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Court of Appeals  
Division III  
State of Washington  
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NO. 36340-6-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**ELIAS F. VARGAS,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **ASSIGNMENTS OF ERROR**

1. The trial court miscalculated Elias F. Vargas's offender score in connection with Counts I, II and III.

2. The trial court improperly imposed legal financial obligations (LFOs) without considering the GR 34 factors and then subsequently determining that Mr. Vargas was indigent for purposes of appeal. (CP 142)

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did the trial court improperly calculate Mr. Vargas's offender score on Counts I, II and III as 8, 7, and 5 respectively?

2. Was the trial court's colloquy with Mr. Vargas concerning his ability to pay LFOs sufficient when considered in light of GR 34 and the subsequent determination that he was indigent for purposes of this appeal?

## **STATEMENT OF THE CASE**

The Douglas County Sheriff's Office received a 9-1-1 call involving domestic violence on February 12, 2018. Deputy Oules responded. (RP 82, ll. 2-4; RP 83, ll. 4-6; RP 130, ll. 2-5)

The 9-1-1 call was made by Robin (Leslie) Pomarleau. She and her daughter, Talisha Pomarleau, were involved in a confrontation with Mr. Vargas. (RP 89, ll. 19-21; RP 129, ll. 20-21)

Upon arrival, Deputy Oules saw that Talisha Pomarleau appeared disheveled, upset and crying. He noticed abrasions on her arms. (RP 84, ll. 9-13; RP 84, l. 19 to RP 85, l. 1)

Robin Pomarleau appeared scared and upset. (RP 89, ll. 3-10)

Deputy Oules learned that the incident occurred both inside the house and in a playhouse in the backyard. He went to the playhouse and observed that a bed had been moved away from a wall, there was a hole punched in the wall, and the bed had been knocked off its blocks. (RP 90, ll. 15-18; RP 92, ll. 13-17; RP 94, ll. 8-11)

Both of the Pomarleau women stated that Mr. Vargas threatened to kill them if they were to call 9-1-1. The threat occurred inside the main house. (RP 137, ll. 20-23; RP 168, ll. 2-6)

Both Talisha Pomarleau and Mr. Vargas admitted that they had been arguing. They disputed who began the physical altercation. (RP 95, ll. 3-6; RP 104, ll. 1-10; RP 164, ll. 7-13; ll. 17-20; RP 166, ll. 12-20; RP 202, ll. 14-23; RP 204, ll. 7-14; ll. 17-22)

Mr. Vargas and Ms. Pomarleau had been in an off-and-on relationship since November 2017. When they were together they would stay in the playhouse. (RP 129, ll. 22-24; RP 160, ll. 14-15; ll. 18-23)

On February 12 Ms. Pomarleau intended to go to an NA meeting. She had dressed and applied her makeup before going out to the playhouse. Mr. Vargas apparently became

angry about her makeup and the manner in which she had dressed. (RP 162, ll. 6-8; RP 163, l. 25 to RP 164, l. 6)

Robin Pomarleau was in the backyard when she heard screaming, yelling and scuffling from the playhouse. She ran to the door and beat on it when she found that it was locked. Talisha Pomarleau was yelling to let her out and for help. (RP 131, ll. 11-15; RP 133, ll. 2-5; RP 134, l. 8 to RP 135, l. 1)

When the playhouse door was finally opened Talisha Pomarleau came out. Her hair was in disarray and her mother observed bruises on her neck and face. Her makeup was messed up and her mascara was running. (RP 135, ll. 6-15; RP 136, ll. 21-25)

Inside the house Ms. Pomarleau reapplied makeup to both her face and neck. Her mother described it as how she always does it and that she uses a lot of makeup. (RP 143, ll. 1-12)

Deputy Oules did not observe any bruising on Ms. Pomarleau's face or neck. He would have taken photos if the bruises were present. (RP 109, l. 24 to RP 110, l. 9)

Ms. Pomarleau advised Deputy Oules that during the confrontation in the playhouse that Mr. Vargas put her in a choke hold. He also covered her mouth and nose with his hand. She indicated she couldn't breathe for approximately ten (10) minutes and was gasping. (RP 164, ll. 17-20; RP 164, l. 24 to RP 165, l. 7)

Both of the Pomarleau women believed that Mr. Vargas would carry out his threats. Their belief was based upon prior altercations, the look on his face and his criminal history. (RP 138, ll. 9-11; RP 168, ll. 17-20)

