NO. 96689-3

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOSE MENDEZ, JR.,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. **INTRODUCTION.**

This case was affirmed by the Court of Appeals, Division III in a decision wherein Judge Siddoway dissented in part. The court upon reconsideration altered its initial opinion.

In this petition for review Mendez only challenges the Court of Appeals opinion regarding criminal history. Mendez also attempts to raise for the first time and issue regarding the Respondent's brief. This alleged issue was not addressed in the Court of Appeals.

The Court of Appeals opinion cited well settled case law regarding law of the case. The court had and has ordered this case to be remanded to the trial court for resentencing. There were no conditions or limitations placed on either party by the court when it remanded for resentencing. The trial court agreed that this case was before it for a complete resentencing and did just that.

Mendez challenged that interpretation both in the trial court and in the Court of Appeals. The Court of Appeals in it decision sent this case back to the trial court, yet again, to allow for an comparative analysis of the federal crimes which were used in the determination of the defendant's offender score.

The State noted in its opening brief, as did the Judge Siddoway in

her dissent, that no matter what the final determination was regarding the inclusion or exclusion of the "washed-out" crimes, Mendez's sentencing score would allow for the trial court to impose the exact same sentence and therefore, there was no need for review remand, the Court of Appeals could simply impose the sentence which the trial court would clearly impose.

The State is uncertain under what RAP or theory Mendez is raising his second "allegation" regarding the State addressing the totality of the defendant's criminal history, the inclusion of all of his federal criminal history. Mendez did not challenge this alleged issue in his reply brief he filed prior to the issuance of the Court of Appeals opinion.

Only after the Court of Appeals acknowledged the totality of Mendez's criminal history and the State's ability to introduce any history stating "Mr. Mendez has not addressed whether the second 1990 federal conviction is comparable to a Washington State crime. He may concede this point. If so, the 1988 crimes would not wash out. Consistent with RCW 9.94A.530(2), the State may introduce additional evidence at the hearing" did Mendez address this alleged second issue; that the State proffered the possibility of other crimes being used to negate washout. And, Mendez did not address this argument of the State until he filed his motion of reconsideration of the Court of Appeals opinion. (Amended

Opinion, slip at 7-8)

ISSUES PRESENTED BY PETITION

1. This Court should grant review because the Court of Appeals opinion addresses an issue of significant public interest.
   a. There was a violation of the law of the case doctrine.
   b. Should the State be allowed to address all of the defendant's criminal history in its Court of Appeals brief?

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not merit review. Mendez has not met the standards set forth in RAP 13.4, which set forth basis for review by this court. The Court of Appeals opinion does not merit review under any circumstance and specifically not under RAP 13.4

B. **STATEMENT OF THE CASE**

The facts are from the Court's opinion in this case:

In 2013, a Yakima County jury found Mr. Mendez guilty of multiple crimes: count 1, attempting to elude a pursuing police vehicle; count 2, possession of a controlled substance-cocaine; count 3, possession of a controlled substance-heroin; count 4, first degree driving while license revoked (a gross misdemeanor); and count 5, felony driving under the influence of intoxicating liquor and/or drugs.

At sentencing, the State presented evidence of Mr. Mendez's lengthy criminal conviction history. The history included four 1988 convictions for drug crimes, a 1988 conviction for failure to return from work release, a 1990 federal conviction for conspiracy to distribute

cocaine (for which he was released December 17, 1999), a 2002 conviction for a drug crime, a 2002 conviction for attempt to elude, a 2002 conviction for second degree malicious mischief, and a 2006 conviction for felony violation of a protection order.

The State did not produce certified documents of the 1990 federal conviction. Instead, the State argued that Mr. Mendez had acknowledged the 1990 conviction in the sentencing hearing for his three 2002 convictions. Mr. Mendez objected and held the State to its burden of proving the 1990 conviction. The court agreed that the State did not present adequate proof of the 1990 conviction. The court sentenced Mr. Mendez, but also included his washed-out 1988 convictions. Mr. Mendez appealed, but did not raise the issue of his washed-out 1988 convictions. This court affirmed.

In remanding for resentencing, this court wrote:

> The trial court counted nine earlier adult felonies in Jose Mendez's offender score. Jose Mendez now contends four [1988] drug convictions and one [1988] conviction for failure to return from work release should have washed out. During sentencing and by agreement of the parties, the trial court did not include in the calculation a 1990 federal conviction of conspiracy to distribute cocaine because the State had not obtained a certified record of the judgment. The State now concedes that several class C felony offenses were washed out due to the State's failure to provide a record of the federal conviction ....
>
> We agree that the trial court incorrectly calculated the offender core. Consequently, we vacate the sentence and

> remand to the superior court for resentencing. As a result, Jose Mendez's remaining contention regarding his trial counsel's and appellate counsel's failures to challenge the offender score are moot. ...

CP at 57-58.

At resentencing, the State notified the court it had obtained a certified copy of the federal judgment and sentence for the 1990 federal conviction. This document notes that Mr. Mendez pleaded guilty to two counts: conspiracy to distribute a controlled substance under 21 U.S.C. § 846 and distribution of a controlled substance, cocaine (over 500 grams) under 21 U.S.C. § 841(a)(l). The State did not produce any other evidence for these convictions.

Mr. Mendez argued that the State waived its ability to prove the 1990 federal conviction when it failed to produce the evidence at the first sentencing hearing and when it later conceded the wash-out issue in his PRP. The parties also addressed whether the resentencing was a full resentencing hearing or was limited to the record and arguments that were presented at the initial sentencing. Mr. Mendez argued that the sentencing court could not consider evidence beyond that which was considered at the first hearing and noted that he had earlier preserved the issue of whether the federal conviction was comparable to a Washington State felony. The State countered that the hearing was a full resentencing and that the sentencing court was not limited to the record at the original

sentencing.

The sentencing court noted the language of our opinion, which remanded for "resentencing," rather than a limited sentencing hearing without the federal conviction or washed-out convictions. Report of Proceedings (July 15, 2016) (RP) at 9. The court construed our instructions to it as not precluding a full resentencing. The court thus allowed the State to introduce the certified 1990 federal judgment and sentence.

Mr. Mendez argued in opposition to an exceptional upward sentence but did not re-raise the comparability issue. The court accepted the State's proof, accepted the State's argument that the other offenses no longer washed out, and sentenced Mr. Mendez. Prior to doing so, the court did not perform a comparability analysis of the 1990 conviction with Washington law. The court calculated Mr. Mendez's offender score to be a 16 for count 1 (attempting to elude) and count 5 (felony driving under the influence) and an 11 for counts 2 and 3 (possession of controlled substances).

The court then imposed an exceptional sentence by running the convictions consecutively. The court's basis for the exceptional sentence was its "finding that Mr. Mendez committed multiple current offenses, and his offender score results in some offenses going unpunished." RP at 19.

…

Mr. Mendez appealed. The sentencing court later entered findings of fact and conclusions of law in support of its exceptional sentence for free crimes. (Slip 1-6)

This case rests as much on the past process and procedure as it does on the case law cited by Petitioner. (The entire opinion is contained in Appendix A.)

Mendez did not take any further action in his PRP. He did not challenge the dismissal of the three other claims, that there was insufficient evidence, that the trial court erred on another sentencing issue, same criminal conduct, and he did not challenge the Court of Appeals ruling that both of his previous attorneys were "ineffective." As noted throughout this Answer at no time did Mendez attempt to clarify or limit the Court of Appeals use of the term "resentence." Mendez's PRP was mandated by the Court of Appeals on March 29, 2016. (Appendix B)

Mendez knew he was going back before the trial court to be resentenced with no limitations in place, the plain language of each and everyone of these opinions makes that clear.

This continues to the present ruling where the Court of Appeals states in its decision that the State will be allowed to submit additional information to the trial court at the next "resentencing."

The case notes from ACORDS are attached in Appendix B

ARGUMENT

This petition is governed by RAP 13.4(b), which sets forth the standard an appellant must meet before their case will be accepted for review. Perez claims that his petition meets the criterion of RAP 13.4(b) (3) and (4), this is patently incorrect.

