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Division III  
State of Washington  
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No. 34639-1-III

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

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STATE OF WASHINGTON, Respondent

v.

JOSE MENDEZ Jr., Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY  
THE HONORABLE JUDGE MICHAEL MCCARTHY

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REPLY BRIEF OF APPELLANT

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## I. STATEMENT OF FACTS

Mr. Mendez relies on the facts presented in his opening brief and will include any supplemental facts within the argument section of this brief.

## II. ARGUMENT

### A. The State Conceded The Earlier Convictions Should Be Stricken And This Court Remanded To The Trial Court For A Recalculation Of The Offender Score And Resentencing Based On That Concession.

Mr. Mendez relies on the facts and argument presented in appellant's opening brief and adds the following in reply.

In its response brief, the State argues that despite its concessions before this Court and this Court's ruling on the matter, the law of the case does not apply. (Br. Of Resp. p. 3, 9, 11-14).

The State is incorrect mischaracterizing both this Court's reasoning and ruling and the law of the case doctrine.

The law of the case doctrine demands that once an appellate court rules, 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).

Here, this Court specifically 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.” *In the Matter of Mendez*, 192 Wn.App. 1045 (2016), Slip Op. at \*1. This Court further stated:

We agree 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 contentions regarding his trial counsel's and appellate counsel's failures to challenge the offender score are moot. *State v. Hunley*, 175, Wn.2d 901, 907, 287 P.3d 584 (2012).

*In the Matter of Mendez*, Slip Op. at \*5.

If the State's argument here were to be accepted, it would signal that concession on issues on appeal is meaningless for the State. It could concede before the reviewing Court, then withdraw its concession at the trial court by relying on an imprecise term (“resentence”) to support its position. In this case, it skirts this Court's reasoning for the remand and its directive to recalculate the offender score and resentence based on an accurate score.

The trial court erred when it allowed the state to effectively withdraw the concession it made before this Court and further erred when it failed to adhere to this Court's directive on remand. This matter should be remanded to the trial court with instructions to strike the federal conviction and not consider the 1988 convictions in calculating the offender score.

B. The Trial Court Did Not Conduct The Required Comparability Analysis, And The State Did Not Prove The Crime Was Comparable To A Washington Crime.

An appellate Court reviews a sentencing court's calculation of an offender score *de novo*. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). If a defendant does not challenge the criminal history presented by the State, then the use of prior Washington judgments and sentences satisfies the State's burden. *State v. Ammons*, 105 Wash.2d 175, 185-86, 713 P.2d 719, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). Where the defendant objects and the State does not produce any evidence, it does not meet the preponderance of the evidence standard of proving a prior conviction. *State v. Hunley*, 175 Wn.2d 901, 910, 912, 287 P.3d 584 (2012).

Here, at the first sentencing hearing, the State did not produce documentation relating to the federal conviction. (4/12/13 RP 5). Mr. Mendez objected to the use of the federal conviction in his offender score and the trial court said, "...if the defendant wants to put the state to its proof then they have to prove it again and again and again. So...in the absence of the certified record 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." (4/12/13 RP 6). At

the second hearing, defense counsel told the court there had not been a comparability analysis at the first hearing because the State had not produced any documentation. (7/15/16 RP 8). The court did not acknowledge the matter presented any comparability issues; rather it focused on whether Mr. Mendez would agree that he was the person named in the federal paperwork and moved forward with the sentencing. (7/15/16 RP 6).

The clear language of RCW 9.94A.525(3) requires a comparability analysis to arrive at an accurate offender score:

Out-of-state convictions for offenses **shall** be classified according to the **comparable** offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the **comparable** offense definitions and sentences provided by Washington law.

(7/15/16 RP 8-9).

In examining a prior conviction, the trial court may consider only the statutory definition, charging documents, written plea agreements, transcripts of a plea colloquy and explicit factual findings, or some comparable judicial record. *State v. Thiefault*, 160 Wn.2d 409, 419-420, 158 P.3d 580 (2007). The trial court must determine whether the foreign offense is legally comparable to a Washington crime. *Id.* At 415. What the trial court may *not* do

is count a foreign conviction absent the State satisfying its burden of proving the conviction is legally and factually comparable to a Washington crime. *State v. Duke*, 77 Wn. App. 532, 535-36, 892 P.2d 120 (1995).

Mr. Mendez refers the Court to his opening brief, in which he provides the Court with the comparability analysis for this Court to consider.

### III. CONCLUSION

Based on the preceding facts and authorities, Mr. Mendez respectfully asks this Court to remand to the trial court with instructions to strike the federal convictions and the earlier convictions and calculate an accurate offender score.

Dated this 19<sup>th</sup> day of January 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 Appellant's Reply Brief was sent by first class mail, postage prepaid, on January 19, 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 Reply Brief to David Trefry, Yakima County Prosecuting Attorney at [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us); [David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)

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**Transmittal Information**

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