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Court of Appeals  
Division III  
State of Washington

NO. 31595-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE HERNANDEZ,

Appellant.

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error. These can be summarized as follows;

1. The offender score was not properly calculated.
2. The trial court exceeded its statutory authority in imposing its sentence.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did err when it calculated the offender score, however Appellant has also miscalculated that score.
2. a. The trial court exceeded its authority when it imposed a combined sentence, including community custody which exceeds the maximum sentence.  
b. The ignition interlock was properly imposed.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

**RESPONSE TO ALLEGATION ONE**

The actions of the trial court regarding the inclusion of some prior criminal offenses in scoring the sentence range on count 1, Felony Driving Under the Influence of Intoxicating Liquor and/or Drugs was correct, the

court properly included the prior Possession of Stolen Property, Attempt to Elude, Malicious Mischief, Forgery and Second Degree Robbery. CP 67. The action of the trial court was proper; State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992), “A sentencing judge's discretion under the SRA is structured, but not eliminated. See RCW 9.94A.010.” The SRA does not limit the prior convictions that count toward the offender score for Felony DUI solely to those offenses included in RCW 9.94A.525(2)(e). State v. Morales, 168 Wn.App. 489, 278 P.3d 668 (2012), is not controlling.

Hernandez’s prior convictions were properly included in his offender score because they did not wash out under RCW 9.94A.525(2)(c), that provision requires that these offenses be included in his offender score. RCW 9.94A.525 (11) is the scoring provision for all felony traffic offenses, including felony DUI, and plainly requires that where the present conviction is for a felony traffic offense, each prior adult felony conviction counts as one point:

**If the present conviction is for a felony traffic offense** count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; **for each felony offense count one point for each adult** and ½ point for each juvenile **prior conviction**; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and ½ point for each juvenile prior conviction; count one point for each adult and ½ point for each juvenile prior conviction

for operation of a vessel while under the influence of intoxicating liquor or any drug. RCW 9.94A.525(11) (2009) (emphasis added).

Because Hernandez's present conviction for felony DUI is a "felony traffic offense," RCW 9.94A.525(11) directs the court to count each of his prior felony convictions as one point. RCW 9.94A.030(25). Thus, under the plain language of RCW 9.94A.525(11), Hernandez's prior conviction as set forth in his Judgment and Sentence were properly included in his offender score, just as any other adult felony conviction would be.

Former RCW 9.94A.525(2) addresses when certain prior convictions "wash out," or no longer count, in an offender score. Subsection (2)(a) provides that Class A and sex felonies never wash out. Subsection (2)(b) provides that Class B felonies other than sex offenses wash out after the offender spends 10 crime-free years in the community. Subsection (2)(c) and (2)(d) provide that Class C felonies and serious traffic offenses wash out after the offender spends five crime-free years in the community except as provided in subsection (2)(e). Subsection (2)(e) thus operates as an exception to the wash-out provisions of subsections (2)(c) and (2)(d), reviving certain offenses that would otherwise wash out under (2)(c) and (2)(d), but only where the present conviction is for felony DUI or felony physical control:

**(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if:** (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.  
Former RCW 9.94A.525(2)(e) (2009) (emphasis added).

By its plain language, this provision addresses only when prior convictions for felony DUI, felony physical control, and serious traffic offenses wash out when the defendant is convicted of felony DUI or felony physical control. It does not address the wash out of felony convictions other than those specified, so it does not govern whether such convictions count or under what circumstances they wash out. In other words, subsection (2)(e) is irrelevant to whether prior convictions count toward the offender score of one convicted of felony DUI.

Morales does not preclude inclusion of felony convictions felony convictions not specified in subsection (2)(e) in a Felony DUI offender score. Hernandez argues that the Court’s decision in Morales barred the superior court from including in his offender score any conviction other



than those listed in subsection (2)(e). But Morales does not support that proposition, the issue of whether other felony convictions count in an offender score for felony DUI was not even before the court in Morales.

Morales was convicted of felony DUI. 168 Wn. App. at 491. The trial court calculated an offender score of eight in part by counting four “serious traffic offense” convictions that were more than 10 years old. Id. at 493-94. The State argued that these convictions counted under RCW 9.94A.525(2)(e)(i), which provides that prior convictions for serious traffic offenses are included if “committed within five years since the last date of release from confinement ... or entry of judgment and sentence.” Though nine years had passed between Morales’s 1992 conviction for physical control of a motor vehicle and his next DUI conviction, the State argued that an intervening misdemeanor assault conviction prevented the earlier serious traffic offenses from washing out under subsection (2)(e)(i). Id. at 496-97.

The Morales court disagreed, holding that “the prior convictions’ to which subsection (2)(e)(i) refers are the specific convictions outlined in the immediately preceding provision of the statute.” Id. at 497-98. In other words, only convictions for “felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug and serious traffic offenses” prevent wash out of felony DUI, physical control, and serious

traffic offenses more than ten years old under subsection (2)(e)(i). Since Morales's misdemeanor assault was not one of the listed offenses, it did not prevent the earlier serious traffic offense convictions from washing out. Id. Nothing in Morales supports the conclusion that, despite the express language of RCW 9.94A.525(11), prior adult felonies should not be counted in the calculation of the offender score for a felony traffic offense.

