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STATE OF WASHINGTON

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NO. 79432-4

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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Sentence of:

YULANDA LEACH,

Respondent,

**SUPPLEMENTAL BRIEF OF PETITIONER
DEPARTMENT OF CORRECTIONS**

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I. INTRODUCTION

Yulanda Leach was convicted in Pierce County Superior Court of attempted second degree assault of a child. The trial court imposed 23.25 months of confinement and a community custody range of 9 to 18 months. When a trial court imposes a confinement term of over one year, RCW 9.94A.715(1) allows the court also to impose community custody for “any crime against persons under RCW 9.94A.411(2).” Second degree assault of a child is listed under RCW 9.94A.411(2). *Attempted* second degree assault of a child is not, however.

The question in this case is whether the list of “crimes against persons” in RCW 9.94A.411(2) is an exclusive list for purposes of a court’s authority to impose community custody under RCW 9.94A.715. The language of RCW 9.94A.545, which authorizes community custody for confinement terms of one year or less, is identical to that of RCW 9.94A.715, with one important exception. RCW 9.94A.545 explicitly authorizes community custody for *attempts* to commit a drug crime. RCW 9.94A.715(1) does not. Additionally, both RCW 9.94A.545 and RCW 9.94A.715 authorize community custody for most *attempted* sex crimes and all *attempted* class A felonies. This demonstrates that the Legislature will grant community custody sentencing authority for anticipatory crimes when it so chooses.

The Washington Court of Appeals, Division Two, denied the DOC's post-sentence petition challenging the sentence that the superior court imposed on Leach. The Court of Appeals held that RCW 9.94A.715(1) did authorize the trial court to impose community custody for Leach. Because RCW 9.94A.715 precludes a sentencing court from imposing community custody for crimes not expressly on the list of crimes against persons, this Court should remand for resentencing to remove the community custody portion of Leach's sentence.

II. STATEMENT OF THE CASE

A. SENTENCE IMPOSED

Leach pled guilty¹ to attempted second degree child assault, committed in 2005. Appendix 2, Judgment and Sentence.² In October 2005, the Pierce County Superior Court (the Honorable Stephanie A. Arend) sentenced Leach to 23.25 months of confinement and 9 to 18 months of community custody. *Id.* at 4 - 5.

B. POST-SENTENCE PETITION PROCESS

After reviewing Leach's judgment and sentence, the DOC sent a letter to the trial court, the prosecutor, and defense counsel. The letter

¹ Generally, "[a] plea of guilty, voluntarily made, waives the right to trial and all defenses other than that the complaint, information, or indictment charges no offense." *Garrison v. Rhay*, 75 Wn.2d 98, 101, 449 P.2d 92 (1968). However, "a plea bargaining agreement cannot exceed the statutory authority given to the courts." *In re Stoudmire*, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000) (citation omitted).

² The referenced appendices are in the DOC's motion for discretionary review.

requested that the court amend the sentence by removing the community custody range. Appendix 3, Letter from the DOC. Under the post-sentence petition process in RCW 9.94A.585(7) and RAP 16.18, the DOC is required to first contact the sentencing court in an attempt to resolve any perceived sentencing errors. RCW 9.94A.585(7) does not require formal filing of a petition or motion in the trial court. Sentence of Chatman, 59 Wn. App. 258, 264, 796 P.2d 755 (1990).

The State alone responded to the DOC's letter. The prosecutor explained that the State would not be moving to amend. Appendix 4, Declaration of Jacqueline Riley-Noel at ¶ 3. Consequently, the DOC filed a post-sentence petition in the Court of Appeals, Division Two. The DOC's petition pointed out that, unlike attempted class A felonies, attempted class B felonies such as attempted second degree assault are not within the scope of the statute authorizing community custody for sentences over one year.

A panel of the Court of Appeals issued a brief two-page order denying the DOC's petition without oral argument. The order reasoned that “the nature of the crime does not change simply because it was attempted and not completed [I]t is reasonable to conclude attempted second degree assault qualifies as a crime against a person. To assume otherwise would lead to absurd results.” Appendix 1 (quoting In re Post

Sentence Review of Manier, 135 Wn. App. 33, ¶ 11, 143 P.3d 604 (Div. III, 2006)). To illustrate an absurd result, the court noted that a defendant convicted of third degree assault of a child would receive community custody while a defendant convicted of *attempted* second degree assault of a child would not. Appendix 1 at n.1.

