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MAR 30, 2017

Court of Appeals
Division III
State of Washington

No. 346391

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

STATE OF WASHINGTON, Respondent

v.

JOSE MENDEZ, JR., Appellant

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

THE HONORABLE MICHAEL MCCARTHY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it counted a federal conviction in the offender score without conducting a comparability analysis.
- B. The trial court violated the law of the case doctrine when it allowed the State to present new evidence after it had already conceded the issue at the Court of Appeals.
- C. The trial court erred when it failed to enter written findings of fact and conclusions of law for the exceptional sentence.
- D. The judgment and sentence contains discrepancies as to the sentence for count four.
- E. The trial court erred when imposed costs of incarceration of \$500 without considering Mr. Mendez's current or future ability to pay the discretionary fee.
- F. This Court should not impose the costs of appeal on Mr. Mendez.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. To establish a defendant's criminal history, the State must prove the existence of prior convictions by a preponderance of the evidence. If the alleged prior conviction is an out of state or federal conviction, the sentencing court must compare the

offense with the potentially comparable Washington offense. Is it error where the defendant raises the issue of comparability and the court neglects to address it, but imposes sentence as if it were a comparable offense?

- B. Did the trial court violate the law of the case doctrine when it allowed the State to present evidence after it had already conceded the issue at the Court of Appeals?
- C. Washington law requires the sentencing court to enter written findings of fact and conclusions of law upon imposition of an exceptional sentence. Where the court has not entered them, should the matter be remanded?
- D. Did the trial court err when it orally stated count 4 was to run consecutive but wrote on the judgment and sentence that the count was to run concurrent and then calculated the term as running consecutive?
- E. Where the trial court has entered an order of indigency and imposed only mandated legal financial obligations, is it error to impose the cost of incarceration (\$500) without consideration of the defendant's current or likely future ability to pay?
- F. Where the defendant has been found indigent for purposes of appeal and the Rules of Appellate Procedure direct the Court to

consider the appellant indigent throughout review unless presented with evidence indicating a change in financial circumstances, should this Court impose the costs of appeal?

II. STATEMENT OF FACTS

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 some budget constraints. (4/12/13 RP 4-6).

The court found the counts of possession of a controlled substance constituted the same criminal conduct. (4/12/13 RP 23). While recognizing that Mr. Mendez had served his terms of incarceration for his previous criminal offenses, the court considered Mr. Mendez's high offender score to mean "the lesson has never apparently been learned....if it hasn't happened before it's certainly

going to happen today” (4/12/13 RP 22). The court imposed the top of the range for each count and an exceptional upward sentence, setting the counts to be served consecutive to one another. (4/12/13 RP 23). 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 because it counted 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 the 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). The State asked the court to impose the same terms as at the initial sentencing. (7/15/16 RP 11).

By contrast, 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 if the court were to consider the offense, it was still required to conduct a comparability analysis with Washington offenses. (7/15/16 RP 8-9).

Mr. Mendez recounted for the court that since he his incarceration he had earned his GED, graduated from Walla Walla Community College, and obtained an HVAC certificate to enable him to obtain employment and provide for his family. He also showed certificates for classes he had taken at DOC as part of his commitment to self improvement. (7/15/16 RP 13-16).

The sentencing court ruled the case had been remanded for a complete resentencing and, without a comparability analysis, included the federal conviction and the previously conceded washed out convictions. (7/15/16 RP 9-10). The court reasoned:

I'm very happy to hear that you've made good use of your time that you've spent incarcerated. Not everybody does that. But you certainly have, and you've done a number of things to improve yourself.

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.

(7/15/166 RP 18).

The judgment and sentence showed the criminal history as follows:

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	

CP 63-64¹.

The judgment and sentence included conflicting directions regarding the exceptional sentence:

2.6 Exceptional Sentence: The Court finds substantial and compelling reasons exist which justify an exceptional sentence. Pursuant to RCW 9.94A.535(2)(c), ***the Court finds that an exceptional sentence by running Counts 1, 2 - 3 and/or 5***

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

consecutively based on the following aggravating circumstance(s):

X The defendant committed multiple current offenses and his high offender score results in some the current offenses going unpunished.

3.2 Exceptional Sentence: Pursuant to RCW 9.94A.535(s)(a) the Court is justified in entering an exceptional sentence which consists of running **counts 1,2,3 and/or 5 consecutively**.