This case does not meet any of the criterion set forth in RAP 13.4(b) RAP 13.4(b) Considerations Governing Acceptance of Review; **4**) The issues raise in this petition for review do not involve any issue of **substantial public interest** which would merit review by this court. (Emphasis added.)

The State is fully aware there is no *precedential* value from a dissent in any case. However, at times a dissenting opinion can give great directional aid. Judge Siddoway stated the following in her partial dissent:

> SIDDOWAY, J. (dissenting in part)-The majority opinion has been modified, following an original opinion that invited Jose Mendez to request remand for a comparability analysis of his 1990 federal conviction for distribution of a controlled substance. He accepted the invitation. The majority now orders remand with directions to the trial court to perform that comparability analysis.
>
> I dissent in part again for the same reason I dissented in part originally. I would not grant Mr. Mendez the remedy of remand for a comparability analysis of the distribution of a controlled substance conviction for two reasons. The first is that he did not

assign error to the failure to conduct a comparability analysis of that crime.

The second is that if Mr. Mendez accepts the invitation, the most he stands to gain from such a hearing is to exclude from the calculation of his off ender score a crime that the trial court excluded for a different reason in imposing the original exceptional sentence. Nothing, score wise, will have changed. Remand is not necessary when the record clearly indicates the sentencing court would have imposed the same exceptional sentence. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). To me, the record is clear.

I otherwise agree with the majority opinion.

The State's argument in its opening brief supported the position taken by Judge Siddoway.

The following is the State's argument from that brief.

"STANDARD RANGE

In addition, it is the States position that if this court determined the trial court erred there is no need to remand this case once again.

Based on Mendez's significant offender score, even if this court were to strike the federal offense and the four crimes that would wash-out, the outcome would be the same due to Mendez's extremely high offender score and the trail courts clear intent at the two previous sentencings.

At the original sentencing and at the resentencing Mendez had by agreement of he, his trial attorney, the State's attorney and the trial court judge;

Count 1 - 16 points on - Attempting to Elude a Pursuing Police Officer,

Count 2/3 - 11 points for both counts Possession of a Controlled Substance – Cocaine/Heroin, (count 4 was a gross misdemeanor)

Count 5 - 16 points for – Felony Driving While Under the Influence of Alcohol.

The State must remind this court that the original sentence did not include the conviction from federal court.

If this court were to discount these point totals by removing the 4 old felonies from 1988 that would "wash-out" without the federal conviction the standard range is still exactly the same.

Using the new, lower point total Mendez would have 11 points for Count 1, 6 points for Counts 2 and 3 and 11 points for Count 5.

The State has attached in Appendix A the scoring sheets for these crimes. In each of these three felonies using the point total that is suggested by Mendez the result is the same range that was used found to be accurate in the first two sentencings.

This court may and should deny further remand of this case. Mendez made his argument to the trial court on two occasions. On the second occasion the court was presented with evidence of the actions that Mendez had taken while in prison. Mendez's trial attorney argued for a standard range sentence based on this new evidence.

The State argued again that the court should impose an exceptional sentence based on the egregious nature of Mendez's actions while he was eluding the police and the number of previous alcohol related driving offenses.

The court considered the information before it and commended the defendant for his positive actions while in prison but stated:

> The difficulty is that you have a significant amount of criminal history that you need to live down. You haven't done that yet. You're progressing in that direction, but you're not there yet.
>
> I am very much afraid that if I were to follow your request and essentially let you back out into the community that the temptation to go back to doing what you've done so many times in the past, whether it be alcohol or drugs, would be too much. So I'm going to decline the opportunity to impose a sentence within the standard range.

> I think that your offender score warrants an exceptional sentence. I'm going to impose the sentence that I imposed last time.
>
> A resentencing need not be ordered when the appellate court is convinced that the trial court would impose the same sentence on remand. State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995). Remanding for an evidentiary hearing on that issue would not likely achieve a different result from her conviction. State v. Perez, 69 Wn. App. 133, 140, 847 P.2d 532 (1993); "We are satisfied that the trial court would have followed the State's recommendation and imposed the same sentence absent the improper factor. Therefore, we need not remand for further consideration. State v. Fisher, 108 Wn.2d 419, 429-30, 430 n.7, 739 P.2d 683 (1987). State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989)."

Just as the act of remanding this case will in all probability result in exactly the same outcome so too will any action by this court. The case needs to be finalized in the Court of Appeals. There is nothing that can come of further review.

Law of the case.

First and foremost, the problem with Petitioner's argument is that he himself is bound by "the law of the case" from the PRP which he now attempts in this motion to assert as dispositive of the underlying sentencing issue.

Mendez never challenged the ruling of the Court of Appeals in cause 33063-5-2-III. The ruling from that opinion states in part:

> We accept the State's concession that the

offender score erroneously included washed out offense. Consequently, **we remand for recalculation of the offender score and resentencing**. We find no merit in Mendez's remaining contentions and otherwise dismiss the personal restraint petition.

…

The trial court counted nine earlier adult felonies in Jose Mendez's offender score. Jose Mendez now contends four 1998 drug convictions and one 1998 conviction for failure to return from work release should have washed out. During sentencing and by agreement of the parties, the trial court did not include in the calculation a 1990 federal conviction of conspiracy to distribute cocaine because the State had not obtained a certified record of the judgment. The State now concedes' that several class C felony offenses were washed out due to the State's failure to provide a record of the federal conviction. Under RCW 9.94A.525(2)(c), class C prior felonies are not included in the offender score if, since the last date of release from confinement or entry of judgment and sentence for a felony, 'the offender spent five consecutive years in the community without committing a crime that resulted in a conviction.

We agree that the trial court incorrectly calculated the offender score. Consequently, **we vacate the sentence and remand to the superior court for resentencing.** As a result, Jose Mendez's remaining contention regarding his trial counsel's and appellate counsel's failures.to challenge the offender score are moot. See State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

CONCLUSION

We grant, in part, Jose Mendez's personal restraint petition. **We remand the case to the Yakima County Superior Court for resentencing.** Otherwise, we dismiss the petition. We refer Jose Mendez's request for **counsel at the resentencing** hearing to the superior court. RAP 16.15(g).

Mendez actually presented new and additional information to the

sentencing court at the time of the resentencing. The State understands this was after the trial court ruled that the Court of Appeals had sent this down as a resentencing with no limitation on the actions of the parties. The trial court stated:

> THE COURT: All right. Well, when this decision first came down I looked at it, and I've looked at it a number of times since then. The court's order, the Court of Appeals order, it says, we vacate the sentence and remand to the superior court for resentencing. Then they repeat, we remand the case to the Yakima County Superior Court for resentencing. They didn't say we send it back to have a sentence imposed which is within the standard range without the federal conviction and with the other state convictions having washed as a result. They say, we send it back for resentencing. I think that means that it's a whole new ball game. (VRP 7-15-16, pg. 9.)

Mendez's claims that one of the categories listed in RAP 13.4(b) is applicable to his case. He claims "[t]he issue in this case is whether the law of the case doctrine is violated when the trial court allows the State to withdraw a concession given on appeal." Petition at 7. He states the ruling is one that should be addressed because it is an issue of substantial public interest.

As is so often the case in a petition for review the issue presented is clearly of substantial interest to the defendant but that is not the standard which must be met to have this court review a Court of Appeals decision.

Here Petitioner "cites" to a factual statement that was considered

by the Court of Appeals in coming to it final decision. The final ruling of the court is the "law of the case" for the PRP filed by Mendez and that decision as set forth above, a decision that was never brought before this court on a motion for review is the law of the case. That decision said very simply "resentence" Mendez.

Mendez clearly understood the law, he was successful in his challenge in his PRP, therefore, the fact he did not challenge the order of the Court of Appeals to resentence him was obviously what he wanted. Undoubtedly, he expected the result to be other than what occurred back in the trial court but he is now stuck with "the law of the case" which was he was to be "resentenced" upon remand.