III. ARGUMENT

A. THE NATURE OF COMMUNITY CUSTODY

After the Sentencing Reform Act (SRA) abolished parole in 1981, the Legislature created various types of post-release supervision. See RCW 9.94A.545, -.650, -.660, -.670, -.700, -.705, -.710, -.712, & -.715. One of these is community custody. “Community custody is the intense monitoring of an offender in the community for a period of at least one year after release or transfer from confinement.” In re Crowder, 97 Wn. App. 598, ¶ 5, 985 P.2d 944 (1999); see RCW 9.94A.030(5) (defining community custody as “that portion of an offender's sentence . . . served in the community subject to controls placed on the offender’s movement and activities by the department”).

Although community custody is primarily punitive, it has rehabilitative aspects as well. In re McNeal, 99 Wn. App. 617, 633, 994 P.2d 890 (2000); see also State v. Ross, 129 Wn.2d 279, 286, 916 P.2d

405 (1996) (“Community placement primarily furthers the punitive purposes of deterrence and protection”).

B. WHO RECEIVES COMMUNITY CUSTODY

RCW 9.94A.545 authorizes community custody for sentences with confinement terms of one year or less, while RCW 9.94A.715 authorizes community custody for sentences with confinement terms of over one year. Both RCW 9.94A.545 and RCW 9.94A.715³ expressly restrict community custody to the following types of crimes: “a sex offense, a violent offense, *a crime against a person under RCW 9.94A.411*, or felony [drug crime].” (Emphasis added.) Also, RCW 9.94A.545, authorizes supervision for “an attempt, conspiracy, or solicitation to commit [a felony drug crime].” A similar specific reference to anticipatory drug crimes does not appear in RCW 9.94A.715.

Additionally, both RCW 9.94A.545 and RCW 9.94A.715 authorize community custody for most *attempted* sex crimes because most “sex offenses” are explicitly defined as including attempts. See RCW 9.94A.030(42)(a)(iv). Likewise, both RCW 9.94A.545 and RCW 9.94A.715 authorize community custody for all *attempted* class A felonies because a violent offence is explicitly defined as including

³ The pertinent portions of both RCW 9.94A.545 and RCW 9.94A.715 are attached to this brief as Appendix 9.

attempts to commit any class A felony. See RCW 9.94A.030(50)(a)(i).⁴ For example, a court could impose community custody for anyone convicted of attempted second degree assault with sexual motivation or attempted first degree robbery because these constitute felony class A violent offenses.

In contrast, the statute defining crimes against persons does not include anticipatory crimes. See RCW 9.94A.411(2).⁵ Therefore, neither RCW 9.94A.545 nor RCW 9.94A.715 authorizes a court to impose community custody following a conviction for an attempt to commit a crime against persons, unless the underlying crime is also either a sex crime or a class A felony or other violent crime.

C. THE DOC'S STAKE IN THE EXCLUSIVITY OF RCW 9.94A.411(2)

When a trial court imposes community custody on a sentence not statutorily authorized to have community custody, it subjects the DOC to liability in several ways. First, the DOC must defend against suits from offenders contesting its authority to supervise them during an unlawful term of community custody. Second, if the DOC were to cease supervision because a court had imposed it unlawfully, the DOC would not only be in contempt of court but also may be subject to liability if

⁴ The portions of RCW 9.94A.030 that define sex offenses and violent offenses are attached to this brief as Appendix 9.

⁵ RCW 9.94A.411(2) is attached to this brief.

unsupervised offenders injured or killed a third party during the term of supervision.

Whether the list of crimes against persons under RCW 9.94A.411(2) is exclusive or merely suggestive is important to the DOC in other ways. A crime's categorization as a crime against persons affects the DOC's decisions whether to supervise offenders under RCW 9.94A.501 and authorize fifty-percent early release time for offenders, instead of the usual one-third, under RCW 9.94A.728. Both statutes require that the DOC use RCW 9.94A.411(2) to make its determinations. If the list under RCW 9.94A.411(2) is held to be open-ended, the DOC is subject to liability from both offenders and future victims. An open-ended list allows an offender to challenge the DOC's determination that the offender's crime was a crime against persons that precludes the offender from being eligible for fifty-percent early release time and that requires post-release supervision. And an open-ended list allows future victims of offenders to challenge the DOC's decision not to supervise an offender whose crime the DOC determines was not a crime against persons.

