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43472-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON (Consol. w/ 43479-2-II 43482-2-II 44900-5-II)

IN THE CONSOLIDATED

DIRECT REVIEW & PERSONAL RESTRAINT

of

SPENCER OBERG

PETITION FOR DISCRETIONARY REVIEW FROM THE ORDER OF THE

COURT OF APPEALS, DIVISION II

The Honorable Justice Hunt, Presiding Judge

PETITION FOR DISCRETIONARY REVIEW

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Personal Restraint of SPENCER L. OBERG Petitioner	No. _____ COA No: 43472-5-II **PETITION FOR DISCRETIONARY REVIEW**
STATE OF WASHINTON Respondent v. SPENCER L. OBERG Appellant	

I. IDENTITY OF PETITIONER

SPENCER L. OBERG, pro se, hereby petitions the Court for review of the decision listed in section 2.

II. DECISION FOR REVIEW

Petitioner asks this court to accept review of the following decision or parts of the decision filed on May 6, 2014, reconsideration of which was denied on June 12, 2014. The order granted, in part, issues raised on direct appeal by appellate counsel, and denied the claims raised by Petitioner in his Statement of Additional Grounds and

consolidated Personal Restraint Petition. Mr. Oberg now brings this petition pursuant to RCW 2.06.030, RAP 13.1(a), and RAP 13.4(b).

A copy of the decisions in question are attached as Appendices A and B.

III. ISSUES PRESENTED FOR REVIEW

1. If a nunc pro tunc order imposes an unlawful sentence, that sentence is derived from an unlawful sentence range imposed pursuant to the DOSA statute in the original judgment, and the nunc pro tunc order is found to be constitutionally invalid on its face, is the underlying original judgment also facially invalid?

2. Can the convictions contained in a facially invalid judgment be used for offender score purposes in subsequent prosecutions?

3. Does a statute that allows similarly situated defendants to be sentenced under different statutory provisions, calling for different presumptive sentences, violate Equal Protection when the only material difference between the defendant's situations is the day on which sentence is imposed?

4. Is a statute that creates different presumptive sentences for such similarly situated defendants constitutionally invalid? Is it contrary to legislative intent? Does it violate Separation of Powers?

5. Is a defendant entitled to credit for time served applied to all cause numbers he is concurrently incarcerated under pre-trial? Is a statute that allows otherwise unconstitutional?

IV. STATEMENT OF THE CASE

Petitioner was sentenced with an offender score of 24 during the Pierce county sentencing portion of the Global Plea at issue in this petition. Said plea encompasses charges from King and Pierce county. The only other charges used in Petitioner's offender score (aside from those

arising from charges contained under the instant plea) were a result of a global plea he had entered into (and served in its entirety) in Pierce county in 2007. There were 13 felony charges under the 2007 plea, which were scored as 13 points for the instant plea.

Petitioner discovered that one of the judgments from the 2007 plea evidences constitutional infirmities on its face while he was researching for the appeal of his current convictions. Specifically, the judgment for 06-1-04831-0 contained an incorrect sentence range for the Theft 1 charge, and incorrect statutory maximums for several other charges. (The incorrect sentence range is material in this case because sentence was imposed under the DOSA statute.) There are 6 felonies contained within that judgment in all.

Petitioner further discovered that there was a nunc pro tunc order issued by the sentencing court, after the time to appeal had expired, that amended the sentence for the Theft 1 charge to the midpoint of the range stated on the original judgment. The Court of Appeals found the nunc pro tunc order to be facially invalid, but attempts a distinction between it and the judgment it corrects.

As will be discussed further below, both the original judgment and the nunc pro tunc order are facially invalid because they contain a statutorily unauthorized sentence. Because these judgments are invalid on their face, the convictions contained within them cannot be used for

offender score purposes in subsequent prosecutions. The fact that they were used in the calculation of the offender score for the Global Plea at bar means that Petitioner was sentenced with an invalid offender score, which requires remand for correction of the score and resentecing under that corrected score.