Mr. Vargas was arrested. Later, after having been placed in jail, he made a number of telephone calls to Talisha Pomarleau. The context of those calls which occurred between

February 13 and February 16, 2018 related to his desire to have the charges dropped. He asked Ms. Pomarleau to contact the prosecutor's office and to change her statement. The telephone calls were recorded. (RP 174, l. 25 to RP 176, l. 6; RP 177, ll. 9-12; RP 178, ll. 10-17; RP 182, ll. 16-20; RP 183, ll. 12-22; RP 185, ll. 5-6)

An Information was filed on February 15, 2018 charging Mr. Vargas with two (2) counts of harassment threat to kill (domestic violence). (CP 6)

On April 2, 2018 the State filed an Amended Information. It added one (1) count of witness tampering and two (2) counts of violation of a no-contact order. All three (3) counts carried a domestic violence tag. (CP 10)

A Second Amended Information was filed on August 20, 2018. It added a count of second degree assault (domestic violence) and deleted the no-contact order violations. (CP 33)

A Third Amended Information was filed on September 6, 2018. It merely amended the dates for the witness tampering charge. (CP 37)

Several continuances were granted prior to the commencement of trial on September 13, 2018. (CP 9; CP 17; CP 18; CP 31)

Mr. Vargas testified at trial. He denied either choking Ms. Pomarleau or trying to suffocate her. He admitted the tampering but contended that it was because Ms. Pomarleau was lying and needed to tell the truth. (RP 206, ll. 15-23; RP 213, l. 9 to RP 214, l. 8)

Mr. Vargas relied upon self-defense at the time of trial. Appropriate instructions were given. Defense counsel did object to the trial court's failure to give the no duty to retreat instruction. (RP 218, ll. 13-25)

The jury determined that Mr. Vargas was guilty of all counts. They entered a special verdict that Mr. Vargas and Ms. Pomarleau were members of the same family or household. (CP 106; CP 107; CP 108; CP 19; CP 110)

Judgment and Sentence was entered on September 24, 2018. The trial court calculated Mr. Vargas's offender score as follows:

- Count I - 8;
- Count II - 7;
- Count III - 5;
- Count IV - 7

(CP 114; Appendix "A")

The trial court imposed a sentence of sixty-one (61) months on Count I. The sentences on the remaining counts were directed to run concurrent with Count I. Eighteen (18) months of community custody was also imposed.

The trial court imposed the following LFOs:

- Costs - \$200.00;
- CVC Fee - \$500.00
- DNA Fee - \$100.00;
- Attorney Fees - \$400.00;
- Fine - \$500.00.

Mr. Vargas filed his Notice of Appeal on September 25, 2018. (CP 127)

An Order of Indigency was entered on September 26, 2018. (CP 142)

## SUMMARY OF ARGUMENT

Mr. Vargas contends that the trial court miscalculated his offender score. It is his contention that the correct offender score as to each count is as follows:

- Count I - 7;
- Counts II and III - 6;
- Count IV - 7.

The only count with the correct offender score at this time is Count IV.

Mr. Vargas needs to be resentenced in accord with the correct offender score on the other counts.

The trial court did not conduct an appropriate colloquy concerning Mr. Vargas's ability to pay LFOs. The lack of an appropriate colloquy, in particular in light of GR 34, contravenes *State v. Ramirez*, 191 Wn.2d 732 (2018)**Error! Bookmark not defined..**

All of the legal financial obligations must be stricken from the Judgment and Sentence with the exception of the \$500.00 CVC.

## ARGUMENT

### I. OFFENDER SCORE

RCW 9.94A.525(1) states:

A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender

score is being computed shall be deemed “other current of-fenses” within the meaning of RCW 9.94A.589.

According to Mr. Vargas’s Judgment and Sentence his only prior conviction was first degree assault which occurred on March 22, 2008. He was convicted on September 15, 2008. (CP 116)

Mr. Vargas’s current conviction of second degree assault is a violent offense, while the other three (3) convictions are non-violent. Those three (3) non-violent convictions constitute “other current offenses.”

RCW 9.94A.589(1)(a) provides, in part:

... [W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score ....

Thus, the “other current convictions” count as prior convictions when calculating Mr. Vargas’s offender score as to each conviction.