An open-ended list also would require the DOC to increase the resources it spends to clarify sentences. For example, if a court independently decided that a residential burglary was a crime against persons

based on a defendant's intentions in a specific case, nothing on the face of the judgment and sentence would reflect that determination. Yet, the DOC nevertheless would be required to treat the community custody term as potentially erroneous and would have to seek clarification or have the term removed through the post-sentence petition process under RCW 9.94A.585(7). Such a lack of clarity in the law does not serve the ends of justice.

D. CHARGING STATUTES VERSUS SENTENCING STATUTES

The Court of Appeals relied exclusively upon In re Post Sentence Review of Manier, 135 Wn. App. 33, 143 P.3d 604 (Div. III, 2006), when holding that RCW 9.94A.715 authorizes community custody for attempted second degree assault of a child. Manier applied the language of a charging statute, RCW 10.61.003, to the sentencing statute RCW 9.94A.715. Under RCW 10.61.003, a "jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of . . . an attempt to commit the offense." See Manier, 135 Wn. App. at 36, ¶ 10. Citing this statute, Manier concluded that an attempt is a lesser included offense of every completed crime. It then extended this charging rule to the sentencing context. It held that because assault is listed under RCW 9.94A.411(2) as a crime against persons, attempted

assault also is a crime against persons; the “*nature of the crime* does not change simply because it was attempted.” Manier, 135 Wn. App. at 36, ¶ 11 (emphasis added).

However, as a policy matter, the charging rule of RCW 10.61.003 should not apply in the sentencing context. The rule allows a defendant to be convicted of a lesser crime if not enough evidence exists to convict on the completed crime. If there is not enough evidence to convict on the completed crime, the resulting sentence should not be one that is appropriate for a completed crime. The Manier rule essentially elevates the lesser crime to the status of a completed crime for purposes of sentencing. This was not what the Legislature intended.

E. SENTENCING AUTHORITY MUST BE EXPLICIT

The Legislature defines crimes and fixes penalties. State v. Manussier, 129 Wn. 2d 652, 667, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). A trial court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999) (interpreting prior versions of RCW 9.94A.715(1) and RCW 9.94A.411(1) and holding that armed first degree burglary was not a “crime against a person” that could support community placement).

A trial court should not look beyond the text of the statute and ask about the “nature” of the crime to determine whether it constitutes a crime

against persons requiring community custody. Although this Court undertook this exact type of inquiry in Barnett, it did so solely because the wording of former RCW 9.94A.715(1) did not specify that its reference to “crimes against persons” meant those crimes listed under RCW 9.94A.411(2). Barnett 139 Wn.2d at 472 (interpreting former RCW 9.94A.120 and RCW 9.94A.440, which were recodified as RCW 9.94A.715 and RCW 9.94A.411, respectively).

This Court’s reliance in Barnett on a nature-of-the-crime analysis was appropriate there only because the pre-amended version of RCW 9.94A.715(1) had no reference to RCW 9.94A.411. Since Barnett, the Legislature has modified RCW 9.94A.715(1), specifying that its reference to “crimes against persons” means the crimes listed under RCW 9.94A.411(2). Anticipatory crimes are not listed in RCW 9.94A.411(2).

On the other hand, the definitions for “sex offense” and “violent offense” in RCW 9.94A.030 refer to anticipatory crimes. Additionally, RCW 9.94A.545, which is an almost identical counterpart to RCW 9.94A.715, refers to anticipatory crimes. “[W]here statutes relate to the same subject matter, we must read them as a unified whole to the end that a harmonious statutory scheme evolves which maintains the integrity of the respective statutes.” Anderson v. Department of Corrections, No. 78715-8, 2007 WL 851858, ¶ 22 (Wash. March 22, 2007).