The Court of Appeals was very specific in the ruling in this case when it reviewed its previous ruling. It did not limit any party at the resentencing hearing, and in fact the defendant presented new information at this resentencing which he wished the court to take into account before it imposed its new sentence. He in fact asked for a completely different sentence than he did at the first hearing.

Mendez states that "[t]he State agreed the federal conviction should be stricken, as it had been unable to get a copy of the federal paperwork due to budget constraints." This is completely incorrect and unsupported by the record. (See Appendix C) In fact that State in this

portion of the verbatim report of proceedings argues that because the defendant had previously acknowledged his criminal history both in a statement of defendant on plea of guilty and a judgement and sentence the trial court could take judicial note of those previous convictions. RP 4.12.113 pg. 5 The court, not the State said that it was going to strike the one conviction due to the State not having the funds to obtain the necessary copies of that conviction. RP 4.12.13 pg. 4-7.

This is the last thing the State says about this conviction:

> MR. CLEMENTS: And for whatever accounting we're using they couldn't move the -- the peanuts around to get it. So,--.
> But my point was that Mr. Mendez, in the eluding conviction judgment and sentence, signs off indicating that that was part of his criminal history. And that's the eluding conviction, the 2000-1-01893-8. And if you look in the felony judgment and sentence on that it lists that federal conviction for conspiracy to distribute cocaine, and -- and in his statement on plea of guilty he agrees with the prosecutor's recitation of his criminal history. So, -- I don't know if it really matters either way. We're arguing over a point and it's nine-plus I think either way. I think we agree-

The trial court then ruled:

> THE COURT… So, -- so I -- I don't think -- In the absence of the -- of the certified -- record from the -- from the federal court I don't think that I can include it in his criminal history. So I'm going to go ahead and strike it.

In the response to Mendez's PRP the State, addressing a very

specific legal question, conceded that without the proof of that one prior crime that several other felony convictions would "wash out" for the sentence imposed at the first sentencing. This does not somehow magically negate those prior criminal acts nor the State's ability to use them at some future occasion when the State has the documentation to legally confirm the existences of those acts.

In the first sentencing the State did not have the legal proof of the existence of a prior conviction which would "hook" the other convictions and prevent wash-out at that specific sentencing hearing regarding this specific case.

As this court is well aware an offender score measures a defendant's criminal history and arrived at by totaling the defendant's prior convictions for felonies and certain juvenile offenses. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The existence of a prior conviction is a question of fact, and the State must prove the existence of these prior convictions by a preponderance of the evidence. Id. at 479-80; In re Pers. Restraint of Adolph, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

At a "resentencing" RCW 9.94A.530(2) allows the use of additional evidence. The State did argue this second conviction would be comparable and negate washout in the respondent's brief, but it did not need to raise that because the law specifically allows for that to be done.

This court should decline to even consider the second "allegation" regarding the Respondent's brief arguing there were additional federal crimes that could be used to negate wash-out. This court has stated "… we do not address this issue because it was not raised on appeal. An issue not raised or briefed in the Court of Appeals will not be considered by this court. State v. Laviollette, 118 Wn.2d 670, 679, 826 P.2d 684 (1992)." State v. Halstien, 122 Wn.2d 109, 119, 857 P.2d 270 (1993).

Mr. Mendez got what he wanted, he was resentenced, he just did not get the outcome he wanted, that does not make this outcome one which is of **significant public interest** and therefore, meriting review by this court.

Nothing in any of the Court of Appeals decisions regarding this case contain a single word which "raises a significant question of law" nor is any issue one of "substantial public interest."

In the alternative the State would also argue that this issue is not ripe for review. At this juncture in this case there is nothing to actually challenge. The trial court has not heard any testimony nor seen any supporting documentation. The trial court is tasked with determining if the federal crimes are in fact comparable. If that court were to rule they were not comparable the offender score for Mendez would have the offender score he wants. However, even with this outcome the trial court

could and most likely would just sentence Mendez to the exact same sentence. Or so it would appear from the trial courts previous actions and statements when it sentenced him previously.

If the trial court rules the federal matters are comparable and once again hook in, prevent wash-out of the previous felonies, then the court can and probably will just impose the exact sentence as before.

In either of those instances Mendez will then have the right to yet another "direct" appeal and this exact issue will be litigated in the Court of Appeals only at that time there will be an actual record. It is most important to note that each of these outcomes are speculative at this time.

D. CONCLUSION

The Court of Appeals opinion does not merit review by this court under RAP 13.4 and therefore this court should deny review.

Respectfully submitted this day of January 2019,

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APPENDIX A

FILED
FEBRUARY 18, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Personal Restraint of:	)	No. 33635-2-III
JOSE MENDEZ, JR.,	)	UNPUBLISHED OPINION
Petitioner.	)	

FEARING, J. — In 2013, a jury found petitioner Jose Mendez, Jr. guilty of two counts of possession of a controlled substance, one count of attempting to elude a pursuing police vehicle, one count of first degree driving while license revoked, and one count of felony while driving under the influence. The trial court imposed an exceptional sentence upward due to Mendez's multiple current and prior offenses. This court affirmed his judgment and sentence on appeal. *See State v. Mendez*, Commissioner's Ruling no. 31580-1-III (Wash. Ct. App. 2014).

Jose Mendez seeks relief in this personal restraint petition by raising four

arguments. First, the State presented insufficient evidence that he possessed the controlled substances. Second, the trial court erred in failing to treat the eluding a police officer, driving with a revoked license, and driving while under the influence charges as the same criminal conduct for offender score purposes. Third, his trial and appeal counsel were ineffective. Fourth, the sentencing court miscalculated the offender score because it counted "washed out" convictions. We accept the State's concession that the offender score erroneously included washed out offenses. Consequently, we remand for recalculation of the offender score and resentencing. We find no merit in Mendez's remaining contentions and otherwise dismiss the personal restraint petition.

FACTS

Because Jose Mendez challenges the sufficiency of the evidence to support his convictions, we consider the evidence presented at trial in the light most favorable to the State's case. During one October late evening in 2012, Sergeant Monty McNearney of the Union Gap Police Department patrolled the city in a marked police car when suddenly a sports utility vehicle (SUV) pulled in front of him and turned left. Sergeant McNearney slammed his brakes to avoid a collision. He activated his emergency lights, and the SUV stopped on the side of the road. McNearney parked about 25 feet behind the SUV and shined his spotlight on the rear and driver's side of the vehicle. The interior of the SUV was dimly lit due to tinted windows, but McNearney saw the face of the driver peering at him in the driver's side mirror. The driver appeared Hispanic, with

short hair and facial hair, and wore a red shirt. As McNearney walked to the rear of the SUV, he saw the vehicle's brake lights activate. The SUV then accelerated onto the road.

Sergeant Monty McNearney and officers in two other patrol cars pursued the speeding SUV through Union Gap. In the course of the chase, the SUV breached red lights and stop signs, hit a power pole, and collided with another car. Eventually, McNearney turned a corner and found the SUV stopped midway down the block. He saw the driver exit the SUV and run into the side yard of a nearby residence.

Monty McNearney discovered Jose Mendez hiding under a bush in the residence's yard. Mendez again ran, but officers caught and handcuffed him. He smelled of alcohol. Police officers found a bag of cocaine outside the SUV but near the driver's side door, a bag of marijuana inside the SUV, and two envelopes addressed to Mendez. When McNearney retraced Mendez's running route, McNearney recovered a bag of black tar heroin lying on fallen leaves under the bush where Mendez earlier hid.

PROCEDURE

The State of Washington charged Jose Mendez with possession of cocaine and heroin, attempting to elude pursuing officers, driving with a revoked license, and driving under the influence. The jury found him guilty on all counts.

LAW AND ANALYSIS

To obtain relief in a personal restraint petition, Jose Mendez must show that he is unlawfully restrained due to an error of constitutional magnitude that substantially

prejudiced him or due to a fundamental defect of a nonconstitutional nature that caused a complete miscarriage of justice. *In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). He may not rely on conclusory allegations. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). He must show by a preponderance of the evidence that the error has caused him actual prejudice. *Lord*, 152 Wn.2d at 188.