When Petitioner was sentenced in Pierce county under the plea at bar, the honorable Edmund Murphy ran the 43 month sentence for one charge under cause number 10-1-03778-2 consecutive to the 76 month concurrent sentence issued by the King county court days earlier that applied to all cause numbers under the instant plea. He then imposed 84 months on the remaining charges, to run concurrently with all other cause numbers under the plea. He did not enter findings of fact or conclusions of law to support an exceptional consecutive sentence as required by 9.94A.589(1)(a), but rather relied on the provisions of 9.94A.589(3) in imposing the sentence. (Neither did he award any credit for time served in King county on the Pierce county causes.) The Court of Appeals supported this action, reasoning that, since the Pierce county sentencing court was imposing sentence on a different day from the King county court, it had discretion under 9 94A.589(3) to impose a consecutive sentence, even though it did so on charges all contained within a single plea.

The current definition of "other current offenses",

applied to RCW 9.94A.589 by the definition espoused in RCW 9.94A.525(1), creates a situation that violates the Equal Protection clause of the United States constitution, as well as the Separation of Powers doctrine our government is founded on. Such a situation presents itself in various forms as a result of numerous different factual circumstances. One of these circumstances is present in the case at bar. To wit: the mere fact that the prosecutors involved in the execution of Petitioner's plea agreement elected to have him sentenced before the separate courts of the two counties involved, on different days, subjected him to the provisions of RCW 9.94A.589(3). However, in the recent "barefoot bandit" case (and others similarly adjudicated), defendant Moore was subject to the provisions of 9.94A.589(1)(a) because the prosecutors involved elected to sentence him in a single venue on a single day.

This situation violates Equal Protection by subjecting similarly situated defendants to disparate punishments, indeed disparate statutory provision and presumptive sentence, and it violates Separation of Powers by placing a sentencing determination intended for the Judicial branch in the hands of the Executive.

It could not have been the intent of the legislature to enact a law that raises constitutional question in such a way. The clear intent behind the statutes in question is to give judges some level of discretion in certain sentencing

situations, not to have similarly situated defendants at the whim of prosecutors.

Furthermore, Petitioner is entitled to credit for all time he served pretrial on his convictions, as he was held under warrant for all charges concurrently. Any statute that allows otherwise is unconstitutional.

V. ARGUMENT

1. The entire judgment in 06-1-04831-0 is facially invalid, rendering the convictions contained therein unusable for offender score purposes in the case at bar. Remand for correction of the offender score and resentencing under the corrected score is required.

Use of an erroneous offender score is contrary to Due Process. US Const. Amend. 14. Jones v. United States, 526 US 227, 249, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). It also violates the SRA and results in a manifest error effecting a constitutional right that is structural in nature and may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 5-6, 17 P.3d 591 (2001); In re Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001); State v. Roche, 75 Wn.App. 500, 878 P.2d 497 (Div 1 1994).

In the instant case, Petitioner's offender score is rendered erroneous by the inclusion of 6 felony points for convictions contained within a 2006 judgment that is facially invalid.

A. AN UNLAWFUL SENTENCE RENDERS A JUDGMENT FACIALLY INVALID.

The original judgment in cause number 06-1-04831-0 imposed a Drug Offender Sentencing Alternative (DOSA) sentence on Petitioner. The judgment evidences several constitutional infirmities on its face, including an incorrect sentencing range for the Theft 1 conviction (the most serious contained within the J/S) and incorrect maximum terms for several of the charges it sentences. Of concern here is the former. The J/S imposes a sentence range of 43-53 months, which is incorrect. The correct range would be 43-57 months. The judgment also lists the sentence of confinement as 50 months.

The DOSA statute (applied here) requires the imposition of one half of the **midpoint** of the sentenced range. RCW 9.94A.662 states in pertinent part:

> (1) A sentence for prison-based special drug offender sentencing alternative shall include:
>
> (a) A period of total confinement in a state facility for one-half the midpoint of the standard range or twelve months, whichever is greater;
>
> (b) One-half the midpoint of the standard sentence range as a term of community custody...

Therefore, when applying the DOSA statute, imposition of a sentence range **IS** imposition of a sentence. And in the case at bar, the imposed range was contrary to that authorized in statute, rendering the court without power to impose it.

> Generally speaking, a judgment and sentence is not valid on its face if it demonstrates that the trial court did not have the power or the statutory authority

to impose the judgment.

