report to the sheriff's department weekly and provide a list of the places where he had stayed over the last week. 3/26/08RP 55. Ms. Wilke reviewed Mr. Saunders's file and testified he reported to the department and provided the required list on February 16 and 23, March 2, 9, 16, and 23, and April 6, 2007, but his file contained no registration documents after that date. 3/26/08RP 57-65.

Andrea Shaw, noncommissioned community service officer in the Pierce County Sex Offender Registration Unit, testified she personally went over the paperwork with Mr. Saunders when he reported on February 16 and 23, March 2, and April 6, 2007, and

identified the officers who signed off on his paperwork on March 9, 16, and 23. 3/26/08RP 69-74.

At the end of the State's case, defense counsel moved the court to allow the defense to subpoena Detective Dumais. 3/26/08RP 78. Detective Dumais did not prepare the probable cause declaration, but his report apparently established the factual basis for that declaration, which stated that Mr. Saunders last registered on April 13, not April 6. *Id.* Defense counsel also indicated her intent to call Mary Robnett, the prosecutor who had prepared the probable cause declaration. 3/26/08RP 80. Neither the prosecutor nor defense counsel knew how to contact Detective Dumais, who had moved out of state. 3/26/08RP 81. Without the presence of Detective Dumais for cross-examination, the defense moved for a mistrial, or in the alternative, a recess until Detective Dumais could return to Washington. 3/26/08RP 84-85. However, defense counsel agreed with the State that Ms. Robnett could not testify without violating the hearsay rule. 3/26/08RP 85. The court reviewed Detective Dumais's report and decided it was consistent with the State's evidence at trial and the probable cause declaration was incorrect, and assumed Detective Dumais would testify that Mr. Saunders actually last registered on April 6.

3/26/08RP 88, 90. Therefore, the court denied the defense motions. 3/26/08PR 89-90.

Mr. Saunders testified that he did register on April 13, 2007 and that he had not kept the cards proving his registration on any of the dates from February to April. 3/26/08RP 101, 107.

Mr. Saunders was convicted as charged. At sentencing, the court imposed 57 months of confinement (the high end of the standard range) along with 36-48 months of community custody. The Judgment and Sentence states, "PROVIDED: That under no circumstances shall the combined term of confinement and term of community custody actually served exceed the statutory maximum for each offense." CP 43.

E. ARGUMENT

1. MR. SAUNDERS WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO CALL CRITICAL WITNESSES.

In order to prevail on a claim of ineffective assistance, a defendant must show: (1) that his or her lawyer's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*,

109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. For an ineffective assistance of counsel claim to succeed, the defendant must show that the attorney's conduct was not a legitimate trial strategy or tactic. *State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)

a. Defense counsel was ineffective by failing to call Mary Robnett as a witness. The Declaration for Determination of Probable Cause listed April 13 as the date of Mr. Saunders's last registration, although the information and State's evidence identified April 6 as his last date of registration. However, defense counsel failed to call as a witness Mary Robnett, the deputy prosecutor who prepared the Declaration. Instead, defense counsel decided not to call Ms. Robnett because she could not "testify as to what Detective Dumais did or did not do. I can't get around that hearsay rule." 3/26/08RP 85. This conclusion was incorrect.

The Declaration for Determination of Probable Cause, signed by Mary E. Robnett, states:

> MARY E. ROBNETT, declares under penalty of perjury:
>
> That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the PIERCE COUNTY SHERIFF, incident number 071450686;
>
> That the police report and/or investigation provided me with the following information:
>
> That in Pierce County, Washington, on or about the 13th day of April, 2007, the defendant, CHRISTOPHER ISRAEL SAUNDERS, did commit the crime of Failure to Register as a Sex Offender,
>
> ...
>
> Detective Dumais reports that the defendant most recently registered on April 13, 2007 as a transient. Gaylynn Wilke of the Pierce County Sheriff's Department reports that as of July 19, 2007, the defendant has not updated his registration status.
>
> I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Having stated under penalty of perjury that these assertions were true and correct, Ms. Robnett knew she was acting as a witness and should have been prepared to testify. The United States Supreme Court reached the same result when it denied absolute immunity to a Washington prosecutor who had executed a Certificate for Determination of Probable Cause. *Kalina v. Fletcher,* 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997). The Court found the prosecutor in that case had "performed an act

that any competent witness might have performed." *Id.* at 129-30. Although the prosecutor used her professional judgment in the preparation of the Certificate, "that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness[.]" *Id.* at 130. Thus, like any other witness, a prosecutor who swears to factual statements under penalty of perjury must be subject to cross-examination on those statements. There is no reason why the hearsay rule would prevent her from testifying to any facts within her personal knowledge, pursuant to her sworn declaration.

