Supreme Court No. 96689-3

Court of Appeals No. 346391

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOSE MENDEZ, JR., Petitioner

BRIEF OF PETITIONER

Marie J. Trombley, WSBA 41410
Attorney for Jose Mendez, Jr.
PO Box 829
Graham, WA
253-445-7920

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TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Jose Mendez Jr. through his attorney, Marie Trombley, petitions the Court for review of a decision of the Court of Appeals in *State v. Jose Mendez, Jr.,* Court of Appeals No. 34639-1-III.

II. DECISION OF LOWER COURT

The Court of Appeals filed an opinion on September 11, 2018, generally affirming the trial court's sentencing which included a 1990 federal conviction for which the trial court had not performed a comparability analysis, and which had prevented a "wash out" of earlier felony convictions. In its opinion, the Court looked to a second federal conviction which had not been included in the judgment and sentence but raised by the State in its response brief. The Court allowed for Mr. Mendez to request a hearing before the sentencing judge for a comparability analysis for one or both federal convictions if he did so within 60 days of the Court's mandate. The Court declined to consider whether the $500 in discretionary legal financial obligations was unlawfully imposed because it had not been objected to, and it was below a $750 threshold for review the writing author employed where a resentencing did not require the defendant's presence. A copy of the decision is attached to this petition as Appendix A.

Mr. Mendez filed a timely motion for reconsideration, pointing out to the Court that the second federal conviction was not listed on the State judgment and sentence, was not presented to the trial court for a comparability analysis, and had not been included in the offender score at the original or subsequent sentencing. Mr. Mendez asked the Court to remand for a comparability analysis of any convictions the State intended to use to determine an offender score, and to place the burden on the trial court, rather than Mr. Mendez, to petition for a hearing.

Mr. Mendez also asked the Court to reconsider the decline of review of the discretionary legal financial obligation.

On November 27, 2018, the Court issued an order granting the motion for reconsideration in part and withdrawing its original unpublished opinion. The Court remanded for resentencing for the trial court to conduct a comparability analysis, and to strike the discretionary $500 incarceration fee and the $100 DNA collection fee. A copy of the Court's order is attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

A. Is it a violation of the law of the case doctrine for the trial court to allow the State to present evidence after it has already conceded an issue at the Court of Appeals?

B. Where the judgment and sentence list a single federal conviction, for which the trial court neglects to conduct a comparability analysis, is it error for the State to raise the issue of a second alleged federal conviction for the first time on appeal?

IV. STATEMENT OF THE CASE

After a jury trial Jose Mendez, Jr. was convicted of attempting to elude a pursuing police vehicle, two counts of possession of a controlled substance, felony driving while under the influence, and first degree driving with a revoked license. CP 21-22. At the sentencing hearing of April 12, 2013, Mr. Mendez objected to the inclusion of a 1990 federal district court conviction for conspiracy to distribute a controlled substance. (4/12/13 RP 5). The 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. (4/12/13 RP 4-6). The Commissioner of the Court of Appeals affirmed the convictions and exceptional sentence in a ruling issued September 2014. CP 39-46.

Subsequently, Mr. Mendez filed a personal restraint petition. CP 48. Among other issues, he pointed out that the sentencing court miscalculated his offender score counting five convictions that 'washed

out' as a result of striking the federal conviction. This Court stated: "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." CP 49. This Court explained:

> 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.

CP 57 (emphasis added).

On remand, this time the State presented the sentencing court with a copy of a federal judgment and sentence. The State did not

present a copy of the indictment, the elements of the offense, or a copy of the guilty plea. (7/15/16 RP 2-3); State Exh. BB. The State argued the remand authorized the court to conduct a full resentencing and the federal conviction was properly before the court. (7/15/16 RP 8).

Mr. Mendez argued that the State had conceded the issue before the Court of Appeals and was limited at the resentencing to correct the offender score to account for the washed out convictions. Additionally, he argued that in the initial sentencing, the State did not have the information to show the federal offense was comparable to a Washington offense. (7/15/16 RP 8-9).

The sentencing court ruled the case had been remanded for a complete resentencing and, without a comparability analysis, included a single federal conviction for conspiracy to distribute a controlled substance, and the previously conceded washed out convictions. (7/15/16 RP 9-10). The judgment and sentence showed the criminal history as follows. CP 63-64[1].

[1] The 2006 violation of protection order was stricken. (4/12/13 RP 4).