In re Scott, 172 Wn.2d 911, 916, 271 P.3d 218 (2012). Therefore, the original judgment and sentence for 06-1-04831-0 is invalid on its face of its own accord.

However, there is another document of concern in this issue. A number of months after Petitioner was sentenced on the original judgment, the court, after the time to file an appeal had expired, entered a nunc pro tunc order amending the sentence imposed from 50 months to 48 months, in an apparent attempt to impose sentence at the midpoint of the imposed range, as required by the DOSA statute. Petitioner never received any notice of this whatsoever and only discovered that it had occurred when researching for the present appeal. Upon his discovery of the nunc pro tunc order, and the invalidities contained by it and the original J/S, he filed a PRP in Division 2. The petition in 44908-1-II was recently decided, and the court determined that the nunc pro tunc order is facially invalid, but attempts a distinction between it and the original J/S, ruling the original to be valid.

For the reasons stated above, the original J/S is invalid in its own right. However, it is also invalid for another reason.

B. A NUNC PRO TUNC ORDER AND THE JUDGMENT IT CORRECTS ARE ONE DOCUMENT UNDER THE LAW.

The very definition of the term in question

demonstrates this clearly. Black's Law Dictionary, 6th edition, is illuminating:

Nunc Pro Tunc

> Lat. Now for then. A phrase applied in acts allowed to be done after the time when they should be done, with a retroactive effect, i.e. with the same effect as if regularly done. Nunc pro tunc entry is an entry made now of something actually previously done to have effect of a former date; office being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake. Seabolt v. State, Okl.Cr., 357 P.2d 1024.
>
> Nunc pro tunc merely describes inherent power of court to make its records speak the truth, i.e., to correct record at later date to reflect what actually occurred at trial. Simmons v. Atlantic Coast Line R. Co., D.C.S.C., 235 F.Supp. 325, 330. Nunc pro tunc signifies now for then, or in other words, a thing is done now, which shall have same legal force and effect as if done at time when it ought to have been done. State v. Hately, 72 N.M. 377, 384 P.2d 252, 254.

Division 1 also articulated that "[t]he purpose of a nunc pro tunc order is to record some prior act of the court which was actually performed but not entered into the record at that time." State v. Rosenbaum, 56 Wn.App. 407, 410-11, 784 P.2d 166 (Div 1 1989).

Therefore, it must follow that a nunc pro tunc order is merely clarifying, or making official, an action actually taken in the original order (judgment in this case) that it seeks to correct. Given the interconnected nature implicit in this relationship, the Court of Appeals erred when it attempted to separate the two, classifying one valid and the other not.

For the foregoing reasons, the judgment and nunc pro

tunc order in 06-1-04831-0 are facially invalid. It is well settled that such judgments cannot be used for sentencing purposes in subsequent prosecutions.

C. FACIALLY INVALID CONVICTIONS CANNOT BE USED IN CALCULATING AN OFFENDER SCORE.

When a judgment is rendered facially invalid, the underlying convictions cannot be used in calculating an offender score. State v. Binder, 105 Wn.2d 417, 419, 721 P.2d 967 (1986)(a facially invalid guilty plea cannot be used in offender score). See also State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert denied 479 US 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). This stems from the constitutional principle espoused by the US Supreme court. Jones v. United States, 526 US at 249. The inclusion of such points in an offender score is contrary to Due Process (US Const. Amends. 5 & 14) and can be likened to the parallel federal sentencing guidelines, which the US Supreme court has consistently held are binding on judges and have the force and effect of laws. US v. Booker, 543 US 220, 234, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)(citing Mistretta v. United States, 488 US 361, 391, 109 S.Ct. 647, 102 L.Ed.2d 714 (1986); Stinson v. United States, 508 US 36, 42, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993)). Thus, in our state application, if an incorrect score is used in sentencing, the resultant sentence is contrary to law.

Division 2 recently determined that resentencing is

required to exclude unconstitutional prior convictions from the offender score in a situation similar to this one. State v. Floyd, 2013 WL 6630888 (Div 2 2013).

Inclusion of facially invalid points in an offender score renders that score incorrect. This court, in State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997), made clear that an offender score must be correctly calculated and that a failure to do so is a violation of the SRA and reversible error.