The Legislature's references to anticipatory drug crimes in RCW 9.94A.545 and to anticipatory violent and sex crimes in RCW 9.94A.030 demonstrate that it can authorize community custody for such crimes when it so chooses. Likewise, the omission of such a reference in RCW 9.94A.715 allows the reasonable inference that community custody is prohibited for non-violent, non-sex-related anticipatory crimes where the confinement term is over one year. "Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citation omitted).

F. RCW 9.94A.411(2) IS EXCLUSIVE

The broader issue this Court must address is whether the list of crimes against persons under RCW 9.94A.411(2) is exclusive or merely suggestive. The Court's objective in construing statutes is to determine legislative intent. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). A statute's plain meaning is considered an expression of that intent. Id. Open-ended statutory interpretation should not answer a question with such a broad impact on offenders' limited liberty interests.

The Legislature has omitted numerous crimes from the list of crimes against persons because the enhanced penalties that a listing brings are

intended only for the crimes listed. For example, indecent exposure, as defined in RCW 9A.88.010, could reasonably be considered a crime against persons. And its definition could support that argument: “A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.” But indecent exposure is not on the list of crimes against persons.

Additionally, the Legislature has demonstrated its control over the list by periodically adding to it. For example, the crime of identity theft was previously not on the list, but in 2006 the Legislature amended the statute to include it as a crime against persons. See Laws of 2006, ch. 271.

To hold that the list under RCW 9.94A.411 is suggestive rather than exclusive would allow inconsistent applications of the definition of a “crime against persons.” For example, under the Ex Post Facto rule, anyone who committed identity theft prior to the effective date of the amendment would argue that he or she is not subject to the enhanced penalties that the new listing brings. See *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (holding that law violates Ex Post Facto Clause if law increases quantum of punishment for crime after its commission). A person convicted of a crime not explicitly on the list (*e.g.*, residential burglary) would not have this same defense, however.

Moreover, he or she would face different sentencing results depending on what nature-of-the-crime conclusions the judge made. Under the decision below and under Manier, a court could determine that the “nature of the crime” in a given case was a crime against persons. If the defendant had not admitted in her plea agreement that her crime was a crime against persons, the sentence would violate Blakely v. Washington, 542 U.S. 296 (2004).

Leach or the State may argue that State v. Mannering requires this Court to rule in their favor. See State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003). In that case, the Court interpreted RCW 9A.16.060. That statute allows a defendant to claim the defense of duress, but it specifically bars defendants convicted of murder from claiming such a defense. Mannering was charged with *attempted* murder. The Court reasoned that the crime of murder includes the crime of attempted murder. As with Manier, the decision in Mannering relied upon the charging rule that a jury can convict on attempt if it does not find enough evidence to convict on the completed crime because a completed crime necessarily is composed of the substantial steps that would establish an attempted crime. The Mannering decision extended this rule to hold that the exception for murder in the duress defense statute includes attempted murder.

Mannering is distinguishable from this case. The statute there involves the longstanding common law bar to duress in cases of murder. See State v. Mannering, 112 Wn. App. 268, 274, 48 P.3d 367 (2002) (citing 40 Am. Jur. 2d, Homicide § 115 (1999)). The attempted murder rule that this Court set down in Mannering merely applies a narrow principle of common law. That policy-driven context is far different from the statutory context in Leach's case, where the statutory regime explicitly addresses anticipatory crimes.

The statutory context in Mannering, on the other hand, does not address anticipatory crimes at all. See Chapter 9A.16, RCW. It would constitute improper statutory construction to read the word "attempts" into RCW 9.94A.715 when the Legislature has demonstrated in RCW 9.94A.545 and RCW 9.94A.030 that it will explicitly include attempts in the community custody statutes when it so chooses.

The DOC's position is also logically correct. A category necessarily contains within it all elements of its subcategories. But a subcategory does not necessarily contain within it all elements of the category. Hence, it is true, as stated in Mannering, that the concept of a murder contains within it all components of attempted murder. However, the reverse is not true. The concept of attempted murder does not necessarily contain within it all components of murder (*e.g.*, attempted

murder does not involve death of a victim). Therefore, it is incorrect to assume that *attempted* second degree assault rises to the level of a crime against persons merely because second degree assault rises to that level.