4.A.2 Concurrent or Consecutive:

X *Concurrent: The confinement time of Counts 2, 3, and 4 are concurrent for a term of 24 months.*

X **Consecutive: The confinement time of Counts 1 (41 Months plus 1 day), 2/3 (24 Months), 4 (180 days), and 5 (60 Months) are consecutive for a TOTAL TERM OF 131 MONTHS PLUS 1 DAY.**

(Emphasis added.) CP 64-65.

The court did not enter written findings of fact and conclusions of law per RCW 9.94A.535. Mr. Mendez filed a motion for an order of indigency to seek appellate review, which the court granted. CP 72-79. He makes this timely appeal. CP 80.

III. ARGUMENT

- A. The Trial Court Violated The Law Of The Case Doctrine When It Allowed The State To Present New Evidence After It Had Already Conceded The Striking Of The Federal Conviction And Wash Out Of Five Earlier Convictions.

At the original sentencing hearing in 2013, the State acknowledged its failure to produce evidence of a federal conviction.

Because the State bears the burden to prove prior convictions at a

criminal sentencing by a preponderance of the evidence, where it fails to present any evidence, it does not meet the preponderance of the evidence standard. *State v. Hunley*, 175 Wn.2d 901, 910,912, 287 P.3d 584 (2012). Here, the trial court, in agreement with all parties, struck the conviction. However, no one raised the issue that having struck that conviction the five convictions from before 1990 washed out.

In his 2016 PRP, Mr. Mendez argued his trial attorney and appellate counsel were ineffective for failing to raise the wash out issue. In an unpublished ruling this Court found that the State conceded on appeal that the offender score erroneously included the washed out offenses. *In re Mendez*, 192 Wn.App. 1045 (2016). The Court further held that because it agreed the convictions washed out, Mr. Mendez's contention that his trial and appellate counsel were ineffective for failing to challenge the incorrect score was moot. The State's concession was well taken, and this Court exercised its authority to correct the erroneous sentence by remanding the matter "for recalculation of the offender score and resentencing". *State v. Toney*, 149 Wn.App. 787, 794, 205 P.3d 944 (2009).

Mr. Mendez contends that in remanding for recalculation and resentencing this Court did not, nor did it intend to allow the State to

withdraw its concession. If it had, it would have addressed the issue of ineffective assistance of counsel, rather than finding it mooted by the concession. As a result of misconstruing the remand and allowing the State to withdraw its concession, the trial court deprived Mr. Mendez of a full and fair hearing on the issue of ineffective assistance of counsel. Denial of the opportunity for a decision on the merits would be blatantly prejudicial to Mr. Mendez.

Furthermore, by allowing the State to withdraw its concession, the trial court violated the law of the case doctrine. 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). This doctrine is applied in order "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 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 of the subsequent stages of the same litigation. *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

Here, the law of the case is this Court's acceptance of the concession by the State that five convictions had washed out and the

federal conviction had been stricken. This Court issued its ruling based on the concession and remanded for recalculation of the offender score and appropriate resentencing.

It is likely the State will argue that RCW 9.94A.530(2) authorized the court to go beyond the existing record on remand and allow the state to introduce new evidence regarding criminal history, including criminal history not previously presented. This reliance is misplaced. The statute, which superseded the common law “no second chance” rule, does not account for the fact that the State conceded the issue and was remanded to remove the washed out convictions from the offender score.

In *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014), the Washington Supreme Court acknowledged that RCW 9.94A.530(2) authorizes the resentencing court to hear relevant evidence from both parties to ensure accuracy of criminal history. *Id.* at 10-11. The Court held that because the accuracy of criminal history did not implicate due process, the legislature acted within its plenary authority to enact the statutory remand provision. *Id.*

There, the matter was remanded the first time because the trial court failed to conduct a comparability analysis for out of state convictions. *Id.* at 3. On remand, the State erroneously presented a

copy of a probation report to validate the convictions rather the plea colloquy. *Id.* at 4. On a third remand the State offered an uncertified copy of the plea colloquy. *Id.* The trial court denied the State's motion for a continuance to obtain a certified copy. The trial court's ruling was based on its understanding there were no "second chances." *Id.* at 5. The Supreme Court reversed based on RCW 9.94A.530(2).

Similar to *Jones*, the State here has had multiple opportunities to provide the requisite documentation and proper comparability analysis. However, *Jones* should not control the outcome of the decision in this case. In *Jones* the State made no concession at the appellate court. The Court's acceptance of the State's concession in this case should act as a bar to the execution of the statute.

Mr. Mendez respectfully asks this Court to find that the trial court exceeded its authority by violating the law of the case and counting the washed out convictions in the offender score. This matter should be remanded to the trial court with a directive to strike the federal conviction and not consider the 1988 convictions in calculating the offender score.