> [W]hen the sentencing court acts outside the SRA, the appellate court may review any such departures. State v. Mail, 121 Wash.2d 707, 711-12, 854 P.2d 1042 (1993)(defendant may appeal a sentence by showing the sentencing court had a duty to follow some specific procedure of the SRA and failed to do so).

Parker at 188. The court goes on to say that remand is the proper remedy, even in the case of a standard range sentence, unless the record clearly indicates the sentencing court would have imposed the same sentence anyway. Parker at 189. See also State v. Huntley, 175 Wn.2d 901, 916, 287 P.3d 584 (2012)(Erroneous calculation of offender score requires remand for resentencing unless record clearly shows the trial court would have imposed the same sentence sentence regardless of the error. State v. Tili, 148 Wash.2d 350, 358, 60 P.3d 1192 (2003)... Resentencing is appropriate even though defendant had served entire modified sentence because modifications could cause a future sentencing court to impose additional demanding conditions of community

placement or sway a court to impose the high end of the standard range. State v. Raines, 83 Wash.App. 312, 315, 922 P.2d 100 (1996)).

In this case, remand is appropriate because it cannot be said with any certainty that the sentencing court would impose the same consecutive sentence. The court clearly articulated that the volume of prior convictions was a significant factor in its determination. (Opinion of the Court at 7; quoting RP at 31-33.) A reduction of 6 points is a large drop in that volume and well may have affected the judge's sentencing decision.

Division 2 adjudicated a case analogous to the case at bar in State v. Thompson, 143 Wn.App. 861, 181 P.3d 858 (Div 2 2008). The Thompson court, in applying Ammons, supra, determined that the petitioner had to pursue the normal channels provided for post-conviction relief to determine the invalidity of his prior convictions and then request resentencing. In the case at bar, Petitioner has followed these channels, Division 2 having determined that the 06-1-04831-0 judgment is constitutionally invalid on its face. (See 44908-1-II and argument above.)

The invalid convictions cannot be used in Petitioner's offender score for the convictions at bar. Remand for resentencing is appropriate because Petitioner has shown that his restraint is due to a fundamental defect which inherently results in a miscarriage of justice because he

has shown that his sentence is based upon a miscalculated offender score. In re Goodwin, 146 Wash.2d 861, 867, 50 P.3d 618 (2002). Petitioner raised this issue in his Statement of Additional Grounds, citing the PRP in 44908-1-II that was then also pending before Division 2, but that court failed to rule on the matter. Petitioner then brought the issue to that court's attention in a Motion for Reconsideration, expounding on the argument raised in the SAG, which was summarily denied. This denial is contrary to this Court's jurisprudence, United States Supreme Court caselaw, and constitutional mandate. Therefore, this court should accept review of this issue.

2. RCW 9.94A.525(1) is constitutionally infirm because it violates the Equal Protection clause and Separation of Powers doctrine, subjecting similarly situated defendants to disparate presumptive sentences at the whim of the Executive. Such conditions as are created by this statute are contrary to legislative intent.

RCW 9.94A.525(1) creates situations in which similarly situated defendants are subject to different statutory sentencing provisions, disparate presumptive sentence conditions, and disparate punishments. This violates the 14th Amendment to the US constitution, as well as Article 1, Section 12 of the Washington constitution. Such situations could not have been the intent of the legislature upon enactment of the statute in question.

A. THE APPLICATION, AND RESULTANT CONSTITUTIONALLY OFFENSIVE SITUATIONS, OF RCW 9.94A.525(1) IS CONTRARY TO LEGISLATIVE INTENT.

Legislative intent is the cornerstone of statutory interpretation.

> A court interpreting a statute must discern and implement the legislature's intent. Where the plain language of a statute is unambiguous and legislative intent is apparent, we will not construe the statute otherwise. Plain meaning may be gleaned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. If a statute is still susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in determining legislative intent.

Anthesis v. Copeland, 173 Wn.2d 752, 756, 270 P.3d 574 (2012)(internal quotes and citations omitted.)