Any contrary interpretation of Morales is belied by the facts of Morales itself. In addition to the felony DUI, Morales was simultaneously sentenced for the felony offense of attempting to elude a pursuing police vehicle. 168 Wn. App. at 491. The Court stated that, "Subsection (2)(e)(ii) ... requires that his three most recent prior [serious traffic] convictions be included in his offender score. His current conviction of the crime of attempting to elude is scored as 1. Therefore, his correct offender score is 4." 168 Wn. App. at 500-01. Attempting to elude is a felony not listed in subsection (2)(e), so its inclusion in Morales's offender score demonstrates that felonies other than those listed in that subsection do count toward a felony DUI defendant's offender score. By the same token, Hernandez's prior felony convictions were properly included in his offender score.

The trial court reviewed briefing from both the State and the defendant and closely reviewed Morales. After that review the court stated;

THE COURT: --.... And so as I did it reading the statutes -- I'm just going to tell you where I'm starting, okay, so you kind of know. As I did it and as I read it, I think you do count the prior criminal history that hasn't washed, and then you look at the other traffic matters the way you did, the ones that count.

RP 03.19.13 pg. 4

...

THE COURT: And I think it should be a 9.

MR. GUZMAN: I agree, Your Honor. I didn't count the community --

THE COURT: But it still maxes at 60, so --

MR. GUZMAN: Right.

THE COURT: And then on the other one, I think I came up with an offender score of 5 putting him on -- I think you may have had a 4, and I ended up with a 5 because he was on supervision.

RP 03.19.13 pg. 4

MR. GUZMAN: I actually had him at a 6 on the Assault III, Your Honor.

THE COURT: You had him on a 6? What was your range?

MR. GUZMAN: Well, I was also including if we included, I guess, the current charge.

THE COURT: I did, too. I did, too.

MR. GUZMAN: So what I had was the --

THE COURT: And you -- did -- and you gave him a point for being on supervision, too?

MR. GUZMAN: That would have put him at a 7 under mine.

THE COURT: I -- yeah, I think it was a 7, and I -- that I thought he was at. Do you agree with that --

MR. GUZMAN: Yeah.

THE COURT: -- at this point?

MR. GUZMAN: On the Assault III.

THE COURT: Okay. So I'm kind of with you on that.

MR. GUZMAN: Okay.

THE COURT: And I did look at the statutes.

RP 03.19.13 pg. 5

...

MR. NEWHOUSE: And why don't the other felony convictions count when computing his offender score for purposes of the felony DUI.

THE COURT: But I think that we do, don't you?

MR. NEWHOUSE: No, I don't.

THE COURT: Okay. That's where we differ. Okay.

RP 03.19.13 pg. 8

...

THE COURT: Okay. But -- Okay. Well, let -- looking at -- and I just kind of want to hone in on this, because I think I'm with you. I want to make sure that I am.

If you look at RCW 9.94A.525(11), and I think that's kind of where we are -- and I'm looking at the State's brief right now -- "If the present conviction is for a felony traffic offense" -- which we agree the felony DUI is, correct? -- "you count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault," for which he has no -- none.

MR. NEWHOUSE: Mm-hmm.

THE COURT: Semicolon: For each felony offense count one point for each adult and one point for each -- or a half point for each juvenile. And then: For each serious traffic offense, other than those used to enhance, count one point for each of those. So what -- I think what you're saying is you don't count other felonies. You count the current offense of the third degree assault --

MR. NEWHOUSE: Yes.

THE COURT: -- but you don't count other felonies.

MR. NEWHOUSE: You --

THE COURT: But doesn't this language clearly say: For each felony offense count one point

RP 03.19.13 pg. 9-10

THE COURT: But doesn't this language clearly say: For each felony offense count one point?

RP 03.19.13 pg. 11

...

THE COURT: Okay. And (2)(d) says, "Except as provided in (e) of this section" -- "subsection" --

MR. NEWHOUSE: Yes.

THE COURT: -- "serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement, including full-time residential treatment, pursuant to a felony conviction,

if any, or entry of judgment and sentence, the offender spent five" -- isn't that the wash -- just a wash-out provision? That's all that is.

RP 03.19.13 pg. 12

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THE COURT: The case seems to center primarily about the wash-out provisions for non-felony traffic offenses. So I don't know, that's just the way I read it. Keep going.

MR. NEWHOUSE: Your Honor, and, you know, honestly --

THE COURT: And he didn't have -- Morales didn't have the issues we have here. He didn't -- he had a lot of DUIs, but he didn't have --

MR. NEWHOUSE: He didn't.

THE COURT: -- other felonies and so forth.