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 Viol Protection Order 06-1-00753-6	5-30-2006	Yakima, WA	3-18-2006	Adult	NV
Malicious Mischief 2 02-1-01364-9	9-9-2002	Yakima, WA	7-8-2002	Adult	NV
Attempt to Elude 00-1-01893-8	9-9-2002	Yakima, WA	11-9-2000	Adult	NV
Possess Cont Sub - Cocaine 00-1-01678-1	9-9-2002	Yakima, WA	10-4-2000	Adult	Drug
Conspiracy to Distribute -- Cocaine - CR-90-2005-AAM Last Release 12/17/1999	5-29-1990	US Eastern Dist., WA	12-20-1989	Adult	Drug
Fail to Return to Work Release 88-1-01090-1	11-1-1988	Spokane, WA	11-1-1988	Adult	NV
VUCSA 88-1-00365-4	6-20-1988	Spokane, WA	2-21-1988	Adult	Drug
VUCSA 88-1-00365-4	6-20-1988	Spokane, WA	2-28-1988	Adult	Drug
VUCSA 88-1-00365-4	6-20-1988	Spokane, WA	2-12-1988	Adult	Drug
VUCSA 87-1-01568-3	1-6-1988	Yakima, WA	11-24-1987	Adult	Drug
Non Felony DUI Convictions					
Drive Under Influence #H00013586	7-15-2011	Yakima Municipal, WA	1-5-2011	A	
Drive Under Influence #654880	12-15-2008	Yakima District, WA	11-30-2008	A	
Drive Under Influence #732993	11-13-2008	Yakima District, WA	5-9-2008	A	
Drive Under Influence #G00058003	7-15-2011	Yakima Municipal, WA	4-15-2008	A	
Drive Under Influence #605137	2-20-2007	Yakima Municipal, WA	12-1-2006	A	

Mr. Mendez appealed the trial court's ruling. CP 80. In its opinion, the Court of Appeals considered the State's argument that the exhibit presented to the trial judge showed two federal convictions, entered on the same day in 1990. (*Slip. Op.* at 7). The alleged second federal conviction was never entered on the judgment and sentence and the parties and court referred to the federal paperwork as "the" federal conviction (singular). (7/15/16 RP 7-8, 11-12). Nevertheless,

the Court held that if Mr. Mendez contested the comparability of the second federal conviction, he could request a hearing for the sentencing court to consider whether either of the convictions was comparable to a Washington crime.

In the order on motion for reconsideration, the Court remanded for the sentencing court to conduct a comparability analysis on any requested foreign conviction. (Order on Reconsideration p. 10).

Mr. Mendez makes this timely petition for review.

V. ARGUMENT FOR ACCEPTANCE OF REVIEW

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes this Court should accept review because the decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

The 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. The law of the case doctrine refers to the binding effect that an appellate court's decision has on a trial court's proceedings on remand. *State v. Harrison,* 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). The purpose of the doctrine is to "avoid indefinite relitigation of the same issue, to obtain consistent results in the same

litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of the lower courts to the decisions of appellate courts." *Id.* at 562 (internal citation omitted). Once the appellate court rules, its holding must be followed in all subsequent states of the same litigation. *State v. Schwab,* 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

In its unpublished opinion *In re Mendez,* 192 Wn. App. 1045 (2016), the appellate Court found the State conceded that several class C felonies were washed out due to the State's failure to provide a record of the federal conviction. The Court agreed with Mr. Mendez, the offender score was incorrectly calculated, vacated the sentence, and remanded to the superior court for resentencing. *Id.* at *5. The Court's ruling specifically cited the concession.

In *State v. Jones,* 182 Wn.2d 1, 338 P.3d 278 (2014), this Court held that RCW 9.94A.530(2) authorized the resentencing court to hear relevant evidence from both parties to ensure accuracy of criminal history. *Id.* at 10-11. Finding that the accuracy of criminal history did not implicate due process concerns, this Court held the legislature acted within its plenary authority to enact RCW 9.94A.530(2), which superseded the common law "no second chance" rule. *Id.*

Jones should not control the outcome of the decision in this case for three reasons. First, in *Jones* the State made no concession to the appellate Court; here, the acceptance of the concession should act as a bar to the execution of the statute. Second, the State did not, in either the original sentencing or the resentencing, argue there were two federal convictions. The trial court did not consider two convictions. A second conviction was not entered on the judgment and sentence. It was only on the most current appeal, wherein it was argued by Mr. Mendez that the listed conspiracy to distribute a controlled substance was not legally or factually equivalent to a Washington crime that the State proposed the exhibit showed two 1990 convictions. (Appellant's Opening Brief, pp. 13-16; Respondent's Brief, p.6).

