

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 15, 2015, 3:21 pm
BY RONALD R. CARPENTER
CLERK

E CRJ
RECEIVED BY E-MAIL

NO. 92263-2
COA NO. 46072-6-II CONSOL W/ 46668-6-II
Cowlitz Co. Cause NO. 13-1-00063-3

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOEL D. MCANINCH,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
Prosecuting Attorney
AILA WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Respondent

**HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080**



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. IDENTITY OF RESPONDENT	1
II. ANSWER TO ISSUES PRESENTED FOR REVIEW	1
III. STATEMENT OF THE CASE	1
IV. ARGUMENT	2
The decision of Decision Two of the Court of Appeals is in conflict with Division One, but in agreement with Division Three. Because there is a conflict among the divisions, the Supreme Court should accept the petition for review.	2
V. CONCLUSION	4

TABLE OF AUTHORITIES

Washington Cases

State v. Hernandez, 185 Wn. App. 680, 342 P.3d 820 (2015)..... 2, 3

State v. Jacob, 176 Wn. App. 351, 308 P.3d 800 (2013)..... 2

State v. Morales, 168 Wn. App. 489, 278 P.3d 668 (2012)..... 2

Statutes

RCW 9.94A.525..... 2

RCW 9.94A.525(2)(e) 2

I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the August 18, 2015, published opinion of the Court of Appeals in *State v. McAninch*, COA No. 46072-6-II. This decision upheld the trial court's order denying relief under CrR 7.8 and denied McAninch's personal restraint petition.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that the trial court did not abuse its discretion in denying McAninch's motion for relief from judgment, as his offender score was correctly calculated as six, including a point for a 2004 conviction for attempting to elude.

III. STATEMENT OF THE CASE

The State agrees with the Statement of the Case given in McAninch's petition.

IV. ARGUMENT

The decision of Decision Two of the Court of Appeals is in conflict with Division One, but in agreement with Division Three. Because there is a conflict among the divisions, the Supreme Court should accept the petition for review.

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. The decision of the Court of Appeals in this case is in conflict with Division One's decision in *State v. Morales*, 168 Wn. App. 489, 498, 278 P.3d 668 (2012). However, the decision in this case aligns with Division Three's decision in *State v. Hernandez*, 185 Wn. App. 680, 342 P.3d 820 (2015).

In *Morales*, Division One held that the only relevant offenses in calculating an offender score for felony DUI are those listed in former RCW 9.94A.525(2)(e). 168 Wn. App. at 493. Division Two originally relied on *Morales* to find that RCW 9.9A.525(2) should be strictly

interpreted to specify a limited class of prior offenses to be used in offender score calculations. *State v. Jacob*, 176 Wn. App. 351, 357, 308 P.3d 800 (2013). However, Division Three then noted that *Morales* and *Jacob* overlook portions of RCW 9.94A.525 and the overall purpose of the statute. *Hernandez*, 185 Wn. App. at 686. That Division held that all of the defendant's prior offenses were properly included, as former subsection (2)(e) acts as an exception to the wash out provision in subsections (2)(c) and (d). *Id.* In other words, subsection (2)(e) does not *exclude* any prior convictions; rather, it expands the categories of prior convictions that can be included if the present conviction is for felony Driving under the Influence, while also allowing those prior convictions to “wash out” after five crime-free years in the community.

Neither *Jacob* nor *Morales* mention RCW 9.9A.525(11), and the decisions in those cases read Section 2 in such a way as to render Section 11 meaningless. If the only prior convictions that can be considered for purposes of calculating an offender score are those enumerated in Section 2(e) – DUI, physical control, and serious traffic offenses – then the part of Section 11 that includes a point for “each felony offense” is meaningless. This is an inappropriate reading of the SRA. It was proper for Division Two to decline to follow those cases and instead follow Division Three's

holding in *Hernandez*. However, this creates a split in divisions that the Supreme Court may properly review.

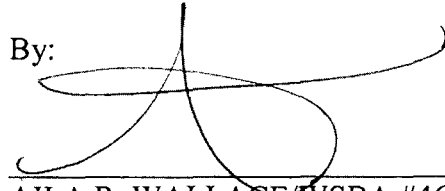
V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be granted.

Respectfully submitted this 16th day of October, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



AILA R. WALLACE/WSBA #46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:


Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504
supreme@courts.wa.gov

and,

Ms. Catherine E. Glinski
Attorney at Law
P.O. Box 761
Manchester, WA 98353-0761
cathyglinski@wavecable.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 15th, 2015.


Michelle Sasser
Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle; Cathy Glinski (cathyglinski@wavecable.com)
Subject: RE: PAs Office Scanned Item Joel D. Mcaninch, 92263-2, Response to Petition for Review

Received on 10-15-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sasser, Michelle [mailto:SasserM@co.cowlitz.wa.us]
Sent: Thursday, October 15, 2015 3:20 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; Cathy Glinski (cathyglinski@wavecable.com) <cathyglinski@wavecable.com>
Subject: FW: PAs Office Scanned Item Joel D. Mcaninch, 92263-2, Response to Petition for Review

Attached, please find the Response to Petition for Review in regards to the above-named Petitioner.

If you have any questions, please contact this office.

Thanks, Michelle

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
Sent: Thursday, October 15, 2015 4:18 PM
To: Sasser, Michelle
Subject: PAs Office Scanned Item