Defense counsel's concession that Ms. Robnett's testimony would necessarily be inadmissible hearsay was incorrect. Especially given counsel's failure to bring Detective Dumais into court, this concession could not have been tactical, since it left Mr. Saunders with no recourse for addressing the crucial issue of when he allegedly failed to register.

b. Defense counsel was ineffective by failing to subpoena Detective Dumais. This Court has held that failure to interview and subpoena witnesses constituted ineffective assistance of counsel. *State v. Jury,* 19 Wn. App. 256, 264-65, 576 P.2d 1302 (1978). *See also State v. Smith,* 56 Wn.2d 368, 370, 353 P.2d 155 (1960)

(failure to cause subpoena to issue clearly constitutes lack of due diligence); *State v. Hartley,* 51 Wn App. 442, 445-46, 754 P.2d 131 (1988) (defense counsel who did not make timely use of legal mechanisms to compel witness's attendance did not exercise due diligence).

Here, although Ms. Robnett's declaration was based entirely on Detective Dumais's report, defense counsel made no attempt to subpoena the detective. Instead, defense merely moved the court for permission to subpoena Detective Dumais. 3/26/08RP 78. Such permission was unnecessary. Having had the discovery for months, defense counsel should have been aware of the discrepancy in dates between the probable cause declaration and the information and registration documents, and anticipated the need to subpoena Detective Dumais before trial. However, her inability to make an offer of proof indicated she had never interviewed him. Inexcusably, defense counsel apparently made no attempt to locate or contact the detective.

Failing that, defense could have proceeded with the subpoena without the court's permission. Although the court

overstepped its bounds in denying the motion,[1] the motion was not actually necessary. CrR 4.8 provides that subpoenas in criminal matters shall be issue in the same manner as in civil actions. Under CR 45, no motion is required for the issuance of a subpoena; the requesting party, and not the court, is responsible for its issuance and service.

As counsel recognized, there could be no substitute for Detective Dumais' actual testimony. While the State and the court were content to assume that the April 13 date was a mere scrivener's error, only cross-examination of Detective Dumais could reliably establish that conclusion.

c. Defense counsel was ineffective by failing to propose a missing witness instruction. Having failed in her inadequate attempt to procure Detective Dumais's testimony, defense counsel was obligated, at the least, to propose a missing witness instruction. Defense counsel had earlier argued to the court that no one could guess "what Detective Dumais's recollection would or

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[1] The court found, "So it appears that [Ms. Robnett's] declaration is not correct and that the detective's report is consistent with the testimony provided by the state in this case in this trial." 3/26/08RP 88. Whether the declaration was correct is a question of fact which should have been reserved for the jury.

The court's ruling that Detective Dumais was "not able to testify" because he no longer worked for the Pierce County Sheriff's Department and had moved out of state was also unfounded. 3/26/08PR 89.

would not be" and the "issue of discrepancies in dates can't go before the jury, and that's the critical issue here." 3/26/08RP 86-87. These remarks demonstrate that defense counsel correctly understood what was at stake and that there can be no tactical reason why defense counsel to omit the missing witness instruction. Even in closing, she argued to the jury, "We'll never know what the detective would have testified to –" but the State objected, pointing out that there was no missing witness instruction, and the court sustained the objection. 3/26/08RP 128.