RP 03.19.13 pg. 13

THE COURT:...And I read the statute, I read the briefs and then I looked at the guidelines. And if you pull out the felony DUI scoring page, it certainly tracks the analysis that the State is putting on this.

RP 03.19.13 pg. 21

...

THE COURT: Exactly right. But there is also a caveat, and, you know, it's not a supreme court decision, but it's a guideline to help us as we, you know, fight our way through this forest of legislation that's sometimes very complicated.

But -- and looking at Morales, I really do agree with Mr. Guzman. Morales is not about the situation. And I don't think that this -- I don't think we -- I don't think there is a statutory construction issue here. I think it's really clear. I don't think it's hard to apply, and I totally agree with the State.

So the -- I believe that on the felony DUI, he has an offender score of 9, but that doesn't count the second degree robbery. Because you think it's dismissed, but it may still be there. And if it does, then he has a 10. He maxes out at 8 anyway, but that could affect -- certainly could and I suspect would affect the sentence on the third degree assault.

So for purposes of the ruling today, I would say that on the felony DUI he has a 9, on the third degree assault, he has a 7. But that assumes that there is no second degree robbery conviction. And if there is and it hasn't washed, which I don't think it has, then he will have a 10 and an 8 respectively.

PR 03.19.13 pg. 22

Division Two's decision in State v. Jacob, 176 Wn. App. 351, 308 P.3d 800 (2013), does not dictate a different result. In Jacob, the court considered whether the superior court erred in including a 1993 drug conviction and a 1989 DUI in calculating his felony DUI offender score. Id. at 357. With respect to the drug conviction, the court cited only to Morales for the proposition that subsection (2)(e)(i) limits the offenses that can be included in a felony DUI offender score to those specified in subsection (2)(e). Id. at 360. Jacob did not address the application of RCW 9.94A.525(11) and overlooked the fact that the Morales court itself affirmed the inclusion of an offense not specified in subsection (2)(e) in Morales's offender score.

Furthermore, related statutory provisions must be read together to achieve a harmonious result. State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (2000). To interpret subsection (2)(e) as limiting the offenses that can be counted in a felony DUI offender score to those specified in that section creates an irreconcilable conflict between that provision and subsection (2)(a), which directs that "Class A and sex prior felony convictions shall always be included in the offender score." Former RCW 9.94A.525(2)(a). If for example Hernandez's Second Degree had instead been First Degree, a class A felony, RCW 9A.56.200, Under subsection (2)(a), they would always count in his offender score. But under this

Court's interpretation of subsection (2)(e), they could not. Interpreting these provisions according to the State's straightforward analysis outlined above avoids this irreconcilable conflict.

It is the State's position that to limit the use of former RCW 9.94A.525(2)(e) (2009) to the type of prior felony convictions that can be used to calculate the offender score of one convicted of Felony DUI/Physical Control would be erroneous. Such an erroneous conclusion would conflict with the Washington State Supreme Court's decision in State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010)

In Moeurn, the Court held that RCW 9.94A.525 sets out a three-step process for calculating offender scores for sentencing purposes. 170 Wn.2d at 175. The first step is to identify "all prior convictions" using the statutory definition of "prior conviction" contained in former RCW 9.94A.525(1).<sup>1</sup> Moeurn, 170 Wn.2d at 175 (emphasis added). The second step is to sift through the prior convictions to eliminate those that wash out under subsection (2) of the statute. Moeurn, 170 Wn.2d at 175. The third step is to "count" the remaining convictions according to the specific rules set out in the rest of the section. Id.

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<sup>1</sup> "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." Former RCW 9.94A.525(1) (2009).

Thus, in Hernandez's case, the first step was to identify all of his prior convictions. "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." Former RCW 9.94A.525(1). The trial court identified ten prior convictions, including the Possession of Stolen Property, Attempt to Elude, Malicious Mischief, Forgery and Second Degree Robbery. CP 67

The next step, according to Moeurn, is to determine whether any of these ten prior convictions "washes out," or does not count in Hernandez's offender score. 170 Wn.2d at 175. Former RCW 9.94A.525(2) includes several provisions dictating when certain types of prior convictions wash out. Subsection (2)(a) provides that Class A and sex felonies never wash out. Subsection (2)(b) provides that Class B felonies other than sex offenses wash out after the offender spends 10 crime-free years in the community. Subsection (2)(c) and (2)(d) provide that Class C felonies and serious traffic offenses wash out after the offender spends five crime-free years in the community except as provided in subsection (2)(e). Subsection (2)(e) thus operates as an exception to the wash-out provisions of subsections (2)(c) and (2)(d), reviving certain offenses that would otherwise wash out under (2)(c) and (2)(d), but only where the present conviction is for felony DUI or felony physical control:



**(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if:** (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.  
Former RCW 9.94A.525(2)(e) (2009) (emphasis added).