The crime of attempted second degree assault irrefutably is not included in the list of crimes against persons under RCW 9.94A.411(2). The community custody statute, RCW 9.94A.715, precludes a sentencing court from imposing community custody for crimes not expressly on the list of crimes against persons, even when a court believes that the nature of the crime is equivalent to a crime against persons. A trial court may only impose a sentence that is authorized by statute. The statute does not authorize community custody for sentences of over one year where the conviction is for an anticipatory crime.

IV. CONCLUSION

This Court should hold that the list of crimes against persons under RCW 9.94A.411(2) is an exclusive list for purposes of a court's

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sentencing authority and should remand for resentencing to remove the community custody portion of Leach's sentence.

RESPECTFULLY SUBMITTED this 9th day of April, 2007.

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A handwritten signature in cursive script, appearing to read "Ronda D. Larson", written in black ink.

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APPENDIX 9

RCW 9.94A.545
Community custody.

(1) Except as provided in RCW 9.94A.650 and in subsection (2) of this section, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crime, the court may impose up to one year of community custody, subject to conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

(2) If the offender is guilty of failure to register under RCW 9A.44.130(10)(a), the court shall impose a term of community custody under RCW 9.94A.715.

[2006 c 128 § 4; 2003 c 379 § 8; 2000 c 28 § 13; 1999 c 196 § 10; 1988 c 143 § 23; 1984 c 209 § 22. Formerly RCW 9.94A.383.]

RCW 9.94A.715
Community custody for specified offenders — Conditions.

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of RCW 9A.44.130(10)(a) committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

...

[2006 c 130 § 2; 2006 c 128 § 5; 2003 c 379 § 6; 2001 2nd sp.s. c 12 § 302; 2001 c 10 § 5; 2000 c 28 § 25.]

RCW 9.94A.030 Definitions

(42) "Sex offense" means:

- (a)(i) A felony that is a violation of chapter 9A.44 RCW other than ***RCW 9A.44.130(11);
 - (ii) A violation of RCW 9A.64.020;
 - (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or
 - (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;
 - (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;
 - (c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or
 - (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.
- ...

(50) "Violent offense" means:

- (a) Any of the following felonies:
 - (i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;
 - (ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;
 - (iii) Manslaughter in the first degree;
 - (iv) Manslaughter in the second degree;
 - (v) Indecent liberties if committed by forcible compulsion;
 - (vi) Kidnapping in the second degree;
 - (vii) Arson in the second degree;
 - (viii) Assault in the second degree;
 - (ix) Assault of a child in the second degree;
 - (x) Extortion in the first degree;
 - (xi) Robbery in the second degree;
 - (xii) Drive-by shooting;
 - (xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and
 - (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and
- (c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

RCW 9.94A.411(2)(a) Table

CATEGORIZATION OF CRIMES FOR PROSECUTING STANDARDS

CRIMES AGAINST PERSONS

Aggravated Murder

1st Degree Murder

2nd Degree Murder

1st Degree Manslaughter

2nd Degree Manslaughter

1st Degree Kidnapping

2nd Degree Kidnapping

1st Degree Assault

2nd Degree Assault

3rd Degree Assault

1st Degree Assault of a Child

2nd Degree Assault of a Child

3rd Degree Assault of a Child

1st Degree Rape

2nd Degree Rape

3rd Degree Rape

1st Degree Rape of a Child

2nd Degree Rape of a Child

3rd Degree Rape of a Child

1st Degree Robbery

2nd Degree Robbery

1st Degree Arson

1st Degree Burglary

1st Degree Identity Theft

2nd Degree Identity Theft

1st Degree Extortion

2nd Degree Extortion

Indecent Liberties

Incest

Vehicular Homicide

Vehicular Assault

1st Degree Child Molestation

2nd Degree Child Molestation

3rd Degree Child Molestation

1st Degree Promoting Prostitution

Intimidating a Juror

Communication with a Minor

Intimidating a Witness

Intimidating a Public Servant

Bomb Threat (if against person)

Unlawful Imprisonment

Promoting a Suicide Attempt

Riot (if against person)

Stalking

Custodial Assault

Domestic Violence Court Order Violation
(RCW 10.99.040, 10.99.050, 26.09.300,
26.10.220, 26.26.138, 26.50.110, 26.52.070, or
74.34.145)

Counterfeiting (if a violation of RCW
9.16.035(4))