B. The Trial Court Erred When It Failed To Conduct A Comparability Analysis.

Without conceding the preceding argument, in the alternative Mr. Mendez contends the trial court failed to conduct a comparability analysis

To be included in a Washington state offender score, a federal conviction for an offense must be classified according to comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3). The burden of proving the existence and comparability of such a conviction lies with the prosecution. *State v. Arndt*, 179 Wn.App. 373, 378, 320 P.3d 104 (2014). Under a two-pronged analysis, the sentencing court must address first the legal comparability and then, if necessary, the factual comparability of the foreign offense with the comparable Washington offense. *Arndt*, 179 Wn.App. at 378-79.

To determine whether the foreign offense is legally comparable, the court compares the elements of the crime with the elements of the Washington offense. Where the elements are the same or substantially similar, the foreign conviction is equivalent and may be included in the offender score. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005). If the federal crime elements are not identical or are broader than the elements of the Washington offense, they are not legally comparable. *Lavery*, 154 Wn.2d at 258.

Here, the record indicates the trial court did not review the applicable federal or state statutes criminalizing conspiracy to distribute a controlled substance.

21 U.S.C. §§ 841 and 846 define the federal crime of conspiracy to delivery a controlled substance:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

§846.

§841 provides in pertinent part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Unlike the federal general conspiracy statute, the federal drug conspiracy statute does *not* require the government to prove that a conspirator committed an overt act in furtherance of the conspiracy.

U.S. v. Shabani, 513 U.S. 10, 11, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994).

In Washington, the crime of conspiracy to deliver a controlled substance is governed under RCW 69.50.407, which mirrors the language of 21 U.S.C. § 846:

Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

RCW 69.50.407².

For purposes of defining the elements of conspiracy RCW 60.50.407 is read in conjunction with RCW 9A.28.040(1):

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them *takes a substantial step in pursuance of such agreement*.

(Emphasis added). See *State v. Pineda-Pineda*, 154 Wn.App. 653, 226 P.3d 164 (2010); *State v. Pacheco*, 125 Wn.2d 150, 153, 882 P.2d 183 (1994). The Washington statute requires proof of an additional element not found in the federal statute: a substantial step in pursuance of the agreement. The federal statute is broader and not legally comparable. *Lavery*, 154 Wn.2d at 258.

² Under Washington law, conspiracy to deliver a controlled substance is an unranked felony. *State v. Mendoza*, 63 Wn.App. 373, 378, 819 P.2d 387 (1991). The standard range for an unranked felony cannot exceed 12 months confinement. RCW 9.94A.505(2)(b).

Where the elements of the crimes are not identical or the foreign statute is broader, the court moves to the second step of the analysis to determine factual comparability. *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007). The court conducts a limited examination of the undisputed facts of the foreign record that are admitted, stipulated, or proved beyond a reasonable doubt. *State v. Larkins*, 147 Wn.App. 858, 863, 199 P.3d 441 (2008); *Lavery*, 154 Wn.2d at 255; *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998) .

Here, the State produced a 1990 judgment and sentence stating that Mr. Mendez pleaded guilty. (SE BB). This document is insufficient to prove the required missing element of a substantial step, as it does not “clearly indicate that this element [a substantial step] was proved or conceded” by his guilty plea. *State v. Bunting*, 115 Wn.App. 135, 143, 61 P.3d 375 (2003). Absent additional documents conclusively demonstrating the facts he admitted in pleading guilty the court cannot make a factual comparison. Including the prior conviction in the offender score violates the defendant’s due process rights. *Lavery*, 154 Wn.2d at 258.

The State has not made the required showing for comparability, and the conviction should not have been included in the offender score. A sentencing court acts without statutory authority when it

imposes a sentence based on an incorrect offender score. *In re Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). Unless this matter is resolved under Section A of this argument, the matter should be remanded for a comparability analysis.

C. The Trial Court Erred In Failing To Enter Written Findings And Conclusions Justifying An Exceptional Sentence.

Under RCW 9.94A.589(1)(a), consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. Under RCW 9.94A.535, a court may impose an exceptional sentence when the statute's enumerated aggravating factors are present. Here, the court imposed an exceptional sentence under RCW 9.94A.535(2)(c): the multiple current offenses

Here, §2.6 of the judgment and sentence has a checked box indicating the court finds substantial and compelling reasons to impose the exceptional sentence and §3.2 states the court is justified in imposing an exceptional sentence. These checked boxes do not meet the requirements of RCW 9.94A.535, which mandates that whenever “a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” Entry of written findings is essential when a court imposes an exceptional sentence. *State v. Friedlund*, 182 Wn.2d 388,

393, 341 P.3d 280 (2015).