Because the actions of counsel were unreasonable, they cannot be construed as merely a tactical decision. *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 1037, 145 L.Ed.2d 985 (2000).

d. Mr. Saunders was prejudiced by counsel's deficient performance. The cumulative effect of counsel's errors was highly prejudicial to Mr. Saunders. By failing to call both Ms. Robnett and Detective Dumais to testify, counsel effectively deprived Mr. Saunders of his right, under the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington

Constitution, to confront his accusers.[2] Both witnesses were necessary to explain the discrepancy between the April 13 date in the Declaration for Determination of Probable Cause and the April 6 date in the charging document and State's evidence. Without this testimony, the jury never knew that the discrepancy existed,[3] and Mr. Saunders was unable to challenge the State's theory that he last registered on April 6.

The failure to call these witnesses, combined with the failure to propose a missing witness instruction, also violated his right to present a defense.[4] The defense theory of the case was that Mr. Saunders did register on April 6 and April 13, as he testified. Without the evidence of the discrepancy of dates, or in the alternative the missing witness instruction, the theory could not be fleshed out.

The conviction should therefore be reversed.

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[2] The Sixth Amendment of the United States Constitution provides a criminal defendant the right "to be confronted by the witnesses against him." Article 1, section 22 of the Washington Constitution provides "the right . . . to meet the witnesses against him face to face."

[3] The record indicates that as Mr. Saunders stepped down from the witness stand, he said, "In the probable cause, it says April 13th." 3/26/08RP 108. He was admonished, and the jury is presumed to disregard his comments as non-evidence.

2. THE SENTENCING COURT EXCEEDED ITS STATUTORY 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

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[4] U.S. Const. amends. V, XIV; Wash. Const. article I, section 3; *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

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. Saunders's sentence is not determinate and violates RCW 9.94A.505. In the present case, the trial court imposed a term of confinement of 57 months for the conviction as well as a community custody term of 36 to 48 months. CP 42-43. Yet the Judgment and Sentence states, "PROVIDED: That under no circumstances shall the combined term of confinement and term of community custody actually served exceed the statutory maximum for each offense." CP 43. Mr. Saunders was convicted of failure to register as a sex offender, a class C felony with a maximum sentence of 60 months. RCW 9A.44.130(11)

This judgment is invalid for three reasons. First, on its face the judgment still "imposes" a term of confinement in excess of the statutory maximum for the offense contrary to RCW 9.94A.505. Second, the sentence imposed is unlawfully indeterminate. Finally, the courts conclusion unlawfully delegates to the Department of Corrections the authority to impose a sentence in violation of the Separation of Powers Doctrine.

The plain language of RCW 9.94A.505(5) provides a court "court may not impose" a total term of confinement plus community custody which exceeds the statutory maximum for the offense.

Zavala-Reynoso stated that a judgment and sentence that violates this provision is invalid on its face.

> The term "valid on its face'" has been interpreted to mean "'without further elaboration.'" *In re Personal. Restraint of Stoudmire*, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000) (quoting *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986)). Here, Mr. Zavala-Reynoso's community custody term (9-12 months), plus his standard range sentence (114 months), exceeds his statutory maximum term. Thus, the total (123-136 months) on its face exceeds the 120 month maximum term.

Zavala-Reynoso, 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. <u>Viewed from the outset, the sentence exceeds the maximum term</u>.

(Emphasis added.) *Zavala-Reynoso*, 127 Wn.App. 119 at 124. The Court therefore remanded for resentencing, stating, "Since the sentencing court imposed a sentence exceeding Mr. Zavala-Reynoso's statutory maximum, we vacate his sentence and

remand for resentencing in a manner consistent with this opinion." *Zavala-Reynoso*, 127 Wn.App. at 124.

Recently, in *State v. Davis,* the Court affirmed an exceptional downward sentence, where the sentencing court had imposed a term of confinement below the low end of the standard range so that the entire sentence would fit within the statutory maximum. 2008 Wash. App. LEXIS 2263 at 4, 192 P.3d 29 (2008), 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).