When determining a statute's plain meaning, it is appropriate for courts to look to the context of the statute, including other provisions within the same act. Dept. of Ecology v. Campbell & Gwinn LLC, 146 Wash.2d 1, 10-12, 43 P.3d 4 (2002). Implementing this concept, this court commented that "[i]n construing the PRA, we look at the Act **in its entirety** in order to enforce the law's overall purpose." Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 536, 199 P.3d 393 (2009)(Bold emphasis added). Based on the law's overall purpose, the Legislative intent for various parts/subsections of an act can be determined separately, and severed if deemed appropriate. Regan v. Time, Inc., 468 US 641, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984).

Division 3, presumably based on the foregoing

principles, has articulated that "the legislature intended that the SRA [Sentencing Reform Act], among other things, would ensure that the punishment fits the crime. RCW 9.94A.010(1)." State v. King, 149 Wn.App. 96, 202 P.3d 351, 354 (Div 3 2009).

It is therefore safe to say that this intent is also behind RCW 9.94A.525(1), as this statute is part of the SRA. Operating from this premise, the intent of the statute can be analyzed. RCW 9.94A.525(1) reads in pertinent part:

> Convictions entered or sentenced on the same date as the convictions for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

In applying this provision, Division 3 has opined that "[g]enerally, sentences for multiple offenses set at one sentencing hearing are served concurrently." State v. Graham, 178 Wn.App. 580, 589, 314 P.3d 1148 (Div 3 2013). Such practice is common with trial courts throughout the state.

This practice does yield results commensurate with legislative intent on some occasions, but there are many instances in which it does not. These instances stem from circumstances that have become quite common with the proliferation of plea bargaining. With the current provision, a defendant can be sentenced for several crimes on the same day and be subject to presumptive concurrent sentences under RCW 9.94A.589(1)(a), and another defendant

can be sentenced to two crimes on separate days of the same week and be subject to discretionary consecutive sentences under RCW 9.94A.589(3). The latter defendant can easily receive a longer sentence for fewer, and potentially less serious, crimes than the former receives. This does NOT 'ensure that the punishment fits the crime'. Both of these hypothetical defendants entered their convictions by plea of guilty, accepting responsibility for their actions and the punishment behind them, yet one is penalized simply because his sentences are entered on two separate days, which can happen for any of a myriad of reasons.

Moving now from the hypothetical to reality. A situation that models the one just discussed can be seen in comparing the case at bar with one adjudicated around the same time in another county. Petitioner entered into a Global Resolution Plea between King and Pierce county for the resolution of 12 felonies. The defendant, Moore, in the "Barefoot Bandit" case, entered into a Global Plea between several counties for the resolution of significantly more felony charges. Petitioner was sentenced before the two courts separately in hearings separated by approximately a week. Moore was sentenced before a single court in Island county for all charges in one hearing. Petitioner was subject to 9 94A.589(3) and received a consecutive sentence. Moore was subject to 9.94A.589(1)(a) and received concurrent sentences. The former was subject to discretionary

consecutive sentences, the latter was subject to the presumption of concurrent sentences. This is clearly contrary to the purpose of the statute. Crimes that are arguably deserving of harsher punishment received a less onerous sentence simply because prosecutors elected to adjudicate them in a single sentencing hearing rather than multiple. (See §C below.)

Looking to the first part of the statute gives a glimpse of the legislative intent behind it. The words "Conviction's entered...on the same day" indicate that the legislature envisioned 9.94A.589(1)(a) to apply when the courts adjudicate crimes that are all part of a single plea or trial, for these are the only situations in which convictions are entered on the same day. In the case of a Global plea between more than one county, as is the case here, a defendant is entering into a **single plea** as a whole when he pleads and is convicted before the first court, as the charges before both courts are then inseparable under the plea. It is therefore reasonable to conclude that the legislature intended the provisions of §(1)(a) to apply in cases involving Global plea agreements. Thus, it is also reasonable to conclude that 9.94A.525(1) is contrary to legislative intent.

Not only is the current use of this statute contrary to legislative intent, the statute itself creates situations that violate Equal Protection, rendering it

unconstitutional.

