

66239-2

66239-2

NO. 66239-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

FLORENCIO MORALES,

Appellant.

REC'D  
MAY 03 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Wesley Saint Clair, Judge

BRIEF OF APPELLANT

DANA M. LIND  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

FILED  
MAY 03 2011  
CLERK OF COURT  
APPELLATE DIVISION  
COURT OF APPEALS  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
C. <u>ARGUMENT</u> .....	12
THE COURT MISAPPLIED THE LAW IN CALCULATING MORALES' OFFENDER SCORE.....	12
D. <u>CONCLUSION</u> .....	19

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Davis v. Dep't of Licensing</u> 137 Wn.2d 957, 977 P.2d 554 (1999) .....	13
<u>State v. Delgado</u> 148 Wn.2d 723, 63 P. 3d 792 (2003) .....	13
<u>State v. Keller</u> 143 Wn.2d 267, 19 P.3d 1030 (2001) <u>cert. denied</u> , 534 U.S. 1130 (2002) .....	13
<u>State v. Posey</u> 161 Wn.2d 638, 167 P.3d 560 (2007) .....	12
<u>State v. Roggenkamp</u> 153 Wash.2d 614, 106 P.3d 196 (2005).....	13
<u>State v. Sullivan</u> 143 Wn.2d 162, 19 P.3d 1012 (2001) .....	13
<u>Vita Food Products, Inc. v. State</u> 91 Wash.2d 132, 587 P.2d 535 (1978).....	13
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	19
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94.525 .....	18
RCW 9.94A.030 .....	18
RCW 9.94A.525 .....	1, 2, 4, 7, 9, 10, 12, 14, 18

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.94A.535 .....	7
RCW 9.94A.589 .....	4, 7, 14
RCW 10.05.....	6
RCW 46.52.020.....	18
RCW 46.61.500.....	18
RCW 46.61.502.....	5, 6, 7, 15, 16, 18
RCW 46.61.504.....	5, 6, 15, 16, 18
RCW 46.61.520.....	6
RCW 46.61.522.....	6
RCW 46.61.5055.....	6, 7, 8, 15, 16
RCW 46.61.5249.....	6
Sentencing Reform Act .....	8
U. S. Const. amend. VI.....	18
Wash. Const. art. 1, § 22.....	18

A. ASSIGNMENTS OF ERROR

1. The sentencing court misapplied the law in calculating appellant's offender score for felony driving under the influence (DUI).

2. Appellant received ineffective assistance of counsel at sentencing when counsel agreed a prior conviction for negligent driving should be included in appellant's offender score for felony DUI.

Issues Pertaining to Assignments of Error

At sentencing, the parties disputed appellant's offender score for felony DUI. Relying on RCW 9.94A.525(2)(e),<sup>1</sup> the defense asserted that appellant's four prior DUI offenses from 1990-1992 should not be included, as they were beyond the 10-year period provided for under subsection (e)(ii). As defense

---

<sup>1</sup> The statute provides:

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

counsel argued, intervening criminal behavior does not prevent the offenses from washing out after ten years under the plain language of the statute.

Relying on RCW 9.94A.525(2)(d),<sup>2</sup> however, the state urged that the 1990-1992 DUI offenses did not wash out, because appellant did not spend five consecutive years in the community crime-free since his last date of release from confinement.

1. Where subsection (e) plainly states that when sentencing for felony DUI, prior DUI-type and serious traffic offenses shall be included if occurring within ten years, did the court err in applying subsection (d) to find that offenses occurring outside of that ten year period should nevertheless be included in appellant's offender score, due to intervening criminal behavior?

2. Where subsection (e) plainly states the circumstances under which serious traffic offenses will be included in the offender

---

<sup>2</sup> That statute provides:

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

Emphasis added.

score for felony DUI, did the court err in including a point for appellant's negligent driving conviction, as it does not qualify as a serious traffic offense?

3. To the extent defense counsel contributed to the error by agreeing to the inclusion of one point for the negligent driving offense, did appellant receive ineffective assistance of counsel at sentencing?

B. STATEMENT OF THE CASE

Florencio Morales is appealing from the judgment and sentence following his convictions for felony DUI and attempting to elude, allegedly occurring on December 7, 2009. CP 18-19 (Amended Information); CP 119-131 (Judgment and Sentence); CP 132-33 (Notice of Appeal). He was convicted following a jury trial in King County Superior Court in October 2010.<sup>3</sup> CP 65, 67. The court granted Morales' post-trial motion to dismiss a third conviction for first degree driving while license suspended, however, based on insufficient evidence. CP 105. The state is cross-appealing that ruling. CP 141-42.