By its plain language, this provision addresses only when prior convictions for felony DUI, felony physical control, and serious traffic offenses wash out when the defendant is convicted of felony DUI or felony physical control. It does not address the wash-out of felony convictions other than those specified, so it does not govern whether such convictions count or under what circumstances they wash out. In other words, subsection (2)(e) is irrelevant to whether prior drug convictions count toward the offender score of one convicted of felony DUI.

After identifying all prior convictions and eliminating those that wash out under subsection (2), the final step is to “‘count’ the prior convictions that remain in order to arrive at an offender score.” Moeurn, 170 Wn.2d at 175. In the 2009 version of the statute applicable here,

subsections (3) through (20) provide specific rules regarding the actual calculation of offender scores, instructing courts to count prior offenses by assigning different numerical values to the prior offenses. Former RCW 9.94A.525(3)-(20) (2009). Subsection (11) applies “[i]f the present conviction is for a felony traffic offense,” which includes Felony DUI. Former RCW 9.94A.525(11) (2009). That subsection directs the court to count one point for each adult felony.<sup>2</sup> Id. Thus, each of Hernandez’s prior felonies count as one point, plus one point for being on Community Supervision at the time of the this offense, for a total score of “9+.” CP 67.

If this court were to follow the argument of Appellant a trial court would not, in Felony DUI/Physical Control cases, determine initially all prior convictions, but rather to identify only prior convictions for Felony DUI/Physical Control and serious traffic offenses. Not only does this

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<sup>2</sup> The complete text of the subsection is as follows:

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and ½ point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and ½ point for each juvenile prior conviction; count one point for each adult and ½ point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

Former RCW 9.94A.525(11) (2009).

reading of the statute conflict with Moeurn, but it is patently inconsistent with subsection (2)(a), which provides that “Class A and sex prior felony convictions shall always be included in the offender score.” Former RCW 9.94A.525(2)(a).

Once again, Morales does not conclude that former RCW 9.94A.525(2)(e) limits the prior offenses that can be included in a Felony DUI defendant’s offender score. Morales does not support that proposition. Indeed, the issue of whether felonies other than those listed in subsection (2)(e) count in an offender score for Felony DUI was not even before the court in Morales. Rather, the issue in Morales was whether an intervening misdemeanor assault conviction – which would never count in an offender score for Felony DUI – kept certain serious traffic offense convictions that were more than ten years old from washing out under subsection (2)(e)(i). 168 Wn. App. at 496-98. The Morales court concluded that the only convictions that could keep older convictions for Felony DUI/Physical Control and serious traffic offenses from washing out were other convictions for Felony DUI/Physical Control and serious traffic offenses. Id.

Nothing in Morales supports the proposition that prior adult felonies unrelated to Felony DUI/Physical Control/serious traffic offenses should not be counted as set out in the statute. Indeed, the Morales court

explicitly concluded that such an offense does count. There, Morales was convicted of Felony DUI along with a concurrent felony offense of attempting to elude a pursuing police vehicle. As stated above Attempting to elude is a felony not listed in subsection (2)(e) just at the current offense in this case, Assault third degree is not included. Therefore just as Division One held that “Subsection (2)(e)(ii) ... requires that his three most recent [serious traffic] convictions be included in his offender score. His current conviction of the crime of attempting to elude is scored as 1, this court must include Assault third degree in Hernandez’s offender score. Clearly by including an offense not listed in subsection (2)(e) in Morales’s offender score, the Morales court necessarily rejected the very proposition for which it is cited in Hernandez’s case and confirmed that felonies other than those listed in subsection (2)(e) are properly included in a Felony DUI defendant’s offender score.

Appellant also cites State v. Graciano, 176 Wn.2d 531,536, 295 P.3d 219 (2013), RCW 9.94A.525(1),; RCW 9.94A.589; for the proposition that the other “current offense must be treated the same as a prior conviction for the purposes of calculating the offender score.” This is incorrect. Appellant has not and cannot claim that Assault Third Degree and Felony Driving Under the Influence are the same criminal conduct. Graciano at 536 discusses in detail the analysis our Supreme Court

requires in a case where there is a claim of “same criminal conduct.”

Graciano;

A determination of "same criminal conduct" at sentencing affects the standard range sentence by altering the offender score, which is calculated by adding a specified number of points for each prior offense. RCW 9.94A.525. For purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). However, "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." *Id.*

The judgment and sentence also specifically indicate that the crimes for which Appellant was sentenced were separate. Section 2.2 Special Findings... Counts 1 and 4 do not encompass the same criminal conduct and **do not count as one crime** in determining offender score, pursuant to RCW 9.94A.589. (Emphasis in original.) CP 67. As discussed above the Morales court came to this same conclusion when it counted “1” point for Morales’ “current” offense of Felony Elude.

While not “precedential” in the trial court the State attached to its briefing, which the trial court reviewed, a portion of the Washington State Sentencing Guidelines Commission sentencing guidelines manual that indicates that when calculating a person’s offender score general felony convictions are included (See Appendix A). The sentencing guideline commission based its manual on the RCWs including the RCWs that have

been cited herein and were cited in the trial court. Further, the sentencing guidelines manual is relied on by both the State and the defense in daily court hearings when calculating a person's offender score. There has been no update to this section of the manual since the entry of the decision in Morales.