Davis disapproved of the previous approach justified by *State v. Sloan*, 121 Wn.App. 220, 223-24, 87 P.3d 1214 (2004) and *State v. Vanoli*, 86 Wn.App. 643, 655, 937 P.2d 1166 (1997), which relied on RCW 9.94A.700(3)[5] to reason that because an

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[5] RCW 9.94A.700(3) provides:

> The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the

inmate may receive good time, he or she could still serve all or some of the community custody imposed, as long as the court instructed DOC that the inmate could not serve a term in excess of the statutory maximum. The *Davis* Court rejected this reasoning, recognizing that although a sentencing court's "clear instruction that the time served cannot exceed the statutory maximum," *could* save the defendant from an illegal sentence, such a vague solution would unwisely leave

> the responsibility for assuring that the sentence does not exceed the statutory maximum to the Department of Corrections... 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, <u>a clear mandate from the trial court eliminates the chance of legal errors in implementing the trial court's sentence.</u>

Davis, 192 P.3d at 11-12 (emphasis added). Therefore, the Court held an exceptional sentence within the statutory maximum was the better alternative.

This speculative sentencing has been rejected in other similar contexts. *See State v. Sledge*, 133 Wn.2d 828, 947 P.2d

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> offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

1199 (1997); *State v. S.H.*, 75 Wn.App. 1, 877 P.2d 205 (1994); and *State v. Bourgeois*, 72 Wn.App. 650, 866 P.2d 43 (1994). These cases provide the juvenile court cannot be allowed to set the term for a manifest injustice disposition, while taking into consideration the fact that the juvenile could be released early. In each of these cases, the courts held that the possibility that a juvenile may be released before the maximum term of a standard range disposition was not a proper basis for setting the term of a manifest injustice disposition. *See Sledge*, 133 Wn.2d at 846; *S.H.,* 75 Wn.App. at 15; *Bourgeois*, 72 Wn.App. at 661.

Here, regardless of the court's notation, the trial court "imposed" a sentence which exceeds the statutory maximum. Nowhere in RCW 9.94A.505 did the legislature permit the imposition of an unlawful sentence so long as the trial court believes it will not actually be served. In fact, such speculation is contrary to the requirement that the sentence be determinate.

Because RCW 9.94A.505 plainly prohibits the sentence "imposed" here, the sentence imposed is unlawful regardless of whether the sentence is ultimately served.

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d. Imposing an unlawful sentence on 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, section 1, art. II, section 1, art. III, section 2, art. IV, section 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." *Ammons*, 105 Wn.2d at 180. 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.[6] DOC's duty and function is to enforce the sentence imposed. *See State v. Chapman*, 105 Wn.2d 211, 713

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[6] An obvious exception, and one expressly permitted by statute, is the imposition of indeterminate sentences for certain sex offenders pursuant to RCW 9.94A.712.

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. *See In re Sentence of Chatman*, 59 Wn.App. 258, 796 P.2d 755 (1990). In *Chatman*, DOC questioned whether a sentencing court issued a lawful sentence, first by asking the judge to reconsider its sentence and then by seeking review in the Court of Appeals pursuant to RCW 9.94A.585(7). RCW 9.94A.585(7) was enacted for the purpose of stopping DOC from disregarding sentences it did not believe were correctly imposed. *Id.* at 264. The statute was intended to provide a mechanism for addressing sentencing errors, because courts had "repeatedly admonished the department for disregarding sentences." *Id.*

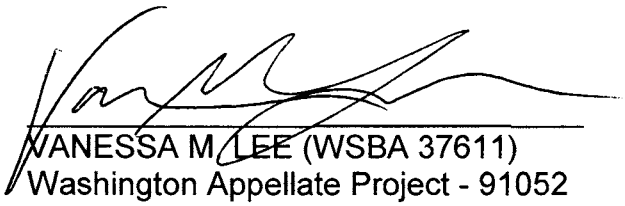
By imposing a sentencing in excess of its statutory authority, and then delegating to DOC the authority to fix the actual term, the trial court violated the Separation of Powers Doctrine.

F. CONCLUSION.

Because ineffective assistance of counsel denied Mr. Saunders his opportunity to confront his accusers and present his theory of the case, he respectfully asks that his conviction be reversed.

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 7th day of November, 2008.



VANESSA M. LEE (WSBA 37611)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 37621-1-II
v.	)	
	)	
CHRISTOPHER SAUNDERS,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2008, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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

STATE OF WASHINGTON, RESPONDENT, v. CHRISTOPHER SAUNDERS, APPELLANT.	)))))))))	NO. 37621-1-II

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF NOVEMBER, 2008.

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cc. PIERCE CO PROSECUTOR'S OFFICE