---

<sup>3</sup> The verbatim reports of proceedings are contained in one bound volume, consecutively paginated, referred to herein as "RP."

At sentencing, the parties disputed Morales' offender score for purposes of the felony DUI. The defense asserted it was a "5," while the state urged it was an "8." CP 315-316, 320. The dispute centered on the parties' interpretations of RCW 9.94A.525, which provides in relevant part:

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) 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 offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex

offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses<sup>[4]</sup> shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement

---

<sup>4</sup> Under the SRA, a "serious traffic offense" means:

(a) Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)); or

(b) Any federal, out-of-state, county, or municipal conviction for an offense that under the laws of this state would be classified as a serious traffic offense under (a) of this subsection.

RCW 9.94A.030(43).

(including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.<sup>[5]</sup>

---

<sup>5</sup> Under RCW 46.61.5055, a prior offense within ten years is defined as:

(i) A conviction for a violation of RCW 46.61.502 **[driving under the influence]** or an equivalent local ordinance;

(ii) A conviction for a violation of RCW 46.61.504 **[physical control of a vehicle under the influence]** or an equivalent local ordinance;

(iii) A conviction for a violation of RCW 46.61.520 **[vehicular homicide]** committed while under the influence of intoxicating liquor or any drug;

(iv) A conviction for a violation of RCW 46.61.522 **[vehicular assault]** committed while under the influence of intoxicating liquor or any drug;

(v) A conviction for a violation of RCW 46.61.5249 **[negligent driving]**, 46.61.500 **[reckless driving]**, or 9A.36.050 **[reckless endangerment]** or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

(vi) An out-of-state conviction for a violation that would have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;

(vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance; or

(viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

If a deferred prosecution is revoked based on a subsequent conviction for an offense listed in this subsection (14)(a), the subsequent conviction shall not be treated as a prior offense of the revoked deferred prosecution for the purposes of sentencing;

RP 315-325 (discussing offender score under statute).

Relying on subsection (e)(ii), the defense proposed Morales' offender score included four points for his prior convictions that qualified as prior offenses within ten years as defined in RCW 46.61.5055.<sup>6</sup> The defense acknowledged that Morales' offender score also included one point for the other current attempt to elude offense. CP 114-15; RCW 9.94A.589.<sup>7</sup>

---

RCW 46.61.5055(14)(a) (brackets and emphasis added).

<sup>6</sup> Within the last ten years, Morales has convictions for: (1) DUI in 2007; (2) first degree negligent driving in 2007 (amended from physical control under the influence); (3) DUI in 2003; and (4) DUI in 2001. CP 106-118, 110 (defense presentence report). At trial, Morales stipulated to the existence of these priors for purposes of elevating the DUI to a felony. RP 77, 91, 185; RCW 46.61.502(6)(a) (6) (DUI is a class C felony if the person has four or more prior offenses within ten years as defined in RCW 46.61.5055).

On appeal, Morales disputes that the first degree negligent driving count in his offender score, because negligent driving is not defined as a serious traffic offense under RCW 9.94A.030(43). See RCW 9.94A.525(2)(e) (detailing when "serious traffic offenses" shall be included in the offender score for felony DUI). Thus, although it counts as a prior offense within ten years for purposes of elevating DUI to a felony, it does not count as a prior offense for purposes of the offender score. See argument infra.

<sup>7</sup> Under RCW 9.94A.589(1)(a), other current offenses are included in the offender score:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever 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: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same

However, the defense disputed that Morales' four additional DUI-type convictions from 1990-1992<sup>8</sup> scored under subsection (e), because none occurred within 5 years since the last date of release from confinement, and because none would be considered prior offenses *within ten years* as defined in RCW 46.61.5055. CP 113. According to the defense, Morales' offender score therefore was a "5," yielding a standard range of 33-43 months. CP 114-15. The defense asked the court to impose 33 months. CP 106; RP 317.

In contrast, but also relying on subsection (e), the state proposed that not all of Morales' prior offenses within 10 years – scored by defense counsel – actually counted, because one was for negligent driving, which is not a "serious traffic offense" under the SRA.<sup>9</sup> Supp. CP \_\_ (sub. no. 81, State's Supplemental Presentence Report, 11/16/10), page 2; RP 314-315. The state agreed that the other current attempt to elude offense scored as an

---

criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

<sup>8</sup> These additional convictions include: (5) physical control while under the influence in 1992; (6) DUI in 1991; (7) DUI in 1990; and (8) DUI in 1990. CP 110; see also Supp. CP \_\_ (sub. no. 81, State's Supplemental Presentencing Report, 11/16/10) (detailing same offenses).