In the present case the defendant has provided his criminal history in his motion. The State agreed that there were numerous convictions which did not count towards his offender score. It was the State's position at sentencing that three past alcohol related driving offenses could no longer be counted. However the remaining history included

**2.3 Criminal History:** Prior criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	Adult or Juvenile	Type of Crime*
Felony DUI 09-1-00421-3	10/13/2009	Yakima, WA	02/22/2009	Adult	NV
Poss Stolen Property 2 06-1-00693-9	11/21/2006	Yakima, WA	04/18/2006	Adult	NV
Attempt to Elude 03-1-01696-4	10/06/2003	Yakima, WA	08/12/2003*	Adult	NV
Malicious Mischief 2 03-1-01696-4	10/06/2003	Yakima, WA	08/12/2003*	Adult	NV
Forgery 98-1-00609-4	07/15/1998	Yakima, WA	02/19/1998	Adult	NV
DUI CA46681	11/15/2007	Yakima, WA	10/09/2007	Adult	GM
Physical Control C14286	10/14/2006	Toppenish Muni, WA	03/06/2005	Adult	GM
Physical Control 384737	07/09/2003	Yakima District, WA	08/04/2002	Adult	GM
DUI E65122	04/04/2001	Yakima Muni, WA	03/03/2001	Adult	GM
Second Degree Robbery 94-8-01515-1	12/08/1994	Yakima, WA	09/23/1994	Juvi.	V

The Court finds the above-listed concurrent prior convictions (indicated by \*) are not the same criminal conduct under RCW9.94A.525(5)(a)(i), and shall count separately.

Appellant was on community custody when he committed this offense. (CP 68) Appellant indicates throughout his brief that the “point” for being on community supervision should be counted. This would appear to contradict Appellants assertion that the list in 525(e) is “exclusive.” Just like in Morales, Hernandez’s numerous non-subsection-(2)(e) felony convictions were properly included in his offender score.

Appellant also claims that “[e]ven if the Court determines subsection (2)(e)(i) applies here, the trial court over-counted Mr. Hernandez’s prior offenses.” (App’s Brief at 13) Appellant then sets forth an analysis that is flawed. He states that “[t]he DUI conviction from 2001 would not be included because it was committed more than five years “since” his most recent prior conviction, a 1994 juvenile robbery offense.” (App’s Brief at 14) The fatal error in this analysis is that the last crime committed by Hernandez that would be considered if this court were to follow this analysis is a 1998 Forgery as set forth in the judgment and sentence. CP 67

Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	Adult or Juvenile	Type of Crime*
Felony DUI 09-1-00421-3	10/13/2009	Yakima, WA	02/22/2009	Adult	NV
Poss Stolen Property 2 05-1-00693-9	11/21/2006	Yakima, WA	04/18/2006	Adult	NV
Attempt to Elude 03-1-01696-4	10/06/2003	Yakima, WA	08/12/2003*	Adult	NV
Malicious Mischief 2 03-1-01696-4	10/06/2003	Yakima, WA	08/12/2003*	Adult	NV
Forgery 98-1-00809-4	07/15/1998	Yakima, WA	02/19/1998	Adult	NV
DUI CA46881	11/15/2007	Yakima, WA	10/09/2007	Adult	GM
Physical Control C14288	10/14/2005	Toppenish Muni, WA	03/06/2005	Adult	GM
Physical Control 384737	07/09/2003	Yakima District, WA	08/04/2002	Adult	GM
DUI E65122	04/04/2001	Yakima Muni, WA	03/03/2001	Adult	GM
Second Degree Robbery 94-8-01515-1	12/08/1994	Yakima, WA	09/23/1994	Juvi.	V

\* The Court finds the above-listed concurrent prior convictions (indicated by \*) are not the same criminal conduct under RCWB.94A.525(5)(a)(i), and shall count separately.

Therefore using Appellant’s own analysis the 2001 DUI would still be counted as a point.

The State could not disagree more with Appellant’s interpretation of HB3317. A complete reading of the “Background” section of that bill makes it clear that the legislature meant to have this felony crime treated as any other felony crime. This section discusses the use of criminal history and how that affects the scoring of an offense. It makes it clear that what the legislature was attempting to do was to take this very serious crime and place make it punishable as any other felony would be punished. (Appendix B) That section states “The SRA has a sentencing grid in statute (sic) that provides a standard sentence range based on the seriousness level of the current offense and the offender’s prior criminal



history score.” ... “An offender’s criminal history score ranges from 0 to 9+ and is calculated based on numerous factors, including the number of prior felony convictions and the relationship between those prior convictions and the current offense.” (HB 3317 pgs 1-2, Appendix B.)

