71093-1

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No. 71093-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARL ADORNETTO,

Appellant.

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

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# APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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## A. ASSIGNMENT OF ERROR

The trial court abused its discretion in refusing to impose a Family and Offender Sentencing Alternative (FOSA).

## B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court abuses its discretion in refusing to impose a sentencing alternative if it applies the wrong legal standard or refuses to consider the alternative for a class of offenders who are otherwise eligible. Here, the trial court refused to consider granting Richard Adornetto a FOSA, stating it did not believe a FOSA was appropriate because Mr. Adornetto's incarceration would not require that his four-year-old child be placed in foster care. Did the court abuse its discretion, where it effectively refused to apply the sentencing alternative to an entire class of offenders who might otherwise be eligible, in the absence of legislative intent to limit application of the sentencing alternative for those offenders?

## C. STATEMENT OF THE CASE

On November 28, 2012, Mr. Adornetto was charged in King County Superior Court with one count of residential burglary and three counts of theft of a firearm. CP 1-3. The charges arose out of an

incident in which he unlawfully entered a residence in Seattle and stole three firearms. CP 17. Mr. Adornetto pled guilty as charged. CP 6-29.

Prior to sentencing, defense counsel filed a presentence report requesting that the court impose a FOSA. CP 47-81. Attached to the report was an assessment prepared by a social worker employed by the defense. CP 56-59. The social worker reported that Mr. Adornetto had a four-year-old daughter named Samantha. CP 57. Mr. Adornetto, his wife Myleshia, and Samantha lived together in a home in Seattle. CP 57. Prior to Mr. Adornetto's incarceration, both he and his wife had stable, regular employment. CP 58. The two shared parenting duties and worked well as a team. CP 57. Myleshia reported Mr. Adornetto was a "great dad." CP 57. The family enjoyed spending time together reading, playing, watching movies, and going to the pool and the park. CP 57.

Mr. Adornetto told the social worker he wanted a FOSA for the sake of his daughter and believed he would benefit from the intensive supervision and programming requirements that a FOSA would entail. CP 57. Mr. Adornetto's own father had been in prison for most of his childhood and he knew how harmful a father's absence can be for a child. He did not want his daughter to suffer the same experience. CP

56-59. Mr. Adornetto had only one prior felony conviction, for residential burglary in 2009. CP 35. He did not have a history of substance abuse or psychiatric treatment. CP 58. He was committed to his family and committed to making up for his mistakes. CP 58.

At the sentencing hearing, Mr. Adornetto requested the court impose a FOSA. 9/27/13RP 4-5. The court denied the request, stating its belief that the FOSA statute did not apply to families where the parent's incarceration would not result in the child's being placed in foster care. 9/27/13RP 5-6. The court explained its reasoning as follows:

> It appears to the Court that there may very well be appropriate cases for this kind of parenting sentencing alternative. And really the Court sees those, and I saw those in some of the PowerPoint demographic breakdown, situation where the child would be in foster care but for the parents being spared a prison sentence, or circumstances that would be really endangering to the child. And I don't mean to minimize any child having to be separated from any parent for a period of incarceration, but that's un unpleasant fact of life in this arena. But this isn't a situation where the Court would exercise its discretion to grant such a sentence.

9/27/13RP 6. The court imposed a standard-range sentence of 31 months. CP 33.

## D. ARGUMENT

### THE COURT ABUSED ITS DISCRETION IN REFUSING TO IMPOSE A FOSA ON THE BASIS THAT MR. ADORNETTO'S INCARCERATION WOULD NOT REQUIRE HIS CHILD TO BE PLACED IN FOSTER CARE

#### 1. The Legislature did not intend the FOSA sentencing alternative to be available only to families whose children are placed in foster care as a result of a parent's incarceration.

Although sentencing courts have considerable discretion under the Sentencing Reform Act (SRA), they are still required to act within its strictures and principles of due process of law. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Id. at 342. If a defendant requests a sentencing alternative, the court's categorical refusal to consider the alternative for a class of offenders who are otherwise eligible, is effectively a failure to exercise discretion. Id. A court abuses its discretion if its decision was reached by applying the wrong legal standard and was thus made "for untenable reasons." State v. Sisouvanh, 175 Wn.2d 617, 623, 290 P.3d 942 (2012).