<sup>9</sup> Morales agrees with the state's assertion on this point.

additional point, bringing Morales' initial offender score to a "4." Id. at page 3; RP 315.

However, the state disagreed Morales' four additional DUI-type offenses from 1990-1992 were excluded from Morales' offender score on account they did not occur within the last ten years. On the contrary, the state argued that inclusion of such offenses is determined according to subsection (d) of RCW 9.94A.525(2), which requires the offender to spend five years in the community crime-free before any prior conviction for a serious traffic offense washes out. Supp. CP \_\_\_ (sub. no. 81, State's Supplemental Presentencing Report, 11/16/10), page 5; RP 315. Because Morales had an intervening misdemeanor assault conviction in 1996, the state argued none of the prior DUI-type offenses washed out. Id.; see also RP 319. Accordingly, the state alleged Morales' offender score was an "8," yielding a standard range of 60 months (the statutory maximum). Id.

The defense countered that the state's reliance on subsection (d) was faulty, as subsection (e) expressly applies to sentencing for felony DUI, and subsection (d) contains the caveat "Except as provided in (e) of this subsection . . . ." To defense counsel, the plain language of the statute could not be more clear

and, under it, criminal behavior does prevent wash out of offenses older than ten years. CP 113; RP 318, 320.

The court resolved the issue in favor of the state, reasoning:

I in fact am in agreement with how the prosecution has calculated it. We are actually become very attuned in to the fact that the legislature sometimes creates inconsistencies in their implementation of the various statutes that we are in fact required to enforce or implement. This one has a very glaring inconsistency in that the prior DUIs from an earlier period of time actually clearly calculate in the offender's score for the attempting to elude yet is more problematic as you look at the felony DUI.<sup>[10]</sup> From the court's perspective it is the washout rule does apply in this instance and looking at any criminal behavior. It is the assault case that has a continuation of criminal behavior where there is no five year period crime free that from the Court's perspective again makes those sweep those in to the calculation of the offender's score.

RP 325-26.

---

<sup>10</sup> The parties agreed Morales' offender score for the attempt to elude was an "8," yielding a standard range of 17-22 months. CP 116. The defense noted that in contrast to felony DUI, which is sentenced under subsection (e) of RCW 9.94A.525(2), attempting to elude is sentenced under subsection (d), which requires the offender to spend five years in the community crime-free before serious traffic offenses wash out.

The court sentenced Morales to 60 months, but indicated that confinement time and community custody time combined could not exceed that statutory maximum. CP 123.

C. ARGUMENT

THE COURT MISAPPLIED THE LAW IN CALCULATING  
MORALES' OFFENDER SCORE.

The state's argument, adopted by the sentencing court below, is not supported by the plain language of the statute. The argument depends on subsection (d) of RCW 9.94A.525(2), but subsection (d) specifically provides that it does not apply when sentencing for felony DUI. When sentencing for felony DUI, as in Morales' case, subsection (e) applies. And while subsection (d) requires crime-free behavior in the community to trigger washout of prior serious traffic convictions, subsection (e) does not. The sentencing court therefore erred when it included serious traffic convictions not occurring within ten years in Morales' offender score.

The sentencing court also erred when it included Morales' negligent driving conviction in his offender score, because negligent driving does not qualify as a serious traffic conviction. To the extent defense counsel contributed to this second error, Morales received ineffective assistance of counsel at sentencing.

Statutory interpretation is a question of law reviewed de novo. State v. Posey, 161 Wn.2d 638, 643, 167 P.3d 560 (2007).

A court's primary goal in construing the meaning of a statute is to determine and give effect to the Legislature's intent and purpose. State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). The meaning of a clear and unambiguous statute is derived from its plain language alone. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002). Courts must assume the Legislature means exactly what it says. State v. Delgado, 148 Wn.2d 723, 727, 63 P. 3d 792 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

When the legislature chooses different statutory terms, courts must recognize that a different meaning was intended by each term. State v. Roggenkamp, 153 Wash.2d 614, 625-26, 106 P.3d 196 (2005) ("Because the legislature chose different terms, we must recognize that a different meaning was intended by each term."). An unambiguous statute is not subject to construction, and the court may not add language to a clear statute even if it believes the Legislature intended something else but failed to express it adequately. Vita Food Products, Inc. v. State, 91 Wash.2d 132, 587 P.2d 535 (1978). Application of the rules of statutory construction reveals the court erred in calculating Morales' offender score for felony DUI.