**RESPONSE TO ALLEGATION TWO A.**

The Appellant is correct. As presently set forth in the judgment and sentence the term of Community Custody combined with the term of confinement exceed the statutory maximum allowed for the crimes charged.

**RESPONSE TO ALLEGATION TWO B.**

Before the State addresses the propriety of the imposition of the “Community Custody” condition requiring the defendant to install and maintain an ignition interlock device the State must point out that the Appellant has not challenged the constitutionality of RCW 46.61.5055(5) which is the basis for section 4.C.3 in the Judgment and Sentence.

**COMMUNITY CUSTODY - IGNITION INTERLOCK.**

The State does not agree that the imposition of the “ignition interlock” exceeds the courts ability to impose a sentence. This requirement is set forth in two sections of the Judgment and Sentence. One is contained within the section captioned “Conditions of Community

Custody or Probation” (CP 69); the requirement that Appellant use this device is also set forth in a separate section of the Judgment and Sentence 4.C.3 which cites to RCW 46.61.5055(5). CP 70. RCW 5055(5) mandates;

(5)(a) The court shall require any person convicted of a violation of RCW 46.61.502 or 46.61.504 or an equivalent local ordinance to comply with the rules and requirements of the department regarding the installation and use of a functioning ignition interlock device installed on all motor vehicles operated by the person.

The crime charged in this case was under RCW 46.61.502(6). CP 4, 66

Clearly the legislature enacted this law with fully knowledge and intent that it would be imposed on crimes where the maximum period was far less than the ten yeas maximum allowed. The legislature specifically imposed this separate codified mandate under RCW 46.20.720. That statutes indicates;

1) The court may order that after a period of suspension, revocation, or denial of driving privileges, and for up to as long as the court has jurisdiction, any person convicted of any offense involving the use, consumption, or possession of alcohol while operating a motor vehicle may drive only a motor vehicle equipped with a functioning

ignition interlock. The court shall establish a specific calibration setting at which the interlock will prevent the vehicle from being started. The court shall also establish the period of time for which interlock use will be required.

The legislature specifically required that the court apply this law in cases such as Appellant's. While it is possible that the section set forth in subsection 4.C.2 under the section captioned "Conditions of Community Custody" may "exceed" the time limits imposed where a term of incarceration and a period of community custody exceed the statutory maximum for that crime the fact remains that the following section correctly applies the law and therefore the section under 4.C.2 is merely surplusage.

#### IV. CONCLUSION

If this court were to hold that RCW 9.94A.525(2)(e) defines the only prior convictions that can be used in the offender score for one convicted of felony DUI or felony physical control, that decision would conflict with Moeurn, with Division One's decision in Morales, and the plain language of former RCW 9.94A.525.

The legislature has since amended the statute to more clearly provide that the prior convictions that can be included in the offender score of one convicted of Felony DUI or Felony Physical Control are not

limited to those listed in former subsection (2)(e),<sup>3</sup> the proper calculation of offender scores for those sentenced under the former statute remains in doubt. As former subsection (2)(e) was enacted in 2006 (effective July 2007), this decision may affect every Felony DUI/Physical Control case prosecuted in the six years before the 2013 amendment. This amendment clearly demonstrates that the intent of the legislature was not to exclude these other offenses.

The community custody terms set forth in the judgment and sentence that impose this form of “custody” beyond the statutory maximum need to be removed. The ten year term of ignition interlock in the community custody section is redundant and also may be removed.

For the reasons set forth above this court should deny the allegation regarding criminal history and remand to correct the community custody issues.

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<sup>3</sup> See RCW 9.94A.525 (2013) (“If the present conviction is felony driving while under the influence of intoxicating liquor or any drug ... or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug ..., all predicate crimes for the offense ... shall be included in the offender score, and prior convictions for felony driving while under the influence of intoxicating liquor or any drug ... or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug ... shall always be included in the offender score. All other convictions of the defendant shall be scored according to this section”) (emphasis added).

Respectfully submitted this 23<sup>rd</sup> day of May 2014,

s/ David B. Trefry  
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# Appendix A

## DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR ANY DRUG (EFFECTIVE 7/1/2007)

*RCW 46.61.502(6)*  
**CLASS C\* – NONVIOLENT/TRAFFIC OFFENSE**

OFFENDER SCORING RCW 9.94A.525(11)

**ADULT HISTORY:**

Enter number of Vehicular Homicide and Vehicular Assault felony convictions ..... x 2 = \_\_\_\_\_

Enter number of Operation of a Vessel While Under the Influence of Intoxicating Liquor or Any Drug felony convictions ..... x 1 = \_\_\_\_\_

Enter number of felony convictions ..... x 1 = \_\_\_\_\_

Enter number of Driving While Under the Influence of Intoxicating Liquor or Any Drug and Actual Physical Control While Under the Influence of Intoxicating Liquor or Any Drug and Reckless Driving and Hit-And-Run Attended Vehicle non-felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of Vehicular Homicide and Vehicular Assault dispositions ..... x 2 = \_\_\_\_\_