The record here does not contain the required written findings of fact or conclusions of law. Because an oral ruling is insufficient, the remedy is remand for entry of findings and conclusions supporting the exceptional sentence. *Friedlund*, 182 Wn.2d at 393;395. Mr. Mendez reserves the right to challenge the written findings and conclusions entered after the filing of this brief. *State v. Hale*, 145 Wn.App. 299, 189 P.3d 829 (2008). A challenge to the trial court's reasons for imposing an exceptional sentence will be reviewed de novo. *State v. Feely*, 192 Wn.App. 751, 770, 368 P.3d 514 (2016).

D. The Court Should Correct The Judgment and Sentence To Accurately Reflect Its Ruling With Respect To Count Four.

Sections 2.6 and 3.2 of the judgment and sentence state that counts 1, 2/3 and 5 run consecutive to one another. Section 4.A.2 states that 2/3 and 4 are concurrent, but in the next paragraph count 4 is added as a consecutive sentence and added to the total time of confinement as a consecutive sentence. CP 64-65. This matter should be remanded for clarification and correction. *State v. Nailleux*, 158 Wn.App. 630, 646, 241 P.3d 1280 (2010).

- E. The Record Does Not Support The Court's Finding That Mr. Mendez Had The Current Or Future Ability To Pay Five Hundred Dollars Toward The Costs Of Incarceration.

Courts may require a defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P. 2d 166 (1992). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes a legal financial obligation. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015).

Here, the judgment and sentence, § 2.7 provides a boilerplate preprinted statement as follows:

Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.

RCW 9.94A.753.

Section 4.D.4 provides:

4.D.4 Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed \$100.00 per day of incarceration (the rate in 2013 is \$85.00 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2). Costs of Incarceration are capped at ~~\$1,000.00~~ **\$500.00**

Although written findings are not necessary, the record must be sufficient for the appellate court to review whether “the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOS under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511, 517 fn.13 (2011).

Here, despite the boilerplate language in §§ 2.7 and 4.D.4, the record does not show the trial court took into account Mr. Mendez’s financial resources and the potential burden of imposing the \$500 cost of incarceration on him. The court agreed to remove the discretionary fees (criminal filing fee, attorney recoupment, the jury fee, the DUI fee, the crime lab fee) but did not consider the cost of incarceration fee. On remand, the court should be instructed to make individualized inquiry into Mr. Mendez’s ability to pay the fee, and to strike the boilerplate finding that he has the ability to pay. *Blazina*, 344 P.3d at 685.

F. This Court Should Decline To Impose Appellate Costs.

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. A commissioner or clerk of the appellate court must award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. RAP 14.2. In *Sinclair*, the Court of Appeals concluded that where the issue of appellate costs in a criminal case is raised in the appellant's brief or on a motion for reconsideration, it is appropriate for the reviewing Court to exercise its discretion and consider it. *State v. Sinclair*, 192 Wn.App. 380, 382, 367 P.3d 612 (2016).

The *Sinclair* Court reasoned that exercising discretion meant inquiring into a defendant's ability or inability to pay appellate costs. *Sinclair*, 192 Wn.App. at 392. If a defendant is indigent and lacks the ability to pay, the appellate court should deny an award of costs. *Sinclair*, 192 Wn.App. at 382.

Here, Mr. Mendez already owes at least \$2,739.39. He was found indigent and entitled to appellate review at public expense. CP 72-29. Under *Sinclair* and RAP 15.2(f), this Court should presume that he remains indigent.

A party and counsel for the party who has been granted an

order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

There is little to no evidence Mr. Mendez has or will have the ability to repay additional appellate costs. He currently is serving over a ten year sentence and has no assets. Mr. Mendez respectfully asks this Court to decline to impose appellate costs in the event the State seeks them.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mendez respectfully asks this Court to remand to the trial court with directions to resentence Mr. Mendez by striking the federal conviction and five wash out convictions. He also asks the Court to direct the trial court to enter findings of fact and conclusions of law in the event an exceptional sentence is still justifiable. He further asks for correction of the sentence for count 4.

Dated this 30th day of March 2017.

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 Opening Brief was sent by first class mail, postage prepaid, on March 30, 2017 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; tamara.hanlon@co.yakima.wa.us

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