The difficulty in making the calculation arises out of the fact that all four (4) counts had a domestic violence tag. In the absence of a domestic violence tag the offender scores for the respective offenses would be:

<b>Offense</b>	<b>Offender Score</b>	<b>Sentence Range</b>
Second degree assault	5	22-29 months (Appendix “B”)
Harassment	5	12+-16 months (Appendix “C”)
Witness tampering	5	12+-16 months (Appendix “D”)

It must be noted that as to each of the scoring sheets (Appendices “B,” C,” and “D”) there is an exception if the offense is a felony domestic violence offense. If so, then the general offense scoring forms are used to calculate the offender score. There is a separate general scoring form for violent and non-violent offenses. (Appendices “E” and “F”)

RCW 9.94A.525(21) explains how to calculate the offender score for a violent felony - DV offense. It states, in part:

If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pleaded and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

- (a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after August 1, 2011, for any of the following offenses: ... felony Harassment (RCW 9A.46.020(2)(b)), ... Assault 2 (RCW 9A.36.021) ....

RCW 9.94A.525(21)(a) makes no reference to witness tampering. Thus, even though the witness tampering charge carried a domestic violence tag, it does not count two (2) points.

Since both general sentencing forms for domestic violence reference repetitive domestic violence offenses counting in an offender score calculation, it is necessary to point out that Mr. Vargas has no repetitive domestic violence offense.

RCW 9.94A.030(42) defines a repetitive domestic violence offense as meaning:

- (a)...
  - (i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;
  - (ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;
  - (iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, \*\*\* 26.26, or 26.50 RCW that is not a felony offense;

- (iv) Domestic violence harassment offense under RCW 9A.46.020 that is not a felony offense; or
- (v) Domestic violence stalking offense under RCW 9A.46.110 that is not a felony offense ... or
- (b) ....

Repetitive domestic violence offenses refer to non-felonies. Mr. Vargas was not charged with a non-felony domestic violence offense.

The State failed to present any information to the sentencing court of prior repetitive domestic violence offenses.

## **II. LEGAL FINANCIAL OBLIGATIONS (LFOs)**

GR 34 addresses the issue of when a litigant/criminal defendant may be relieved of certain LFOs. (Appendix "G")

The trial court failed to take into consideration the factors set out in GR 34. The colloquy conducted by the trial court was inadequate. It follows:

THE COURT: Okay. And what about his ability to repay?

Do you work?

MR. VARGAS: Um mmm. [Negative]. Currently no.

MR. BARKER: When he gets out --

THE COURT: Pardon me?

MR. VARGAS: Yeah, when I was out I did work.

THE COURT: What do you gen -- what do you generally do?

MR. VARGAS: Anything really. Supervision -- supervise -- I worked for [inaudible on tape -- muffled] shipping supervisor right there. I was also -- certified fire fighter for the

Department of Natural Resources for several years. So, --

THE COURT: Okay. And you don't have any physical or mental issues that would prevent you from working?

MR. VARGAS: No.

THE COURT: Can you afford to pay \$50.00 a month once you're out?

MR. VARGAS: Yeah.

(RP 277, ll. 4-24)

The duty placed upon the trial court in connection with determining whether or not a criminal defendant is able to make payment of LFOs is explained in *State v. Ramirez*, *supra* 742:

[F]ormer RCW 10.01.160(3) requires the trial court to conduct an individualized inquiry on the record concerning a defendant's current and future ability to pay before imposing discretionary LFOs. [Citation omitted.] ... "[T]he court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." [Citation omitted.] As part of this inquiry, the trial court is required to consider "important factors," such as incarceration and a defendant's other debts, when determining a defendant's ability to pay. [Citation omitted.] Additionally, we specifically instructed courts to look for additional guidance in the COMMENT to Court Rule GR 34, which lists the ways a person may prove indigent status for the purpose of seeking a waiver of filing fees and surcharges. [Citation omitted]; *City of Richland v. Wakefield*, 186 Wn.2d 596, 606-07, 380 P.3d 459 (2016). ... [W]e further clarified, "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." [Citation omitted.]

All LFOs, with the exception of the \$500.00 CVC, should be stricken from Mr. Vargas's Judgment and Sentence. It would appear his prior conviction for first degree assault, in 2008, would have resulted in a prior payment of the DNA fee.