Sufficiency of Evidence of Possession

Jose Mendez challenges the sufficiency of the evidence to convict him of possession of cocaine and heroin. Officers found the cocaine by the SUV and the heroin under a bush where he hid. Mendez contends his mere proximity to the bags of controlled substances fails to show he possessed dominion and control over them.

A conviction based on insufficient evidence violates the due process clause of the Fourteenth Amendment and therefore results in unlawful restraint. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). To determine whether a conviction rests on insufficient evidence, we consider the record in the light most favorable to the defendant and ask whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *Martinez*, 171 Wn.2d at 364. Questions of credibility, persuasiveness, and conflicting testimony are left to the jury. *Martinez*, 171 Wn.2d at 364.

RCW 69.50.4013(1) renders it "unlawful for any person to possess a controlled substance" unless pursuant to a valid prescription. Possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant has actual possession when he holds physical custody of the substance. *State v. Jones*, 146 Wn.2d at 333. Constructive possession comprises dominion and control over the controlled substance, which means that the item may be reduced to actual possession immediately. *State v. Jones*, 146 Wn.2d at 333. Mere proximity to the drug is insufficient to establish possession over it. *State v. Jones*, 146 Wn.2d at 333. To establish constructive possession, the court must look at the "totality of the situation" to determine whether the jury can reasonably infer from the evidence that the defendant possessed dominion and control. *State v. Porter*, 58 Wn. App. 57, 60, 791 P.2d 905 (1990).

Law enforcement officers did not find the bag of cocaine or bag of heroin on Jose Mendez's body. No witness saw him holding or dropping the bags. Thus, the State cannot prove actual possession. Viewed in the light most favorable to the State, however, substantial evidence supported the jury's reasonable conclusion that Mendez constructively possessed both bags.

Sergeant Monty McNearney saw Jose Mendez hurriedly exit from the SUV driver's seat and run to the side yard. No other person occupied the car. Law enforcement did not observe any other persons in that area. The bag of cocaine lay

immediately outside the driver's door. Officers found a bag of marijuana on the SUV's running board, and the location of the bag suggested that Mendez dropped the bag after he opened the door. A jury could reasonably conclude that Mendez dropped the bag of cocaine at the same time as he dropped the bag of marijuana.

The bag of heroin found in the bush lay on top of fallen leaves. A jury could conclude that the bag lay only temporarily on the ground since the season was autumn and leaves continued to fall. Jose Mendez fled from the bush as soon as Monty McNearney espied him. The jury could reasonably conclude that Mendez left the bag in a hiding place and fled to draw attention from the heroin.

Jose Mendez's proximity to the drugs, his action in fleeing the SUV, his conduct in rushing from the hiding area of the bag of heroin, and the other circumstances support the jury's reasonable inference that he possessed dominion and control over the drugs. The evidence sufficed to show constructive possession.

Same Criminal Conduct

Jose Mendez next contends that the trial court erred in treating the charges of eluding a pursuing officer, driving with a revoked license, and driving under the influence as separate current offenses in his offender score. He argues that the convictions should be counted as one offense because they constituted the same criminal conduct.

The trial court determines an offender's standard sentence range by calculating an

offender score based on the number of current and prior convictions. RCW 9.94A.525; RCW 9.94A.589(1)(a); *State v. Graciano*, 176 Wn.2d 531, 535-36, 295 P.3d 219 (2013). If the court finds that some or all of the current offenses encompass the same criminal conduct, those current offenses shall be counted as one crime. RCW 9.94A.589(1)(a); *Graciano*, 176 Wn.2d at 536. Offenses must be treated as the same criminal conduct when they are committed at the same time and place, require the same intent, and involve the same victim. *Graciano*, 176 Wn.2d at 536. RCW 9.94A.589(1)(a) is construed narrowly, and, if the defendant fails to prove any of its elements, the crimes are not the same criminal conduct. *Graciano*, 176 Wn.2d at 540.

We will not disturb a sentencing court's determination of same criminal conduct unless the court abused its discretion or misapplied the law. *Graciano*, 176 Wn.2d at 536. If the record supports only one conclusion on whether crimes constitute the same criminal conduct, we will conclude that the sentencing court abused its discretion in arriving at a contrary result. *Graciano*, 176 Wn.2d at 537-38. But if the record supports either conclusion, we defer to the sentencing court's discretion. *Graciano*, 176 Wn.2d at 538.

Because a determination of same criminal conduct involves the sentencing court's exercise of discretion, the defendant's failure to request a finding of same criminal conduct waives the issue. *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494-95, 158

P.3d 588 (2007). Jose Mendez did not request such a finding and consequently waived the assignment of error.

Ineffective Assistance of Counsel

Alternatively, Jose Mendez contends he received ineffective assistance of counsel because his attorney failed to argue that the three current driving offenses constituted the same criminal conduct. To prevail, he must show that his counsel's performance was deficient and that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs if there is a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. *McFarland*, 127 Wn.2d at 334-35. We strongly presume counsel provided effective assistance, and Mendez must show an absence of legitimate strategic reasons to support his counsel's challenged conduct. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *McFarland*, 127 Wn.2d at 335.

Jose Mendez fails to show either deficient performance or prejudice because he does not show with a preponderance of the evidence that the driving offenses encompass the same criminal conduct. One offense, driving with a revoked license, is a gross misdemeanor and was not counted in the offender score. RCW 46.20.342(1)(a). The remaining class C felony driving offenses were committed near the same time and place and had the same victim, the public at large. RCW 46.61.024(1); RCW 46.61.502(6).

Compare State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). Nevertheless, Mendez's objective criminal intent varied from one crime to the next. He claims that eluding the police vehicle and driving under the influence were committed with the one overall criminal purpose to drive the SUV illegally. This argument, however, characterizes intent too broadly. In a rough sense, all crimes, or at least intentional crimes, have one purpose of acting illegally.

The crimes of eluding the police and driving under the influence did not further one another. Jose Mendez decided to drive under the influence long before he encountered Sergeant Monty McNearney. Mendez later separately decided to elude a police vehicle. Although the eluding activity allowed him to continue to drive impaired, he more likely sought to avoid a police stop because he possessed controlled substances. His objective intent changed from one driving crime to the next.

We construe RCW 9.94A.589(a) narrowly to disallow most contentions that multiple offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d at 540 (2013); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). With that policy in mind, we conclude that Jose Mendez fails to show, with a preponderance of the evidence, that the trial court could only have treated his driving offenses as the same criminal conduct. Consequently, he does not show that his trial or appellate counsel acted deficiently or prejudiced his case by failing to raise a same criminal conduct argument.

Jose Mendez raises additional arguments in his reply brief to support a claim of ineffective assistance of counsel. Because he raises the arguments for the first time in the reply brief, we decline to address them. RAP 10.3(c); *State v. Alton*, 89 Wn.2d 737, 739, 575 P.2d 234 (1978).

Offender Score

The trial court counted nine earlier adult felonies in Jose Mendez's offender score. Jose Mendez now contends four 1998 drug convictions and one 1998 conviction for failure to return from work release should have washed out. During sentencing and by agreement of the parties, the trial court did not include in the calculation a 1990 federal conviction of conspiracy to distribute cocaine because the State had not obtained a certified record of the judgment. The State now concedes that several class C felony offenses were washed out due to the State's failure to provide a record of the federal conviction. Under RCW 9.94A.525(2)(c), class C prior felonies are not included in the offender score if, since the last date of release from confinement or entry of judgment and sentence for a felony, the offender spent five consecutive years in the community without committing a crime that resulted in a conviction.

We agree that the trial court incorrectly calculated the offender score. Consequently, we vacate the sentence and remand to the superior court for resentencing. As a result, Jose Mendez's remaining contention regarding his trial counsel's and

appellate counsel's failures to challenge the offender score are moot. *See State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

CONCLUSION

We grant, in part, Jose Mendez's personal restraint petition. We remand the case to the Yakima County Superior Court for resentencing. Otherwise, we dismiss the petition. We refer Jose Mendez's request for counsel at the resentencing hearing to the superior court. RAP 16.15(g).