Enter number of Operation of a Vessel While Under the Influence of Intoxicating Liquor or Any Drug felony dispositions ..... x ½ = \_\_\_\_\_

Enter number of felony dispositions ..... x ½ = \_\_\_\_\_

Enter number of Driving While Under the Influence of Intoxicating Liquor or Any Drug and Actual Physical Control While Under the Influence of Intoxicating Liquor or Any Drug and Reckless Driving and Hit-And-Run Attended Vehicle non-felony convictions ..... x ½ = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of Vehicular Homicide and Vehicular Assault convictions ..... x 2 = \_\_\_\_\_

Enter number of other Operation of a Vessel While Under the Influence of Intoxicating Liquor or Any Drug felony convictions ..... x 1 = \_\_\_\_\_

Enter number of other felony convictions ..... x 1 = \_\_\_\_\_

Enter number of Driving While Under the Influence of Intoxicating Liquor or Any Drug and Actual Physical Control While Under the Influence of Intoxicating Liquor or Any Drug and Reckless Driving and Hit-And-Run Attended Vehicle non-felony convictions ..... x 1 = \_\_\_\_\_

**STATUS:**

Was the offender on community custody on the date the current offense was committed? (if yes) + 1 = \_\_\_\_\_

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

**SENTENCE RANGE**

	<b>Offender Score</b>									
	0	1	2	3	4	5	6	7	8	9+
	9m	13m	15m	17.5m	25.5m	38m	47.5m	55.5m		
LEVEL V	6 - 12	12+ - 14	13 - 17	15 - 20	22 - 29	33 - 43	41 - 54	51 - 60*	60 - 60*	60 - 60*

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 20 or for gang-related felonies where the court found the offender involved a mit (RCW 9.94A.833) see page 167 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 170.
- ✓ For sentencing alternatives, see page 160.
- ✓ For community custody eligibility, see page 168.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 165.

The Caseload Forecast Council is not liable for errors or omissions in the manual, for sentences that may be inappropriately calculated as a result of a practitioner's or court's reliance on the manual, or for any other written or verbal information related to adult or juvenile sentencing. The scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Caseload Forecast Council.

# APPENDIX B



## SENATE BILL REPORT HB 3317

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As Reported By Senate Committee On:  
Judiciary, March 6, 2006

**Title:** An act relating to making it a felony to drive or be in physical control of a vehicle while under the influence of intoxicating liquor or any drug.

**Brief Description:** Changing provisions relating to driving under the influence of intoxicating liquor or any drug.

**Sponsors:** Representatives Ahern, Lantz, Lovick, Darnelle, Chase, Williams, Hunter, Clibborn, Kilmer, Hudgins, Ericks, Simpson, Conway, Takko and Morrell.

**Brief History:** Passed House: 2/28/06, 97-0.

**Committee Activity:** Judiciary: 3/6/06 [DPA-WM]

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### SENATE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended and be referred to Committee on Ways & Means.

Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Carrell, Esser, Hargrove, McCaslin and Rasmussen.

**Staff:** Lidia Mori (786-7755)

**Background:** Drunk driving (DUI) is a gross misdemeanor. The maximum term of confinement for a gross misdemeanor is one year in jail. The DUI law contains a complex system of mandatory minimum penalties that escalate based on the number of prior offenses and the concentration of alcohol (BAC) in the offender's blood or breath. A "prior offense" counts to increase an offender's sentence under the DUI laws if the arrest for that offense occurred within seven years of the arrest for the current offense. "Prior offenses" include convictions for: (a) DUI; (b) vehicular homicide and vehicular assault if either was committed while under the influence; (c) negligent driving after having consumed alcohol ("wet neg"), reckless driving, and reckless endangerment if the original charge was DUI; and (d) any equivalent local DUI ordinance or out-of-state law. In addition, a deferred prosecution for DUI or "wet neg" counts as a prior offense even if the charges are dropped after successful completion of the deferred prosecution treatment program.

In addition to serving mandatory jail time, a DUI offender is subject to other sanctions that include alcohol assessment, the mandatory use of an ignition interlock system on any vehicle the offender drives, and probation. An adult who is convicted of a felony is sentenced under the provisions of the Sentencing Reform Act (SRA). The SRA has a sentencing grid in statute that provides a standard sentence range based on the seriousness level of the current offense and the offender's prior criminal history score. Unless the sentencing judge imposes an exceptional sentence upward or downward, the sentencing judge will sentence the offender to a period of confinement within that standard range. However, in no case may a sentence be

han the maximum allowed by statute for a particular class of felony. For class C , this maximum is five years in prison.

are "ranked" in the SRA from Level I (low) to Level XVI (high). An offender's history score ranges from 0 to 9+ and is calculated based on numerous factors, g the number of prior felony convictions and the relationship between those prior ons and the current offense. A few prior non-felony crimes can count toward an /s score in sentencing for a current felony. "Serious traffic" offenses, which include a non-felony crimes that count when the current offense is a felony traffic offense. lony traffic offenses, which include vehicular assault and vehicular homicide, count when the current offense is also a felony traffic offense.