B. RCW 9.94A.525(1) VIOLATES THE EQUAL PROTECTION PROVISIONS OF BOTH THE STATE AND FEDERAL CONSTITUTIONS.

Both our state and federal constitutions guarantee like treatment for those similarly situated. US Const. 14th Amendment; WA Const. Art. 1 §12; State v. Manussier, 129 Wash.2d 652, 672, 921 P.2d 473, cert denied 117 S.Ct. 1563, 520 US 1201, 137 L.Ed.2d 709 (1996). Federal and state equal protection clauses are constured identically, and claims arising under their scope are considered as one issue. Manussier at 672.

The rational basis test applies when a statutory classification affects neither a fundamental right nor a suspect or semi-suspect class. Thus, it applies when a statute affects only a physical liberty interest. Manussier at 673.

The rational basis test requires that the challenged law (1) rest on a legitimate state interest and (2) be rationally related to achieving that interest. State v. King, 149 Wn.App. 96, 202 P.3d 351 (Div 3 2009)(citing Manussier at 673, and Madison v. State, 161 Wash.2d 85, 103, 163 P.3d 757 (2007)).

Drawing from this two-part test, it becomes clear that the challenged statute does not have a rational basis.

Looking at the first part of the test, though

9.94A.525(1) is an attempt to effectuate the intent of the legislature, and thus meet a legitimate state interest, it fails to do so in many situations. Far from ensuring that the punishment fits the crime, this statute allows for the imposition of widely disparate sentences to be imposed on similarly situated defendant's by virtue of different presumptive sentence types, as is the case here. It therefore fails the second part of the test as well, because it cannot reasonably achieve the state's interest if it subjects defendant's to widely disparate presumptive sentences, and therefore punishments, as it does. This runs contrary to the very spirit of the SRA, as was discussed in the previous subsection.

Also of great concern is the fact that the disparate subjection at issue is largely determined by the prosecution's decision on how to schedule and adjudicate sentencing.

C. THE EQUAL PROTECTION VIOLATIONS ENUMERATED ABOVE GIVE RISE TO SEPARATION OF POWERS CONCERNS.

Placing the determination of which presumptive sentence a defendant will be subject to in the hands of the prosecution is a breach of the Separation of Powers doctrine because it places sentencing discretion intended by the Legislature for the Judiciary in the hands of the Executive.

The constitution of the United States sets forth the various responsibilities for the three branches of

government. US Const. Art 1, 2, & 3. Our Washington State constitution derives from, and builds on those enumerated in the Federal constitution. WA Const. Art 2, 3, & 4.

Article 2 §(1) vests the various powers of the legislature. Among them are: the power to set punishment for criminal offenses, State v. Thorne, 129 Wash.2d 736, 921 P.2d 514 (1996), and fixing penalties for criminal offenses, as this is a legislative, and not judicial, function. State v. Manussier, supra. Regarding the sentencing statute in question, the Legislature has clearly delegated any available discretion to the Judiciary, which holds jurisdiction over all criminal cases amounting to felony, among other things. WA Const Art IV, §1 & 2; State v. Posey, 174 Wash.2d 131, 272 P.3d 840 (2012).

Article 3 vests the power of the Executive. Nowhere does it authorize the Attorney General or Prosecutors to set penalties or sentences. The Legislature is vested with that power and has done so in the SRA. It has also delegated any discretion within the guidelines it set to the Judiciary, not the Executive.

Therefore, it is a violation of the constitutional Separation of Powers doctrine for 9.94A.525(1) to vest, incidently or otherwise, in prosecutors the ability to determine presumptive sentence (and thus punishment) that a defendant is subject to by virtue of the venue(s) chosen for adjudication of Global plea agreements. This court should

accept review of this issue.

3. Constitutional mandate and state law require that Petitioner be credited for the time he served pretrial on the Pierce county cause numbers.

Petitioner was in custody in King county beginning on or about 7/13/2011. He was held under authority of warrants issued by both the King and Pierce county courts. The Pierce county warrants held him on "no bail" status. CP at 127, 130, 133. When Petitioner was sentenced in King county, he received credit for all time he served in custody. When he was sentenced in Pierce county less than two weeks later, he received no credit for any of the time he spent incarcerated in King county under authority of Pierce county warrants. This is contrary to state and federal law.