As set forth above, RCW 9.94A.525<sup>11</sup> governs offender score calculations. Subsection (1) defines prior convictions for

---

<sup>11</sup> In relevant part, the statute provides:

The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

The offender score is the sum of points accrued under this section rounded down to the nearest whole number.

(1) 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 offenses" within the meaning of RCW 9.94A.589.

(2)(a) Class A and sex prior felony convictions shall always be included in the offender score.

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

purposes of offender score calculations. Under subsection (2)(a), Class A and sex prior felony convictions are always included. Under subsection (2)(b), Class B prior felony convictions are included unless the offender has spent ten years in the community crime-free since the last date of release from confinement. Under subsection (2)(c), "Except as provided in (e) of this subsection," Class C prior felony convictions other than sex offenses are included unless the offender has spent five years in the community crime-free. Under subsection (2)(d), "Except as provided in (e) of this subsection," serious traffic convictions are included unless the offender has spent five years in the community crime-free.

Importantly, under subsection (2)(e):

If the present conviction is felony driving while under the influence of intoxicating liquor or any drug

---

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

Thus, as foreshadowed by subsections (c) and (d), special rules apply for certain Class C prior convictions (such as felony DUI and felony physical control) and prior serious traffic offenses when an offender is being sentenced for felony DUI. Such offenses are included when they are committed within 5 years or they qualify as prior offenses within ten years, as defined in RCW 46.61.5055. Accordingly, these Class C priors and serious traffic convictions can be included even if the offender has spent five years in the community crime-free. Under certain circumstances, therefore, application of subsection (e) will actually result in a harsher sentence.

And while the state and court focused on the difference between the offender scores for attempting to elude and felony DUI

under defense counsel's interpretation, such a result is not necessarily inconsistent with Legislative intent. Whenever an individual is being sentenced for felony DUI based on four priors within the last ten years, the priors are used not only to elevate the DUI to a felony, but most likely to increase the sentence as well. In this respect, the Legislature has already provided for double punishment based on the same conduct.

The Legislature in its wisdom has chosen to include prior DUI-type offenses committed within the last ten years – regardless of intervening criminal behavior – when sentencing for felony DUI. Contrary to the trial court's conclusion, this does not amount to a "glaring inconsistency" between sentencing for felony DUI and other offenses. See RP 325-26.

Regardless, subsection (2)(e)(ii) makes no reference to subsection (2)(d) and contains no indication that construction of qualifying offenses under the former statute should be determined according to the washout provisions of the latter. In construing (2)(e)(ii) as subject to subsection (2)(d), the court essentially added language to a plain and unambiguous statute, which is contrary to the rules of construction.

Under RCW 9.94.525(2)(e), Morales should have been sentenced with three points, based on his prior DUI offenses in 2007, 2003 and 2001. Morales agrees with the state's construction below, in that the 2007 first degree negligent driving offense should not be included in Morales' offender score, because it is not a serious traffic offense, which is defined as:

(a) Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5)); or

(b) Any federal, out-of-state, county, or municipal conviction for an offense that under the laws of this state would be classified as a serious traffic offense under (a) of this subsection.

RCW 9.94A.030(43). RCW 9.94A.525(2)(e) does not provide for the inclusion of traffic offenses that are not serious.

To the extent defense counsel contributed to the court's error in including the negligent driving offense, Morales' received ineffective assistance of counsel. Morales had the right to effective assistance of counsel at sentencing. U. S. Const. amend. 6; Const. art. 1, § 22. To prevail on an ineffective assistance claim, defense counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). By agreeing to the inclusion of a point that legally should not have been included, thereby increasing Morales' sentence, defense counsel performed deficiently and prejudiced Morales.

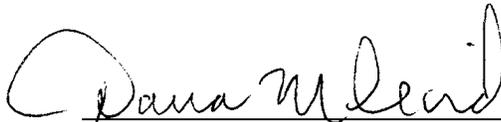
D. CONCLUSION

For the reasons stated above, this Court should reverse and remand for resentencing based on a corrected offender score of four points.

Dated this 3<sup>rd</sup> day of May, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66239-2-1
	)	
FLORENCIO MORALES,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF MAY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FLORENCIO MORALES  
DOC NO. 858050  
LARCH CORRECTIONS CENTER  
15314 NE DOLE VALLEY ROAD  
YACOLT, WA 98675

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF MAY, 2011.

x *Patrick Mayovsky*