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Korsmo, J.

APPENDIX B

CASE EVENTS # 336352			
Date	**Item**	**Action**	**Participant**
08/02/2016	Stored ***Comment:*** *BOX 4494 AT RC*	Status Changed	
05/16/2016	Ruling on cost Bill ***Comment:*** *The Cost Bill filed on April 13, 2016 was untimely filed. The Opinion was filed on February 18, 2016. Therefore, the due date for the Cost Bill was February 29,2016. RAP 14.4(a) Therefore, the requested costs are denied.*	Filed	TOWNSLEY, RENEE
04/13/2016	Cost Bill **Service Date:** 2016-04-08 ***Comment:*** *for $372.80*	Filed	Mendez, Jose Jr.
03/29/2016	Disposed	Status Changed	
03/29/2016	Mandate ***Comment:*** *Trial Court Action required*	Filed	
03/21/2016	Petition for Review ***Comment:*** *or mandate*	Not filed	
02/18/2016	Decision Filed	Status Changed	
02/18/2016	Opinion **Pages:** 11 **Publishing Status:** Unpublished **Publishing Decision:** Affirmed as Modified **Opinion Type:** Majority **Opinion Number:** 2016-	Filed	FEARING, GEORGE

	05058 **JUDGE:** Siddoway Laurel **ROLE: Concurring** **JUDGE:** Fearing George **ROLE: Authoring** **JUDGE:** Korsmo Kevin **ROLE: Concurring**		
02/18/2016	Trial Court Action	Required	FEARING, GEORGE
02/18/2016	Letter	Sent by Court	
02/05/2016	Heard and awaiting decision	Status Changed	
02/05/2016	Non-Oral Argument Hearing ***Comment:*** *9:00 AM* *Siddoway Laurel H.* *Korsmo Kevin M.* *Fearing George B.*	Scheduled	
02/05/2016	Set on a calendar	Status Changed	
02/05/2016	Non-Oral Argument Setting Letter	Sent by Court	
01/08/2016	Letter ***Comment:*** *PRP READY*	Sent by Court	
01/08/2016	PRP Ready	Status Changed	
12/22/2015	Reply to Response to Prp **Service Date:** 2015-12-20	Filed	Mendez, Jose Jr.
12/16/2015	Letter	Sent by Court	
12/15/2015	Ruling on Motions ***Comment:*** *The Motion for Court to Take Judicial Notice of VRP is granted.*	Filed	TOWNSLEY, RENEE

12/07/2015	Motion - Other **Service Date:** 2015-12-07 **Hearing Location:** None **Motion Status:** Decision filed ***Comment:*** *"Motion for Court to Take Judicial Notice of VRP."*	Filed	HANLON, TAMARA ANN
12/07/2015	Response to Personal Restraint Petition **Service Date:** 2015-12-07 ***Comment:*** *Was due 11/13/15, ext granted now due 12/14/15. REC'D 12/07/15 - Motion for Court to take Judicial Notice of VRP pending; 12/15/15 motion granted.*	Filed	HANLON, TAMARA ANN
11/18/2015	Ruling on Motions ***Comment:*** *Motion granted. Respondent's response to the personal restraint petition is now due December 14, 2015.*	Filed	TOWNSLEY, RENEE
11/16/2015	Letter	Sent by Court	
11/13/2015	Motion to Extend Time to File **Service Date:** 2015-11-13 **Motion Status:** Decision filed	Filed	HANLON, TAMARA ANN
10/05/2015	Notice of Appearance **Service Date:** 2015-09-30 ***Comment:*** *Tamara Hanlon appears as counsel for respondent.*	Filed	HANLON, TAMARA ANN
09/14/2015	Ruling on Motions ***Comment:*** *Filing fee waived. Response requested from the Yakima County Prosecutor.*	Filed	TOWNSLEY, RENEE
09/14/2015	Perfection Letter	Sent by Court	
09/08/2015	Case Received and Pending	Status Changed	

09/08/2015	Filing fee	Waived	
08/14/2015	Submitted	Status Changed	
08/05/2015	Case Received and Pending	Status Changed	
08/05/2015	Judgment & Sentence ***Comment:*** *Ct 1 Attempting to Elude a OPursuing Police Vehicle* *Ct 2 Possession of a Controlled Substance, Cocaine* *Ct 3 Possession of a Controlled Substance, Heroin* *Ct 4 First Degree Driving while License Revoked* *Ct 5 Felony Driving While Under the Influence of Intoxicating Liquor and/or Drugs*	Filed	
08/05/2015	Other filing ***Comment:*** *Misc. documents including request fior a determination of probable cause and findings, copy of transcript of 4/12/13*	Filed	
08/05/2015	Personal Restraint Petition ***Comment:*** *includes SOF*	Filed	Mendez, Jose Jr.

APPENDIX C

Court of Appeals No. 346391

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON	No. 12-1-01560-6
v.	Hon. Michael McCarthy Hon. Richard Bartheld
JOSE MENDEZ JR.	April 12, 2013 July 14, 2016

VERBATIM TRANSCRIPT OF PROCEEDINGS
From Electronic Recording

APPEARANCES:

For Plaintiff: TROY CLEMENTS
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For Defendant: JEFFERY B. SWAN
Department of Assigned Counsel
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Yakima, WA 98901-2605

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SENTENCING

April 12, 2013

Before the Hon. Michael McCarthy:

THE COURT: All right. Go ahead and be seated.

This is 12-1-01560-6, State versus Mendez, here today for sentencing.

Do you have a proposed judgment and sentence?

MR. CLEMENTS: Yes. (Inaudible).

THE CLERK: And the clerk is (inaudible) marking State's (inaudible).

THE COURT: All right. Let me -- make inquiry--

MR. CLEMENTS: We've -- Judge, we've kind of marked a few things. For some kind of budget constraint we're unable to get the district court conviction. I didn't include that in the offender score. It's listed on there.

I'd note that in the 00-1-01893-8 judgment and sentence for eluding, sentence date of 9/9, 2002, that conviction was listed in the criminal history, that federal conviction for conspiracy to -- distribute a controlled substance, cocaine, the federal conviction and -- the defendant's statement on plea of guilty he agrees with the prosecutor's -- recitation, I guess, of criminal history.

I don't know if that matters completely. I think what we do agree on is that either way he's a nine offender

score, even without that conviction.

We took out the 2005 felony, which appeared as a felony -- it was charged as a felony violation of protection order, 5-1-01977-3. That actually was pled out as a gross misdemeanor.

Taking both those out he's still a nine. It would be the state's position that the -- the federal conviction does exist and he's acquiesced to that at least in a prior judgment and sentence shortly after that conviction.

So, we've left those blank, I guess at this point, with the understanding that it either adds one point to it -- to either -- I guess on Count 1 a 16 or 17, and either 11 or 12 on Counts 2 and 3.

And then -- did we come up with a--

MR. SWAN: Count 5 is either a 16 or 17--

MR. CLEMENTS: Yeah. 16 or 17 on Count 5.

THE COURT: All right. So, the -- the convictions that are listed here, there's a recognition that the -- 2/17/06 was -- doesn't count because it was a gross misdemeanor. And -- is there another one that's in dispute besides that one?

MR. SWAN: Yes, your Honor. It's the conspiracy to distribute cocaine--

THE COURT: Yes.

MR. SWAN: --the U.S. Eastern District of Washington for

federal court 5/29, 1990. Mr. Mendez is indicating that that has not been proven today and he's objecting to that, because--

THE COURT: Oh, okay. When he said district court I thought of district court--

MR. CLEMENTS: Yeah.

MR. SWAN: --federal district court--

MR. CLEMENTS: Yeah.