The question is whether the Legislature intended to limit application of the FOSA sentencing alternative to only those offenders whose children are placed in foster care, or are otherwise directly and imminently imperiled, as a result of a parent's incarceration. Questions of statutory interpretation are reviewed de novo on appeal. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). When interpreting a statute, "the court's objective is to determine the legislature's intent." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the meaning of the statute is plain on its face, the Court gives effect to that plain meaning. Id. If, after examining the plain language of the statute, it is susceptible to more than one reasonable interpretation, it is ambiguous and the Court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

A penal statute that is subject to more than one reasonable interpretation must be strictly construed in favor of the defendant. State v. Evans, 177 Wn.2d 186, 193, 298 P.3d 724 (2013). This means the Court will interpret an ambiguous penal statute adversely to the defendant only if statutory construction "clearly establishes" that the

Legislature intended such an interpretation. Id. Otherwise, if the indications of legislative intent are insufficient to clarify the ambiguity, the Court interprets the statute in favor of the defendant. Id.

The Legislature enacted the Family & Offender Sentencing Alternative statute, RCW 9.94A.655, in 2010. Laws 2010, ch. 224, § 2. The statute provides a sentencing alternative for certain nonviolent offenders who have minor children. An offender is eligible for a FOSA if (1) the high end of the standard sentence range for the current offense is greater than one year; (2) the offender has no prior or current conviction for a felony that is a sex offense or a violent offense; and (3) "[t]he offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense." RCW 9.94A.655(1).[1] On its face, the statute does not limit application of the

[1] If the sentencing court determines that the offender is eligible for a FOSA, the court waives imposition of a standard-range sentence and imposes a sentence of 12 months of community custody instead. RCW 9.94A.655(4). During the term of community custody, in addition to standard conditions, the court may impose several special conditions including: requiring the parent to attend parenting classes, engage in chemical dependency or mental health treatment, and engage in vocational training or life skills classes. RCW 9.94A.655(5). If the offender violates any of the conditions imposed, or fails to make satisfactory progress in treatment, the court may order the offender to serve a term of total confinement within the standard range. RCW 9.94A.655(7).

sentencing alternative only to offenders who are the *sole* guardian or custodian of the child. In other words, the statute does not plainly require that the child be subject to placement in foster care or be otherwise directly endangered as a result of the parent's incarceration.

Legislative history indicates the Legislature enacted the statute as a means of protecting the public by discouraging the cycle of criminality that often occurs within families as a result of a parent's incarceration. The harms to children the Legislature intended to address are not limited to those caused by foster care. Testimony given in the senate on behalf of the bill reported that:

> Incarceration of a parent has a significant impact on a child and can destroy a parent's tie with their child. The foster care rate is between 10 and 20 percent and these children have an increased incidence of substance abuse problems, mental illness, and incarceration. . . . This bill meets the goals of protecting public safety while giving both the incarcerated parent and child an opportunity for better outcomes.

S.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010).

Similarly, testimony in the house reported that a sentencing alternative for parents would have "tremendous impact on children and may stop the cycle of crime." H.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010). Promoters of the bill stated that "[s]tatistics show that children of incarcerated parents often engage in

the same cycle of behavior as the parent. This bill would offer some early prevention and intervention to help keep these kids out of the system." Id.

The Department of Corrections (DOC) and the Department of Social and Health Services both supported the bill. See Washington State Department of Corrections, "Alternatives to Total Confinement for Some Parents of Minor Children: A Positive Solution for Public Safety," available at http://www.doc.wa.gov/community/fosa. The DOC supported the bill because "[r]esearch shows children of incarcerated parents are significantly more likely to end up in the criminal justice system themselves. The goal of this program is to help stop that cycle of criminal activity." Id.

Nothing in the legislative history or the DOC report indicates the Legislature intended the FOSA alternative be available only to offenders whose children are in foster care. Instead, the purpose of the bill is to help maintain relationships between offenders and their children, and to mitigate the harmful outcomes for children and families that often occur when a parent is incarcerated. These ameliorative purposes are served by a FOSA regardless of whether the

child is in danger of direct, imminent, harm caused by the parent's incarceration.

A report issued in February 2013 on the implementation and outcomes of the FOSA program to date demonstrates that sentencing courts routinely impose FOSAs in cases such as Mr. Adornetto's, where the offender is not the only person responsible for parenting the child. See Susie Leavell, "Promising Outcomes for a Parenting Sentencing Alternative," http://www.reclaimingfutures.org/blog/parenting-sentencing-alternative (Feb. 4, 2013). In fact, most offenders who receive a FOSA are *not* the sole caregivers of their children. Id. As of February 2013, 67 percent of offenders who received a FOSA were parenting with another support person in the home, 30 percent were on their own in the home, and 3 percent participated in some sort of parenting plan. Id. The report concludes that the FOSA program offers appreciable benefits well beyond keeping children out of foster care. "The Parenting Sentencing Alternative helps provide very good outcomes for participants: sustained employment, continued education, improved parenting skills,

and better readiness for life in general. It helps equip offenders with skills to balance life's responsibilities with parenting."[2] Id.