Third, a trial court's discretion to resentence on remand is limited by the appellate Court's mandate. *State v. Kilgore,* 167 Wn.2d 28, 42, 216 P.3d 393 (2009). The Court in this case held:

> 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).

In re Mendez, 192 Wn. App. 1045 at *5. The remand was based on an incorrect offender score and the State's concession the class C felony offenses were washed out. *Id.*

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mendez respectfully asks this Court to accept review of this petition.

Dated this 27th day of December 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for JOSE MENDEZ, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid, on December 27, 2018 to

Jose Mendez/#936781
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to Tamara Ann Hanlon, Yakima County Prosecuting Attorney at: appeals@co.yakima.wa.us; David.Trefry@co.yakima.wa.us

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APPENDIX A

FILED
SEPTEMBER 11, 2018
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

STATE OF WASHINGTON,	)	No. 34639-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOSE MENDEZ,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Jose Mendez prevailed in a prior personal restraint petition (PRP), and we remanded for resentencing. He now appeals the trial court's amended sentence. We generally affirm.

FACTS

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.

Mr. Mendez then filed a PRP and alleged that the trial court imposed an illegal sentence because his 1988 convictions should have washed out and both his trial counsel and his appellate counsel were ineffective for failing to raise that issue. The State

conceded "the offender score erroneously included washed out offenses." Clerk's Papers (CP) at 49. 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 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. . . .

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)(1). 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) 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 sentencing court also imposed costs of incarceration, a discretionary legal financial obligation (LFO), and capped that cost at $500. The trial court justified the discretionary cost because Mr. Mendez had discussed at length his educational advancement since 2013 and his hope for future employment in the HVAC (heating, ventilating, and air conditioning) industry. The trial court however did not inquire of Mr. Mendez's assets or debts. Mr. Mendez did not object to this.

Mr. Mendez appealed. The sentencing court later entered findings of fact and conclusions of law in support of its exceptional sentence for free crimes.

ANALYSIS

A. LAW OF THE CASE DOCTRINE

Mr. Mendez first contends the law of the case doctrine prohibits the State from rescinding its concession in his PRP.

"The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). Mr. Mendez argues that the law of the case is that the State conceded the 1988 convictions washed out and therefore could

not be used in a resentencing hearing. The State counters that its earlier concession did not include a concession that it should not be able to provide accurate conviction history at resentencing. The State also cites RCW 9.94A.530(2), which provides in part: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." *See also State v. Jones*, 182 Wn.2d 1, 10, 338 P.3d 278 (2014) (amended statute is constitutional and permits all relevant evidence to be considered by sentencing court so as to reflect the offender's actual criminal history, whether at sentencing or resentencing).

We agree with the State. In our previous decision, we did not restrict the State from presenting accurate information to reflect Mr. Mendez's complete criminal history. For this reason, the sentencing court did not err when it considered all relevant evidence.

B. COMPARABILITY OF FEDERAL CONVICTIONS WITH WASHINGTON STATE CRIMES

Mr. Mendez argues that his 1990 federal conviction for conspiracy to distribute a controlled substance should not have been included in his offender score calculation. He contends that this conviction is not legally or factually comparable to a Washington State crime. The State responds that the *second* 1990 federal conviction—distribution of controlled substance—cocaine—clearly is comparable. The State requests that this court

perform the comparability analysis or that we remand to the sentencing court for such an analysis.

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.

We permit Mr. Mendez an opportunity to request a hearing before the sentencing court. Such a hearing may be requested, but only if he files his request within 60 days of the issuance of this court's mandate. If he so chooses, the sentencing court may determine whether either of the 1990 federal convictions is comparable to a Washington State crime. If so, the 1988 convictions do not wash out. Consistent with RCW 9.94A.530(2), the State may introduce additional evidence at the hearing.

C. EXCEPTIONAL SENTENCE FINDINGS

Mr. Mendez assigns error to the sentencing court's failure to enter findings of fact and conclusions of law in support of the exceptional sentence it imposed based on free crimes. The trial court later entered those findings and conclusions. We permitted Mr. Mendez to file a supplemental brief. He declined. We construe this as a concession.