THE COURT: Yeah. It's -- sequestered. Right? I mean, they can't get the record because--

MR. CLEMENTS: Well, actually, we -- we could probably get the record, but I thought it was going to be requested when I got back. Apparently there's a fund -- It's -- Their federal clerk's office said it's in archives, so it means it's not as easy to dig out as your typical more recent judgments and sentences. We have a -- an account that has money in typically to go pay for petty cash or that kind of stuff. And there's no money in it right now.--

THE COURT: Okay. So it's -- it's not federal sequester; it's -- you don't have--

MR. CLEMENTS: Yeah.

THE COURT: --not federal.

MR. CLEMENTS: And for whatever accounting we're using they couldn't move the -- the peanuts around to get it.

So,--.

But my point was that Mr. Mendez, in the eluding conviction judgment and sentence, signs off indicating that that was part of his criminal history. And that's the eluding conviction, the 2000-1-01893-8. And if you look in the felony judgment and sentence on that it lists that federal conviction for conspiracy to distribute cocaine, and -- and in his statement on plea of guilty he agrees with the prosecutor's recitation of his criminal history.

So, -- I don't know if it really matters either way. We're arguing over a point and it's nine-plus I think either way. I think we agree-

THE COURT: I understand your argument that it's kind of like, well, it's -- you know, it's res judicata because it's reflected in an earlier judgment.

However, my understanding is is that if -- if -- if it -- if the -- if -- if the defendant wants to put the state to its proof then they have to prove it again and again and again. So, -- so I -- I don't think -- In the absence of the -- of the certified -- record from the -- from the federal court I don't think that I can include it in his criminal history. So I'm going to go ahead and strike it.

MR. SWAN: (Inaudible) a line through that, then, your Honor?

THE COURT: I have.

All right. And so that makes--

MR. SWAN: That should make Count 1 -- we've added that up correctly -- Count 1 is an offender score, then, of 16, because it includes the--

THE COURT: Yes.

MR. SWAN: --prior DUIs. Count 2 and 3 then become 11 each. Count 4 doesn't apply. And Count 5 is -- is--

THE COURT: Yeah. All right.

Now, with the -- is there -- are there any other disputes regarding criminal history?

MR. SWAN: No.

THE COURT: Okay. All right.

I have been handed these -- a large pile of paper work. I'm going to go ahead for the -- for the sake of the record I'm going to go ahead and admit these documents, certified copies of documents as exhibits for this particular proceeding.

And the -- let me ask the state, then, what's -- what's the state's recommendation?

MR. CLEMENTS: Judge, as I indicated at the inception of the trial, the state included its information -- based on Mr. Mendez's high offender score that some of the convictions would go unpunished, essentially, and I think -- what the state is asking for -- and I'm not going

to go over all the facts. The court sat through the whole trial.

I think what -- the reason the state's asking for an exceptional sentence obviously is Mr. Mendez's criminal history. It's reflected in the felonies, but he's also got an extensive misdemeanor history, with multiple convictions for misdemeanors also.

He's got probably what I would say is one of the worst driving records I've come across since I've been a prosecutor. He lucked out, it looks like, in muni' court on the last DUI 'cause that probably should have been a felony DUI too, but they didn't catch that one.

So he's essentially now got six DUIs within ten years, this one now being a felony. I'd say but for dumb luck he didn't kill somebody. Mr. Spencer nearly avoided getting -- getting creamed by him. And he blew through so many intersections where other vehicles nearly got hit, too.

And so, I think given the -- the danger -- the danger involved in this case -- he was felony DUI -- and the nature of this elude -- I mean, he endangered a lot of people -- that if he was just sentenced for the, I guess, the controlling range, which would be on the felony DUI for five years, none of the other conduct would have any punishment. The attempting to elude would just be subsumed

in the -- the sentence of five years, as would the controlled substances.

I think, given his extensive criminal history, the court should run the elude with the elude enhancement consecutive to the felony DUI, and that the two possession counts, also, their sentences, although they're the same course of conduct, should also run consecutive. Their range is 12 to 24, and the range on the elude is 22 to 29 plus the 12-month endangerment enhancement.

I'll defer to the court how the court would want to pick the numbers out of there, but I think given his extreme criminal history, the fact he's taken no responsibility at all, ever, on this, that the court should basically impose the greatest sentence it could. I think the public's at great risk with Mr. Mendez. He's had -- if you look through his criminal history you've got to ask yourself, how many -- opportunities has he had to change his conduct. And he's refused.

And so I think the only choice now is to warehouse him as long as possible.

THE COURT: All right. Mr. Swan?

MR. SWAN: Thank you, your Honor.

So, a couple of comments, then, to make.

The standard range is 60 months. The presumption under -- RCW 9.94A.589 is that when a person is being

sentenced to two or more current offenses that those run concurrent with each other, unless the court can find substantial compelling reasons to do otherwise, which could include the issue that Mr. Clements brought up; that is one of the factors that is -- in there that is -- does not (inaudible) proven, which is whether somebody has an offender score that is well above. Some of that is -- is there, but then we have to question, at what point does it become effective and at what point does it just become -- unnecessary.

Sixty months is Mr. Mendez's standard range, which I believe more time than he's ever served before. The offender scores do tend to be high, but a lot of the offender scores (inaudible) Count 1 and Count 5 become high only because the DUIs count where they wouldn't under the -- using the scoring system--.

Interesting the -- my client's charged with a DUI which -- include both alcohol and drugs. Essentially he has -- the jury made a decision that both drugs were on him and we presume then maybe that he was using the drugs, or (inaudible), he had possession of those drugs and he was using them.

If -- if that were to be believed, which my client disputes (inaudible), that would be part and parcel potentially with the DUI -- (inaudible) question of whether

or not he's under the influence of -- of alcohol and/or drugs. I don't know if that would be -- it's not quite the same course of criminal conduct as -- as -- .589 suggests, but it certainly is all part of the same event.

All of these are part of the same event. So some of these do count against each other as being part of the same event. The licensing, the DUI, the eluding.

The state asks the court to consider some of the factors involved in the case. One of -- as I wrote down what the state was presenting, the question of whether people were endangered. I don't think the court can use that as a factor in considering what essentially becomes an exceptional sentence, to run matters consecutive to each other, because that's already taken into account in the mandatory 12 months plus one day that was -- pled and proven during the trial. So that's already -- the 12 months plus one day is already taken into account and I don't think it's appropriate that that be presented as a factor to be considered nor should the court consider whether other people were in danger. That's already taken into consideration -- for the 12 and a day.

Never taken responsibility. My client has disputed that he was the driver, so I think it's not appropriate for the court to consider that my client has never taken responsibility for anything when he has maintained his

innocence. He maintained his innocence for trial, he maintains his innocence now. The fact that somebody has said, "I want my trial, I want my constitutional rights and I'm going to further invoke my right not to comment one way or another," I don't think that should be taken into account as somebody never taking responsibility. --for the state to have to prove a case, not for my client to try to -- to have to explain himself to anybody.

Especially -- the court is well aware, regardless of whether the jury believed it or not, the court is well aware of my client's position which was he was not the driver, and so therefore he doesn't have to. His theory of his defense isn't that he should be taking responsibility for something that he didn't do.

Finally the issue is, you know, warehouse Mr. Mendez as long as possible. I'm not sure that's a factor that the court needs to be taking into account. The court needs to decide -- what the behavior was the jury found Mr. Mendez guilty of and decide where within that -- what seems to be fair based on that.

The defense is asking, while the defense disputes, again, the allegation and disputes the jury's finding, the defense is asking for the court to impose a standard range sentence -- the standard range sentence would be 60 months and for those matters to all run concurrent with each

other.

So on Count 1, a sentence somewhere between 22 and 29 months; on Count 2 and 3, standard range between 12 and 24 months; on Count 4 -- anywhere between zero to 364 days -- It says months. I guess I didn't catch it -- Paragraph 2.5, Count 4 says zero to 364 months; that should probably say days.

THE COURT: Yeah.

MR. SWAN: That would be a problem.