As the *Ramirez* court noted in its decision at p.4th747, the Legislature's recent amendments under LAWS OF 2018, ch. 269, §§ 6(3) and 17(2)(h) apply prospectively to those individuals whose appeals are pending as of June 7, 2018.

### CONCLUSION

Mr. Vargas is entitled to be resentenced with the correct offender score as to each count of the Judgment and Sentence. The resentencing will result in a reduction of his total sentence. The correct offender score for each offense is:

- Count I - 7;
- Counts II and III - 6;
- Count IV - 7.

At the time of the resentencing the Court should be directed to remove all legal financial obligations with the exception of the \$500.00 crime victim assessment.

DATED this 4th day of March, 2019.

Respectfully submitted,

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## **APPENDIX “A”**

1				
2	1.			
3	2.			

\* DV: Domestic Violence was pled and proved.

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

**2.2 Criminal History (RCW 9.94A.525):**

	<i>Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County &amp; State)</i>	<i>Date of Crime</i>	<i>Adult or Juv. (A / J)</i>	<i>Type Of Crime</i>	<i>DV* Yes</i>
9	1 Assault 1 <sup>st</sup> Degree	9/15/2008	Douglas County Superior (WA)	3/22/2008	A	A	N
10							
11							
12							
13							

\*DV: Domestic violence pled and proven.

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The prior convictions listed as number(s) \_\_\_\_\_ above, or in Appendix 2.2, are one offense for purposes of determining the offender score. RCW 9.94A.525

The prior convictions listed as number(s) \_\_\_\_\_ above, or in Appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

**2.3 Sentencing Data:**

<i>Count No.</i>	<i>Offender Score</i>	<i>Serious-Ness Level</i>	<i>Standard Range (not including enhancements)</i>	<i>Plus Enhancement</i>	<i>Total Standard Range (including enhancements)</i>	<i>Maximum Term</i>	
22	1	8	IV	53-70 months	N/A	53-70 months	10 years / \$20,000
23	2	7	III	33-43 months	N/A	33-43 months	5 years / \$10,000
24	3	5	III	17-22 months	N/A	17-22 months	5 years / \$10,000
	4	7	III	33-43 months	N/A	33-43 months	5 years / \$10,000

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, ((CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

## **APPENDIX “B”**

**RCW 9A.36.021(2)(a)**  
**CLASS B – VIOLENT/CRIMES AGAINST PERSONS**  
**OFFENDER SCORING RCW 9.94A.525(8)**

*If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 263.*

**ADULT HISTORY:**

Enter number of serious violent and violent felony convictions ..... 1 x 2 = 2  
 Enter number of nonviolent felony convictions ..... \_\_\_\_\_ x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... \_\_\_\_\_ x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other serious violent and violent felony convictions ..... \_\_\_\_\_ x 2 = \_\_\_\_\_  
 Enter number of other nonviolent felony convictions ..... 3 x 1 = 3

**STATUS:**

Was the offender on community custody on the date the current offense was committed? ..... \_\_\_\_\_ + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number) ..... 5

**SENTENCE RANGE**

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL IV</b>	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	17.5m 15 - 20	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	61.5m 53 - 70	73.5m 63 - 84

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

## **APPENDIX “C”**

## Harassment Subsequent Conviction or Threat of Death

### RCW 9A.46.020(2)(b) CLASS C\* – NONVIOLENT OFFENDER SCORING RCW 9.94A.525(7)

*If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 256.*

*If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 254.*

**ADULT HISTORY:**

Enter number of felony convictions ..... 1 x 1 = 1

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other felony convictions ..... 3 x 1 = 3

**STATUS:**

Was the offender on community custody on the date the current offense was committed? (if yes) \_\_\_\_\_ + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number)..... 4

### SENTENCE RANGE

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL III</b>	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	19.5m 17 - 22	25.5m 22 - 29	38m 33 - 43	50m 43 - 57	55.5m 51 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

## **APPENDIX “D”**

## Tampering With a Witness

### RCW 9A.72.120 CLASS C\* – NONVIOLENT OFFENDER SCORING RCW 9.94A.525(7)

*If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 256.*

*If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 254.*

**ADULT HISTORY:**

Enter number of felony convictions ..... 1 x 1 = 1

**JUVENILE HISTORY:**

Enter number of serious violent and violent felony dispositions ..... x 1 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other felony convictions ..... 3 x 1 = 3