A has "wash out" periods that determine how long a prior conviction continues to ward an offender's score. Class C felonies and serious traffic offenses wash out if the has spent five years without committing an offense since the date of his or her release nfinement. The SRA also has sentencing alternatives for some types of offenders, such rst-time offender waiver program, drug offender sentencing alternative (DOSA), and hic camp. At the time of sentencing, the court also imposes a term of community for certain offenders, including those offenders who have been convicted of an categorized as a "Crime Against Persons." Conditions of community custody and f supervision are based on risk. The court has discretion when setting the range of ity custody, but generally, the range for a person convicted of a "Crime Against " will be between nine to 18 months. Under the SRA, an offender may earn an early f up to 50 percent off a sentence for less serious offenses. For offenses categorized as "Against Persons" and other serious offenses, an offender may receive earned early ime up to one-third off.

venile Justice Act (Act) governs the disposition (or sentencing) of juvenile offenders. contains a disposition grid with presumptive sanctions based on the seriousness of the and prior criminal history. Offenses are "categorized" between Category E (least through Category A+ (most serious). A DUI is categorized as a D offense. A juvenile ted of DUI who has no prior criminal history will typically receive local sanctions, ; the court may impose one or all of the following: 0-30 days in confinement in a local detention facility; 0-12 months of community supervision; 0-150 hours of community m; and/or \$0-\$500 fine. More serious offenders are subject to confinement in the state facility. The Juvenile Justice Act provides disposition alternatives that give courts n to suspend the juvenile's disposition and impose conditions. Some of those ves include the suspended disposition alternative, the chemical dependency on alternative, and the mental health disposition alternative.

**ry of Amended Bill:** A DUI conviction is a class C felony if the offender: (a) has more prior offenses within seven years; or (b) has ever been convicted of vehicular e while under the influence of alcohol or drugs or vehicular assault while under the e of alcohol or drugs. Felony DUI is a Level V offense. This means a DUI offender r prior DUIs will receive a presumptive sentence range of 22 - 29 months. Felony ategorized as a "Crime Against Persons." A felony DUI offender is eligible for earned case not to exceed one-third of his or her sentence and community custody provisions n offender is not eligible for the first time offender waiver program, DOSA, or work

ethic camp. The court must order the offender to undergo treatment during incarceration. The offender shall be liable for the costs of treatment unless the court finds the offender indigent and no third-party insurance is available. The license suspension and ignition interlock provisions under the misdemeanor DUI laws apply.

The provisions under the SRA related to "wash out" periods and vacation of records are amended to include the seven year period in which "prior offenses" under the DUI laws are counted.

Under the Juvenile Justice Act, felony DUI is made a Category B+ offense. This means a juvenile with four prior DUI adjudications who is adjudicated of another DUI will receive a presumptive disposition range of 15 - 36 weeks in a state juvenile facility.

**Amended Bill Compared to Original Bill:** Language in the bill is corrected to reflect that if the offender is a juvenile, he or she will be punished according to RCW 13.40. The "wash out" periods under the sentencing reform act and the current DUI laws are clarified as they apply to felony DUI convictions.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** Washington is only one of three states that does not have a felony DUI law. There were 222 deaths from people driving under the influence of alcohol in 2004. The purpose of government is protection of its citizens and with this bill, we are protecting citizens against drunk driving. This legislation is directed at the chronic drunk driver. We will not need to build a new prison but we do need to build capacity. While these offenders are in prison and in our control, we need to provide treatment. Experts estimate that they need 11 to 12 months of treatment. The only way to deter a habitual drunk driver is to take him or her off the road and provide treatment. Word will get around to the DUI offenders in bars and other drinking establishments that they are looking at a longer incarceration time if they drink and drive. This is a huge issue to county sheriffs. These offenders are a low risk when sober and they won't require a maximum security prison. Drunk drivers are a threat to police officers on the road as well as to the general public. For a juvenile to get a DUI felony, he or she still has to have had four prior DUI adjudications.

**Testimony Against:** None.

**Who Testified:** PRO: Representative Ahern, prime sponsor; Representative Lantz; Senator Brandland; Jim Reiersen, Deputy Prosecutor; Karen Minahan, Mothers Against Drunk Drivers; Don Pierce, Washington Association of Sheriffs and Police Chiefs; Tom McBride, Washington Association of Prosecuting Attorneys; Anita Kronuall, citizen.

DECLARATION OF SERVICE

I, David B. Trefry, state that on May 23, 2014 by agreement of the parties, I emailed a copy of the State's Motion for Extension of time to: Marla Zink at [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org) and to Enrique Hernandez DOC 783642, Coyote Ridge Corrections Center, P.O. 769 Box Connell, WA 99326-0769

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23<sup>rd</sup> day of May, 2014 at Spokane, Washington.

s/ David B. Trefry  
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