D. CLERICAL ERROR IN JUDGMENT AND SENTENCE

Mr. Mendez argues that paragraphs 2.6, 3.2, and 4.A.2 of the judgment and sentence are internally inconsistent. The State responds that the sentencing court intended to enter a similar consecutive sentence as the original sentence, and that the "and 4" phrase in paragraph 4.A.2 should be struck so the paragraphs are internally consistent. Mr. Mendez did not object to this remedy in his reply brief. We therefore remand to the sentencing court for it to enter an order redacting "and 4" from paragraph 4.A.2 in the July 15, 2016 judgment and sentence. Mr. Mendez's presence is not necessary.

E. COSTS OF INCARCERATION

Mr. Mendez argues that this court should accept review of whether the trial court erred when it imposed the $500 discretionary LFO. The State argues this court should not grant review but agrees to strike the discretionary LFO in the event this court does grant review.

RAP 2.5(a) provides that an "appellate court may refuse to review any claim of error which was not raised in the trial court." For this reason, a defendant who does not object to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Mr. Mendez did not object to the sentencing court's imposition of the $500 discretionary LFO.

Mr. Mendez asks this court to accept discretionary review, which this court is entitled to do. *See id.* at 835. An approach favored by this author is to consider the administrative burden and expense of bringing a defendant to court for a new hearing versus the likelihood that the discretionary LFO result will change. *State v. Arredondo*, 190 Wn. App. 512, 538, 360 P.3d 920 (2015). "An important consideration of this analysis is the dollar amount of discretionary LFOs imposed by the sentencing court." *Id.* Where the discretionary LFOs total less than $750, this author declines to accept review unless resentencing would require the defendant's presence anyway. Here, the scrivener's error does not require Mr. Mendez's presence, and the discretionary LFO is less than $750. We, therefore, decline to accept review of this unpreserved error.

Affirm, except remand to correct scrivener's error, and limited option for hearing on comparability issue.

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.

Lawrence-Berrey, C.J.

I CONCUR:

Fearing, J.

Fearing, J.

SIDDOWAY, J. (dissenting in part) — I would not invite Jose Mendez to request a hearing on the comparability of his 1990 federal conviction for distribution of a controlled substance 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 offender score a crime that the trial court excluded for a different reason in imposing the original exceptional sentence. Nothing, scorewise, 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.

Siddoway, J.

Siddoway, J.

APPENDIX B

FILED
NOVEMBER 27 , 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 34639-1-III**
	)	
Respondent,	)	**ORDER GRANTING**
	)	**MOTION FOR**
v.	)	**RECONSIDERATION**
	)	**IN PART AND**
JOSE MENDEZ,	)	**WITHDRAWING**
	)	**OPINION**
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be granted in part. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of September 11, 2018, is granted in part.

IT IS FURTHER ORDERED that the opinion filed on September 11, 2018, is hereby withdrawn and a new opinion is filed herewith.

PANEL: Judges Lawrence-Berrey, Fearing, Siddoway

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
CHIEF JUDGE

FILED
NOVEMBER 27, 2018
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

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FACTS

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Mr. Mendez then filed a PRP and alleged that the trial court imposed an illegal sentence because his 1988 convictions should have washed out and both his trial counsel and his appellate counsel were ineffective for failing to raise that issue. The State

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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)(1). 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.

The court then asked Mr. Mendez to address the issue of legal financial obligations (LFOs). Mr. Mendez noted that he was in prison, not working, and that he had dependents. Mr. Mendez initially asked the court to strike "some" of the discretionary LFOs. RP at 21. In the next sentence, he asked the court to strike "all" discretionary LFOs. RP at 22. He then asked the trial court to cap the costs of incarceration, a discretionary LFO, at $1,000 "or potentially strike the paragraph altogether." RP at 22.

The court did not impose any discretionary LFOs, except the costs of incarceration, which it capped at $500. Likely because the costs imposed were within Mr. Mendez's request, the trial court did not inquire of his assets or debts. In addition, the court imposed mandatory LFOs, including a DNA[1] collection fee of $100.

[1] Deoxyribonucleic acid.

Mr. Mendez appealed. The sentencing court later entered findings of fact and conclusions of law in support of its exceptional sentence for free crimes.