In sum, the plain language of the FOSA statute and the legislative history demonstrate that the Legislature did not intend that the program be applied only to families with children in foster care, or with children at risk of direct and imminent harm caused by a parent's incarceration. Instead, the purpose and benefits of the program are much broader: to protect the public by stopping the cycle of criminality within families; to prevent recidivism among parents themselves; and to "meet[] the goals of protecting public safety while giving both the incarcerated parent and child an opportunity for better outcomes." S.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010).

2. The court abused its discretion in refusing to impose a FOSA in this case

In this case, the sentencing court refused to grant Mr. Adornetto a FOSA based on its conclusion that the Legislature intended the

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[2] The report also concluded that the FOSA program offers significant cost benefits. Supervising parents on the program is much cheaper than incarcerating them. Leavell, "Promising Outcomes for a Parenting Sentencing Alternative," supra. More important, the program so far has shown measurable success. To date, only 18 percent of program participants have had their alternative revoked. Id. Of the 230 offenders who have successfully completed the program, only two have returned to prison on a new felony. Id. That is compared to a 29 percent recidivism rate for offenders on traditional supervision. Id.

program be available only in a "situation where the child would be in foster care but for the parents being spared a prison sentence, or circumstances that would be really endangering to the child." 9/27/13RP 6. A sentencing court abuses its discretion in refusing to consider a sentencing alternative if its refusal is based on a belief that the alternative is unavailable for a class of offenders who are otherwise eligible. Grayson, 154 Wn.2d at 342. Because the court's interpretation of the law is contrary to the plain language of the statute and legislative intent, it applied the wrong legal standard. Its decision was therefore an abuse of discretion. Sisouvanh, 175 Wn.2d at 623.

Here, under the plain language of the statute, Mr. Adornetto was eligible for a FOSA. The high end of the standard sentence range for his residential burglary conviction was greater than one year; he had no prior or current conviction for a felony that was a sex offense or a violent offense; and he had physical custody of his minor child at the time of the current offense. RCW 9.94A.655(1).

Nothing in the plain language of the statute or the legislative history suggests the Legislature intended to exclude offenders like Mr. Adornetto from receiving a FOSA. Although Mr. Adornetto's child is not in foster care and his wife is able to care for her while he is in

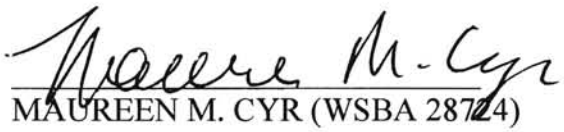
prison, the FOSA program could still provide appreciable benefits to him and his family and ultimately help to protect the public. The loss of Mr. Adornetto's income and his absence from the family will surely have a negative impact on his child. If he were to receive a FOSA, he would not only be able to maintain his relationship with his child and continue to help provide for the family, but he would also be less likely to reoffend. Leavell, "Promising Outcomes for a Parenting Sentencing Alternative," supra. In addition, the State would save a considerable amount of money by not having to pay the costs of incarcerating him. Id. These outcomes are more consistent with legislative intent than the court's categorical refusal to apply a FOSA in this case.

When a sentencing court categorically refuses to consider a sentencing alternative for a group of offenders who are otherwise eligible, the court commits reversible error. Grayson, 154 Wn.2d at 342. The remedy is to reverse the sentence and remand for a new sentencing hearing at which the court meaningfully considers the sentencing alternative. Id. at 343. That is the remedy here.

E. CONCLUSION

Because the sentencing court abused its discretion in refusing to consider a FOSA for Mr. Adornetto, he must be resentenced.

Respectfully submitted this 31st day of March, 2014.



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

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| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 71093-1-I |
| v. | ) | |
| | ) | |
| RICHARD ADORNETTO, | ) | |
| | ) | |
| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] RICHARD ADORNETTO<br>368591<br>MONROE CORRECTIONAL COMPLEX<br>PO BOX 777<br>MONROE, WA 98272-0777 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 31ST DAY OF MARCH, 2014.

X_____

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