**STATUS:**

Was the offender on community custody on the date the current offense was committed? (if yes) \_\_\_\_\_ + 1 = \_\_\_\_\_

Total the last column to get the **Offender Score** (Round down to the nearest whole number) ..... 4

### SENTENCE RANGE

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
<b>LEVEL III</b>	2m	5m	8m	11m	14m	19.5m	25.5m	38m	50m	55.5m
	1 - 3	3 - 8	4 - 12	9 - 12	12+ - 16	17 - 22	22 - 29	33 - 43	43 - 57	51 - 60*

- ✓ For gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustment.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

## **APPENDIX “E”**

# General Violent Offense Where Domestic Violence Has Been Plead and Proven

## VIOLENT OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED: .....

**ADULT HISTORY:**

Enter number of domestic violence felony convictions as listed below\* ..... x 2 = \_\_\_\_\_

Enter number of repetitive domestic violence offense convictions ..... (RCW 9.94A.030(42))  
plead and proven after 8/1/11 ..... x 1 = \_\_\_\_\_

Enter number of serious violent and violent felony convictions ..... 1 x 2 = 2

..... Enter number of nonviolent felony convictions ..... x 1 = \_\_\_\_\_

**JUVENILE HISTORY:**

Enter number of subsequent domestic violence felony dispositions as listed below\* ..... x 1 = \_\_\_\_\_

Enter number of serious violent and violent felony dispositions ..... x 2 = \_\_\_\_\_

Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other domestic violence felony convictions as listed below\* ..... 2 x 2 = 4

Enter number of repetitive domestic violence offense convictions plead and  
proven after 8/1/11 ..... x 1 = \_\_\_\_\_

Enter number of other serious violent and violent felony convictions ..... x 2 = \_\_\_\_\_

Enter number of other nonviolent felony convictions ..... 1 x 1 = 1

**STATUS:**

Was the offender on community custody on the date the current offense was committed?..... + 1 = \_\_\_\_\_

*\* If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:  
Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence  
Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic  
Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence  
Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence  
Arson 2.*

*\* If domestic violence was plead and proven after 7/23/17 for the following felony offenses:  
Assault of a Child 1, Assault of a Child 2, Assault of a Child 3, Criminal Mistreatment 1, Criminal Mistreatment 2.*

### STANDARD RANGE CALCULATION

Total the last column to get the **Offender Score** (Round down to the nearest whole number) ..... = 7

Seriousness Level ..... = \_\_\_\_\_

**STANDARD SENTENCE RANGE** ..... 43 ..... 57

Low to High

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

## **APPENDIX “F”**

## General Nonviolent Offense Where Domestic Violence Has Been Pleaded and Proven

### NONVIOLENT OFFENDER SCORING RCW 9.94A.525(21)

CURRENT OFFENSE BEING SCORED .....

**ADULT HISTORY:**

Enter number of domestic violence felony convictions as listed below\* ..... x 2 = \_\_\_\_\_  
 Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(42))  
 plead and proven after 8/1/11 ..... x 1 = \_\_\_\_\_  
 Enter number of felony convictions ..... 1 x 1 = 1

**JUVENILE HISTORY:**

Enter number of subsequent domestic violence felony dispositions as listed below\* ..... x 1 = \_\_\_\_\_  
 Enter number of serious violent and violent felony dispositions ..... x 1 = \_\_\_\_\_  
 Enter number of nonviolent felony dispositions ..... x 1/2 = \_\_\_\_\_

**OTHER CURRENT OFFENSES:**

*(Other current offenses that do not encompass the same conduct count in offender score)*

Enter number of other domestic violence felony convictions as listed below\* ..... 2 x 2 = 4  
 Enter number of other repetitive domestic violence offense convictions plead and  
 proven after 8/1/11 ..... x 1 = \_\_\_\_\_  
 Enter number of other felony convictions ..... 1 x 1 = 1

**STATUS:**

Was the offender on community custody on the date the current offense was committed? (if yes) ..... + 1 = \_\_\_\_\_

\* If domestic violence was plead and proven after 8/1/2011 for the following felony offenses:

*Violation of a No-Contact Order, Violation of a Protection Order, Domestic Violence Harassment, Domestic Violence Stalking, Domestic Violence Burglary 1, Domestic Violence Kidnapping 1, Domestic Violence Kidnapping 2, Domestic Violence Unlawful Imprisonment, Domestic Violence Robbery 1, Domestic Violence Robbery 2, Domestic Violence Assault 1, Domestic Violence Assault 2, Domestic Violence Assault 3, Domestic Violence Arson 1, Domestic Violence Arson 2.*