And then finally -- And -- and by the way, I -- I -- I was remiss. Count 1 should be the 22 to 29 plus the 12 months enhancement; that's -- that's fair. And then finally Count 5, the 60 months, because that -- max'es out the (inaudible).

So we're going to ask the court -- to run all of those matters concurrent with Count 5, 60 months, for a total of five years.

I would note, I believe that although the state's asking for community custody of 12 months, if the court does give him a standard range sentence the maximum penalty is five years on any of these, so -- I don't believe the court can impose that 12 months of community custody if the -- if we go above a statutory maximum of five years. So,--

THE COURT: (Inaudible) like on the -- isn't there still community custody available as to like the drug charges?

MR. SWAN: The max--

THE COURT: I know. Because with a felony DUI he's max'ed out so it would be--

MR. SWAN: He's max'ed out. And I -- You know, I don't know. (Inaudible) when you're -- when you're running matters together, I -- I make that comment, with -- 60 months--

THE COURT: Yeah. No; I--

MR. SWAN: --60 months.

THE COURT: --(inaudible).

MR. SWAN: Okay.

The other points that I would ask the court to take a look at -- are -- paragraph 4.4(a)(2), there's a number of boxes there to be checked. One of the proposed boxes is that Count 4 run consecutive to Counts 1, 2, 3 and 5. I would ask the court -- I'm going to ask the court regardless on these matters, we're not going to check a box, I would ask that we go ahead and strike the line, wherever this appears in the judgment and sentences, for -- for purposes of clarification. I don't want there to be a suggestion that there -- that actually exists with a box checked or not checked. But we can take a look at that--

Oh, there's another one (inaudible). Paragraph 3 -- I shouldn't go -- I'm sorry; I should go through this

more -- one at a time.

Let me make the record if I could. I appreciate the court's -- little extra time, here.

So, Paragraph 2.2, (inaudible), counsel and I agreed on the box, the first box that was checked, we struck Counts 2 and 3 as the same course of criminal conduct -- that that should not count as -- not the same course of criminal conduct. So we put lines through both of those--

THE COURT: Right.

MR. SWAN: By agreement.

I don't think there was anything else on page 2 to discuss.

Page 3, then, we've corrected the 364 months versus days.

Paragraph 2.6 -- the court's got to make the decision whether any of those would run consecutive to each other. We'd ask the court just to line that out, if the court's inclined to run them concurrent, which would be the -- the base that would done, or the standard operating procedure under the law.

I don't think there's anything else to be done on page 3.

Page 4, -- top, paragraph 3.2, exceptional sentences. It says the court is justified in entering an exceptional sentence. And again we'd ask the court to line that out.

Then I mentioned 4(a)(2), the consecutive sentence as to Count 4.

I've mentioned paragraph 4(b), -- one on the community custody already.

Going to page 5 -- I have gone through the conditions of community custody with Mr. Mendez on page 5 and 6. There are some that are struck out because they are repeats; they are already mentioned previously in the same area. And so counsel and I have -- had those struck by agreement. Otherwise it appears to be in order. Whether the boxes are marked or not I guess the court gets to decide whether to mark the (inaudible) boxes, but otherwise things are agreed as -- in terms of their applicability.

Going to page 7, which is the Paragraph 4(d)(3), the costs that are assessed against my client. Mr. Spencer is asking for $2,139.39 in restitution for the vehicle. I know we saw a bill on that; that did seem rather high for -- And I don't mean to sound judgmental or -- or what-not, but that seemed a bit high for that car. I--

THE COURT: I think he -- Didn't he -- he submitted it. He had coverage from his -- underinsured coverage. So -- Is that a -- is that a statement from his insurance carrier? I assume it is.

MR. SWAN: I wasn't sure if it was a statement from his insurance or simply just a -- an estimate.

MR. CLEMENTS: You know, I'd have to look at that in more detail. I get a form that says "restitution," how much to each person. Those are numbered I'd put in. I'd have to go look at how it broke down.

Did he testify to that, Judge? I don't recall--

THE COURT: (Inaudible).

MR. CLEMENTS: He testified it was covered?

THE COURT: Yep.

MR. CLEMENTS: Okay.

THE COURT: I remember he--

MR. SWAN: I don't think--

THE COURT: No; actually (inaudible) I think he said the car was wrecked, -- subsequently.

MR. SWAN: I don't know. I could say that while he may have testified to that, we never -- I didn't receive -- I don't believe I received any documentation as to insurance covering it. We had an estimate that was originally given out in this case--

THE COURT: Okay.

MR. SWAN: --shortly after the--

THE COURT: Well,--

MR. SWAN: --within 40 or 45 days, once the gentleman sent something back.

So, it's an observation that I make. It sounds like that will mean the car was totaled, given -- the car.

Again, not to be judgmental or anything, but his -- the car had limited value.

The objections we'd make, there is a line for a jury fee, $250. My client is entitled to have a trial by jury, and the defense objects to the $250 fee for the jury fee. He shouldn't have to pay a cost for enforcing his rights under the constitution to have a jury trial. We'd ask the $250 fee be struck.

Mr. Clements and I talked about the DUI fee. He says it's correct. I honestly don't know what the fee is. I wasn't able to find out for myself. So if it's accurate, it's accurate, and if not then we'll object as -- 'cause it's just not -- It says -- includes BAC of $125 and TPS. I'm not even sure what TPS is. Maybe somebody else knows.

THE COURT: Traffic--

MR. SWAN: Okay.

THE COURT: --penalty, I think.

MR. SWAN: Whatever. $43. So I don't know if those are required or not. I don't know what the underlying -- what the actual -- fine for a DUI is. Because it's $125 plus $43, it's going to essentially make $!68. You take the $120 -- I was thinking $1,120.50, that strikes me as a very odd cost for a DUI fine. I -- don't know what the standard fine--

THE COURT: It's -- it's -- it's a base fine and then

there's obvious assessments on top of it. So,--

MR. SWAN: Well, and--

THE COURT: --percentages of the base.

MR. SWAN: And that's fine. I went ahead and looked up the costs of -- RCW 9.94A.760, and it does say that the -- looking at (1), it says the court must on either the judgment or sentence on a subsequent order to pay designate the total amount of legal/financial obligations and segregate this amount amongst the separate assessments made for restitution, costs, fines and other assessments required by law.

So I will object to the DUI assessment simply for the fact that it's not set out specifically -- as to the specific costs so they can be argued and disputed. That would be my objection on that.

My final objection on the costs, under 4(d)(3), is the drug enforcement fund LEAD. And it also cites the same RCW that I just cited, 9.94A.760. Nowhere in 9.94A.760 is there a provision that allows for a assessment for LEAD -- I believe LEAD is for a drug enforcement task force. This was not a drug investigation, nobody from LEAD was involved in the case. I don't know why we'd be giving them $250, or forcing Mr. Mendez to pay them $250 for something they were never involved in. I don't know how -- I don't know -- I don't understand the logic of that

but I will object to that. That is not a -- appropriate cost based upon this -- the facts that were in this trial.

So I'll leave that at that.

Paragraph 4(d)(4), the costs of incarceration. I looked that up as well. Mr. Mendez does not have the present ability to pay for any of the costs of incarceration, nor is it likely he will in the future although that's not part of the -- consideration the court has, is what his -- his likelihood in the future; it's whether he has a present ability. At this point I would ask the court to, if not strike 4(d)(4) to at least limit or cap the amount that can be assessed against him for the costs of incarceration.

The court will see shortly when we file the notice of appeal and his declaration that Mr. Mendez has nothing; he's completely and totally destitute in terms of costs -- or, excuse me -- in terms of -- of -- any money or value that he could use to pay for that.

I did go over the notices with Mr. -- Mendez, and he did sign off that he acknowledge notices of section 5, which included the collateral attack (inaudible) condition violations. And (inaudible) there. So he signed off simply to acknowledge those (inaudible) else.

And that -- those are my comments on sentencing. Thank you.

THE COURT: All right. Mr. Mendez, is there anything

you want to say to me about this matter before I impose sentence.

DEFENDANT: Yes, I would, your Honor.

