

FILED  
May 2, 2017  
Court of Appeals  
Division III  
State of Washington

**NO. 33888-6-III**

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

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STATE OF WASHINGTON,

Respondent,

v.

**LEOPOLDO CUEVAS CARDENAS,**

Appellant.

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

The Honorable Blaine G. Gibson, Judge

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>A. ARGUMENT.....</b>	<b>1</b>
<b>Mr. Cardenas is entitled to be present at a resentencing hearing.</b>	<b>1</b>
<b>B. CONCLUSION.....</b>	<b>3</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>4</b>

**TABLE OF AUTHORITIES**

**Page**

**Washington Supreme Court Cases**

*Garrison v. Rhay*, 75 Wn.2d 98, 449 P.2d 92 (1968) ..... 1  
*State v. Wilson*, 170 Wn.2d 682, 244 P.3d 950 (2010) ..... 2

**Washington Court of Appeals Cases**

*City of Bothell v. Gutschmidt*, 78 Wn. App. 654, 898 P.2d 864 (1995) ..... 2  
*State v. Davenport*, 140 Wn. App. 925, 167 P.3d 1221 (2007) ..... 1

## **A. ARGUMENT**

### **Mr. Cardenas is entitled to be present at a resentencing hearing.**

The State concedes it erred as it relates to all the issues raised in Mr. Cardenas' Brief of Appellant and in his Supplemental Brief of Appellant. Brief of Respondent at 1-4.

The State addresses none of the four issues Mr. Cardenas raised in his Statement of Additional Grounds for Review. Brief of Respondent at 1-4. Mr. Cardenas argues significant errors in the calculation of his offender score. Statement of Additional Grounds for Review at 26-30.

While the State, among its concessions, agrees Mr. Cardenas' sentence was based on a miscalculated offender score, it suggests this court should remedy the error by simply allowing an ex parte order be entered reflecting an offender score of 9. Brief of Respondent at 1-2. The State's requested remedy cites to inapposite authority addressing relief when some of the basis supporting an exceptional sentence are invalidated on appeal. Brief of Respondent at 5-6.

Rather, Mr. Cardenas is entitled to be present at all critical stages of his proceedings. *State v. Davenport*, 140 Wn. App. 925, 932-33, 167 P.3d 1221 (2007); *See Garrison v. Rhay*, 75 Wn.2d 98, 102, 449 P.2d 92 (1968) ("a critical stage is one in which there is a possibility that a

defendant is or would be prejudiced in the defense of his case”). In imposing the high end of the 38.25-51 month standard range, the trial court simply felt a sentence “closer to the top of the range is more appropriate than one at the bottom of the range.” RP 253. With the State’s concession that four of Mr. Cardenas’ convictions should have scored as a single offense, Brief of Respondent at 5, the trial court, on remand, could use its discretion to sentence Mr. Cardenas to a lesser sentence within the 38.25 -51 month range. It is not within the purview of this court to preempt the inherent sentencing authority of the trial court.

Additionally, if the court accepts Mr. Cardenas’ SAG arguments, his standard sentencing range could be even lower.

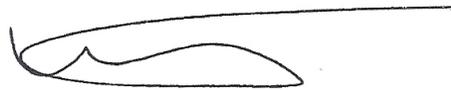
Remand for resentencing is not a simple ministerial act. *City of Bothell v. Gutschmidt*, 78 Wn. App. 654, 662-63, 898 P.2d 864 (1995) (“[w]here the act to be done involves the exercise of discretion or judgment, performance of that duty is not merely ministerial”). A sentence based on an improperly calculated score lacks statutory authority. *State v. Wilson*, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). The court’s ability to use its discretion at sentencing entitles Mr. Cardenas to

be present at resentencing. Mr. Cardenas wishes to be present at resentencing.

**B. CONCLUSION**

This court should remand Mr. Cardenas' case for resentencing attended by Mr. Cardenas.

Respectfully submitted May 2, 2017.

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LISA E. TABBUT/WSBA 21344  
Attorney for Leopoldo Cuevas Cardenas

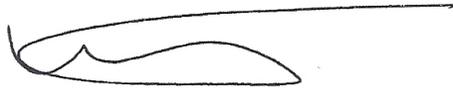
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I filed the Reply Brief of Appellant to (1) Yakima County Prosecutor's Office, at [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us); (2) the Court of Appeals, Division III; and mailed to (3) Leopoldo Cuevas Cardenas/DOC#919072, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenue, Walla Walla, WA 99362.

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

Signed May 2, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Leopoldo Cuevas Cardenas, Appellant