\* If domestic violence was plead and proven after 7/23/17 for the following felony offenses:

*Assault of a Child 1, Assault of a Child 2, Assault of a Child 3, Criminal Mistreatment 1, Criminal Mistreatment 2.*

### STANDARD RANGE CALCULATION

Total the last column to get the **Offender Score** (Round down to the nearest whole number) ..... = 6  
 Seriousness Level ..... = \_\_\_\_\_  
Low      to      High

**STANDARD SENTENCE RANGE** ..... 22 ..... 29

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 66 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 245 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 253.
- ✓ For sentencing alternatives, see page 235.
- ✓ For community custody eligibility, see page 247.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 242.

## **APPENDIX “G”**

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## General Rules

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GR 34  
Waiver of Court and Clerk's Fees and Charges in  
Civil Matters on the Basis of Indigency

(a) Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

(1) The application for such a waiver may be made ex parte in writing or orally, accompanied by a mandatory pattern form created by the Administrative Office of the Courts (AOC) whereby the applicant attests to his or her financial status or, in the case of an individual represented by a qualified legal services provider ("QLSP") or an attorney working in conjunction with a QLSP, a declaration of counsel stating that the individual was screened and found eligible by the QLSP.

(2) The court shall accept an application submitted in person, by mail and where authorized by local court rule not inconsistent with GR 30, electronic filing. The process for presentation of the application shall conform to local court rules and clerk processes not inconsistent with the rules of this court for presenting ex parte orders to the court directly or via the clerk. All applications shall be presented to a judicial officer for consideration in a timely manner and in conformity with the local court's established procedures. There shall be no locally imposed fee for making an application. The applicant or applicant's attorney filing by mail, shall provide the court with a self-addressed stamped envelope for timely return of a conformed copy of the order.

COMMENT

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); other initial filing charges required by statute (e.g., family court facilitator surcharges established pursuant to RCW 26.12.240; family court service charges established pursuant to RCW 26.12.260; domestic violence prevention surcharges established pursuant to RCW 36.18.016(2)(b)); and other lawfully established fees and surcharges which must be paid as a condition of securing access to judicial relief.

(3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:

(A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:

- (i) Federal Temporary Assistance for Needy Families (TANF);
- (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
- (iii) Federal Supplemental Security Income (SSI);
- (iv) Federal poverty-related veteran's benefits; or
- (v) Food Stamp Program (FSP); or

(B) his or her household income is at or below 125 percent of the federal poverty guideline; or

(C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or

(D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

(4) An individual represented by a QLSP, or an attorney working in conjunction with a QLSP that has screened and found the individual eligible for services, is presumptively deemed indigent when a declaration from counsel verifies representation and states that the individual was screened

and found eligible for services.

(5) As used in this rule, "qualified legal services provider" means those legal services providers that meet the definition of APR 8(e).

COMMENT

The adoption of this rule is rooted in the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis. Each court is responsible for the proper and impartial administration of justice which includes ensuring that meaningful access to judicial review is available to the poor as well as to those who can afford to pay.

(b) Nothing in this rule shall prohibit or delay action on the underlying petition upon the court's approval of a waiver and presentation of an original petition may accompany the initial fee waiver.

[Adopted effective December 28, 2010.]

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**NO. 36340-6-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	DOUGLAS COUNTY
Plaintiff,	)	NO. 18 1 00033 9
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
ELIAS F. VARGAS,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 4th day of March, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* and *MOTION TO EXTEND TO DATE OF FILING APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Spokane, WA 99201

E-FILE

DOUGLAS COUNTY PROSECUTOR'S OFFICE

Attn: Steven M. Clem

PO Box 360

Waterville, WA 98858

[sclem@co.douglas.wa.us](mailto:sclem@co.douglas.wa.us)

E-FILE

ELIAS F VARGAS #322876

Stafford Creed Corrections Center

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Aberdeen, Washington 98520

U. S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

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**March 04, 2019 - 7:23 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36340-6  
**Appellate Court Case Title:** State of Washington v. Elias F. Vargas  
**Superior Court Case Number:** 18-1-00033-9

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