THE COURT: Okay.

DEFENDANT: You know, -- as of me not ever trying to do anything to correct the wrongs I've done in my life, that's a lie. I have. I've -- I was enrolled in the (Inaudible) Clinic prior to my last DUI. I had 18 months clean and sober during that time. But during that time I had a loss to my family.

I just had a loss towards my family back in the past, and -- I lost my (inaudible) sobriety. And I found myself here in front of you at your mercy and hoping that, you know, that you know I have done some -- something for my wrongs. You know? And I wasn't -- That's the past, you know, that was my past, and I paid for it -- each and every time I paid for my -- my wrongdoings. And I've admitted (inaudible).

This time I took it to trial, you know, because I wasn't -- driving. And I take responsibilities for my wrongdoings. I won't allow anybody else to do it.

But other than that is, I hope that -- I'm here at your mercy and hopefully that we can come to agreement with what my attorney said.

THE COURT: All right. Thank you, Mr. Mendez.

Well, your -- Mr. Mendez, your criminal history is -- is extraordinary. The -- And it's reflected in the -- in the arithmetic that results in offender scores which are greatly in excess of the top of the range. You know? At some point, and I think in this instance, there has to be a recognition that you are -- that your -- your criminal history -- And I recognize that you've, you know, been convicted and you've served sentences. But -- but there's no -- the lesson has never apparently been learned, Mr. Mendez. And -- and at some point there has to be a switch in the -- in the -- in the focus, I guess, of -- the -- of the reason for the imposition of -- of a particular sentence. And I think that the switch in focus for you it's -- if it hasn't happened before it's certainly going to happen today.

You're off the scale. You know? I mean -- And it's -- and it's not -- And it's mostly the same stuff. You know? It's -- it's eluding, and drugs, and driving under the influence, and -- and, you know, it's like -- it's like a bad dream. It's -- you know, it's the same thing all over again.

And, so -- there -- it needs to come to an end. And -- And I appreciate that you've made some efforts in the past to try to straighten things out, but obviously you're either incapable or at least or at least incapable

at this time of -- of making the changes that society requires that you make.

So, what I am going to do is I'm going to find a basis for an exceptional sentence in this particular matter.

As to Count 1, the -- which is the charge of eluding, 29 months, plus the 12 months for the -- for the aggravator.

Count 2 and 3, 24 months apiece.

Count 4, which is the driving while license suspended charge, I'm going to impose 180 days as to that charge.

And then on Count 5, which is the felony DUI, 60 months.

The -- You'll get credit for the time that you've served here at the county jail, which is 183 days according to my arithmetic.

Counts 2 and 3 will run concurrently with each other for a total of 24 months.

Counts 1, 4 and 5 will run consecutively to each other and consecutively to the concurrent sentence imposed in Count 2 and 3.

So the total, at least according to my arithmetic, will be -- a hundred and -- Let me double-check.

--will be 125-1/2 -- Excuse me -- a hundred and -- 131 months. So, -- including the six months on the gross misdemeanor, and then 125 months as to the other felony convictions.

You will serve a period of community custody, which I

think is still available, certainly under the drug charges. And so when you are released from full custody you'll report to the -- your -- Department of Corrections, and report -- be available for contact with your assigned community corrections officer. You'll cooperate fully with your supervising community corrections officer. You will perform affirmative acts necessary for the Department of Corrections to monitor you compliance with the court's orders, work at Department of Corrections approved education, employment and/or community service. No unlawful possession or consumption of any controlled substances, pay supervision fees as determined by the Department of Corrections. Your residence location and living arrangements subject to the approval of your community corrections officer. You will allow home visits by your community corrections officer to monitor compliance with supervision. No ownership, use or possession of any firearms or ammunition, maintain good behavior. If you do become subject of court-ordered mental health or chemical dependency treatment you must notify the Department of Corrections and allow -- information to be shared with your community corrections officer. You'll report to a Washington state approved substance abuse assessment facility and complete any recommended treatment. You'll submit to urinalysis as well as polygraph

examinations -- drug and alcohol usage, and no possession or consumption of any intoxicating beverages, no driving with a license and liability insurance, and complete the victim impact and/or defensive driving school as directed by your supervising community corrections officer.

Restitution at this point is set for -- at $2,139.39. I'm directing the state to provide Mr. Swan with all materials in its possession regarding how that figure was arrived at, and that figure is subject to review at the defendant's request.

It's a $500 crime penalty assessment and $200 criminal filing fee, a $600 court-appointed attorney recoupment, a $100 DNA collection fee. The jury fee is $250. The driving under the influence fine, which includes certain mandatory assessments, is $1,120.50. There's a mandatory drug fine in the sum of $2,000.

I'm striking the drug enforcement fund contribution but I'm leaving in the crime lab fee.

So that will be $7,009.89 total.

The costs of incarceration will be capped at $1,000.

And I do note that Mr. Mendez appears today dressed as a trustee for this particular facility, and I believe based upon that and his general appearance that he is capable of working. And so he is capable of -- of paying some -- paying some of these legal/financial obligations.

And I'm signing the judgment and sentence.

You do have the right to appeal, Mr. Mendez. In order to perfect your appeal you have to file a notice of appeal in this court, serve a copy on all other parties within 30 days of today's date. If you fail to do so you will have irrevocably waived your right to appeal.

And you are entitled to counsel at public expense as well as the preparation of the record necessary for appeal also at public expense if you're unable to pay for the same yourself.

Do you have the paper work there, Mr. Swan?

MR. SWAN: I do. (Inaudible). And I have the -- reflecting -- notice of appeal -- (Inaudible) previous hearing so -- don't need -- (inaudible) another copy--.

--motion and declaration for order of indigency. I have motion -- (inaudible) -- Mr. Mendez (inaudible) -- doesn't have it in front of me. He does have significant legal/financial obligations, is not employed outside of the jail.

We have asked the court to -- as far as (inaudible) I put in trial (inaudible) including the wording -- the opening statements, beginning February 19 and ending February (inaudible) -- trial dates -- date of sentencing -- is also -- Mr. -- (Inaudible) the actual

order.

And (inaudible) the pretrial (inaudible) -- pretrial being (inaudible) 2/19, -- trial would be (inaudible) -- date of sentencing. And I believe that covers--.

THE COURT: Okay.

All right. I've signed the order of indigency, and the notice of appeal is filed.

MR. CLEMENTS: Thank you, Judge.

THE COURT: Thank you.

Hearing ends

APPEARANCE

July 14, 2016

Before the Hon. Richard Bartheld:

MR. HINTZE: --final one, which is Jose Mendez.

THE COURT: That was also a return from prison.

MR. HINTZE: Yes. The -- It just has to be resentenced, Judge. And there's apparently it's already planned out in front of McCarthy to be sentenced tomorrow.

THE COURT: Okay.

MR. HINTZE: So, there's still a conviction and a sentence -- I don't know if he needs to be brought out, but we have--

THE COURT: Do you have him down?

DEPUTY: We had him down and his attorney Jeff Swan said we don't need him, went in and talked to him for about twenty minutes and (inaudible)--

THE COURT: Okay.

DEPUTY: --no bail scheduling order.

THE COURT: Well, I'm sure Mr. Hintze would have appreciated having been advised by Mr. Swan that that was the case.

MR. HINTZE: I was not.

THE COURT: Well,--

MR. HINTZE: But, we just delayed my exit by a few

seconds.

THE COURT: Sorry about that, Mr. Hintze.

Recording ends

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3. This transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the judicial officer reviewing the transcript;

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Kenneth C. Beck, Transcriber

December 24, 2016
Spokane, WA

DECLARATION OF SERVICE

I, David B. Trefry, state that on January 23, 2019, I emailed a copy of the State's Answer to: Marie Trombley at marietrombley@comcast.net

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

DATED this 23rd day of January, 2019 at Spokane, Washington.

__s/_David B. Trefry_____
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YAKIMA COUNTY PROSECUTORS OFFICE

January 23, 2019 - 5:56 PM

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