ANALYSIS

A. LAW OF THE CASE DOCTRINE

Mr. Mendez first contends the law of the case doctrine prohibits the State from rescinding its concession in his PRP.

"The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). Mr. Mendez argues that the law of the case is that the State conceded the 1988 convictions washed out and therefore could not be used in a resentencing hearing. The State counters that its earlier concession did not include a concession that it should not be able to provide an accurate conviction history at resentencing. The State also cites RCW 9.94A.530(2), which provides in part: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." *See also State v. Jones*, 182 Wn.2d 1, 10, 338 P.3d 278 (2014) (amended statute is constitutional and

permits all relevant evidence to be considered by sentencing court so as to reflect the offender's actual criminal history, whether at sentencing or resentencing).

We agree with the State. In our previous decision, we did not restrict the State from presenting accurate information to reflect Mr. Mendez's complete criminal history. For this reason, the sentencing court did not err when it considered all relevant evidence.

B. COMPARABILITY OF FEDERAL CONVICTIONS WITH WASHINGTON STATE CRIMES

Mr. Mendez argues that his 1990 federal conviction for conspiracy to distribute a controlled substance should not have been included in his offender score calculation. He contends that this conviction is not legally or factually comparable to a Washington State crime. The State responds that the *second* 1990 federal conviction—distribution of controlled substance—cocaine—clearly is comparable. The State requests that this court perform the comparability analysis or that we remand to the sentencing court for such an analysis.

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. We remand for resentencing for the trial court to conduct a comparability analysis of any foreign conviction the State intends to rely on to calculate

Mr. Mendez's offender score. Consistent with RCW 9.94A.530(2), the State may introduce additional evidence at the hearing.

C. EXCEPTIONAL SENTENCE FINDINGS

Mr. Mendez assigns error to the sentencing court's failure to enter findings of fact and conclusions of law in support of the exceptional sentence it imposed based on free crimes. The trial court later entered those findings and conclusions. We permitted Mr. Mendez to file a supplemental brief. He declined. We construe this as a concession.

D. CLERICAL ERROR IN JUDGMENT AND SENTENCE

Mr. Mendez argues that paragraphs 2.6, 3.2, and 4.A.2 of the judgment and sentence are internally inconsistent. The State responds that the sentencing court intended to enter a similar consecutive sentence as the original sentence, and that the "and 4" phrase in paragraph 4.A.2 should be struck so the paragraphs are internally consistent. Mr. Mendez did not object to this remedy in his reply brief. We therefore remand to the sentencing court for it to enter an order redacting "and 4" from paragraph 4.A.2 in the July 15, 2016 judgment and sentence. Mr. Mendez's presence is not necessary.

E. COSTS OF INCARCERATION

Mr. Mendez argues that this court should accept review of whether the trial court erred when it imposed the $500 discretionary LFO. The State argues this court should not

grant review, but agrees to strike the discretionary LFO in the event this court does grant review.

In light of *State v. Ramirez*, __ Wn.2d __, 426 P.3d 714 (2018), we accept review. Ramirez holds that House Bill 1783[2] applies prospectively to criminal appellants challenging their LFOs on appeal and prohibits imposing discretionary LFOs against offenders who are indigent at the time of their sentencing. A person is indigent if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level. RCW 10.101.010(3)(c). Here, Mr. Mendez had been in prison for a number of years by the time he was resentenced. He, therefore, was indigent at the time of his sentencing.

We accept the State's concession and direct the sentencing court to strike all discretionary LFOs. In addition, we direct the trial court to strike the $100 DNA collection fee. LAWS OF 2018, ch. 269, § 18 (DNA database fee no longer mandatory if offender's DNA has been previously collected because of a prior felony conviction).[3]

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[2] ENGROSSED SECOND SUBSTITUTE H.B. 1783, 65th Leg., Reg. Sess. (Wash. 2018).

[3] But for the prospective application of House Bill 1783 to this case on appeal, the trial court's LFO decision would have been affirmed.

In summary, we affirm in part and reverse in part. We remand to correct a scrivener's error, to strike the discretionary incarceration cost and the DNA collection fee, and for the sentencing court to conduct a comparability analysis on any requested foreign conviction.

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.

Lawrence-Berrey, C.J.

I CONCUR:

Fearing, J.

Fearing, J.

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 offender score a crime that the trial court excluded for a different reason in imposing the original exceptional sentence. Nothing, scorewise, 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.

Siddoway, J.

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MARIE TROMBLEY

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