A court must give credit for time served before trial in order to comply with the double jeopardy, due process, and equal protection clauses of the state and federal constitutions:

> Fundamental fairness and the avoidance of discrimination and possible multiple punishments dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence.

Ranier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974): US Const. Amends. 5 & 14; WA Const. Art. 1 § 3 & 9; Stapf v. United States, 367 F.2d 326 (DC Cir 1966). Both state and federal case law require that such credit for presentence

time served be awarded. State v. Speaks, 119 Wn2d 204, 206, 829 P.2d 1096 (1992). North Carolina v. Pearce, 395 US 711, 718-19, 89 S.Ct. 2089, 23 L.Ed.2d 656 (1969).

Implementing this line of jurisprudence, RCW 9.94A 505(6) provides:

> The sentencing court shall give the offender credit for all confinement time served before sentencing if that confinement was solely in regard to the offence for which the offender is being sentenced.

At least one court has interpreted this statute to require credit only for charges being sentenced. State v. Stewart, 136 Wash.App. 162, 149 P.3d 391 (Div 1 2006). But this reasoning fails to contemplate a common situation in which (as here) a defendant is incarcerated on multiple charges concurrently pending trial. In Stewart, the defendant was seeking credit for time served beginning the first day he was detained on only one of the charges, thus requesting credit on the other charges for time he didn't actually serve. The factual circumstances in the case at bar are distinguishable, as Petitioner was in custody pursuant to all charges under the instant plea for all times herein material.

Another Division 1 case addresses the situation (present here) in which a Petitioner seeks credit for pretrial time on consecutive sentences. In re Costello, 131 Wn.App. 828, 129 P.3d 829 (Div 1 2006). Essentially , this case states that credit for time served on sentences

ultimately determined to be consecutive cannot be duplicated on each sentence. Applying this reasoning to the instant case, Petitioner should be credited for all time he spent incarcerated pretrial (beginning 7/13/11) on all charges sentenced concurrently from both counties (the aggregate of which culminates in the 84 month concurrent sentence issued by Pierce county), and for the time he spent in Pierce county awaiting sentencing (less than two weeks) on the single charge sentenced consecutively to the King county sentence.

The constitution, and state and federal case law, require credit for all offenses for which time has been served. This requires that a defendant that is confined due to multiple offenses concurrently be credited for all time he served for those offenses when he is later sentenced on them. To hold otherwise would be an affront to the constitutional provisions enumerated above by subjecting a defendant to multiple punishments for the same crime.

Such is exactly what happened in the case at bar. Petitioner was incarcerated under, and thus serving time for, all of the offenses contained within the plea in question starting on 7/13/2011. However, instead of being credited for that time when he was sentenced in Pierce county, he was given credit only for the days he was physically in Pierce county. This means that he is being forced to serve the time he spent in King county under "no

bail" holds for the Pierce county charges twice, particularly regarding the aggregate 84 month concurrent sentence.

If the reasoning of Costello is assumed, Petitioner must, at a minimum be credited for the time he spent incarcerated pretrial from 7/13/11 to 11/15/11 against the aggregate 84 month concurrent sentence, and approximately 10 days for the time spent in Pierce county against the single consecutive sentence. In this regard, Costello is in conflict with the Court of Appeals decision in this case.

HOWEVER, it is the contention of the Petitioner that the failure to award him with the he time served under all charges is contrary to constitutional mandate.

Failure to credit Petitioner with time he served for the Pierce county offenses is contrary to this Court's jurisprudence, US Supreme Court mandate, and constitutional provision, and this Court should accept review of this issue. If it is determined that 9.94A.505(6) does not allow for such credit, that statute is unconstitutional and should be rendered so by this court.

VI. CONCLUSION

For the foregoing reasons, Petitioner prays that this honorable Court accept review of the issues herein raised.

DECLARATION

I, Spencer Oberg, Petitioner pro se, hereby swear under penalty of perjury under the laws of the state of

Washington that the foregoing is true and correct to the best of my knowledge and ability.

DATED this 9th day of June, 2014.

SIGNED: _____

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SPENCER LAWRENCE OBERG, Appellant,	No. 43472-5-II Consolidated with No. 43479-2-II, 43482-2-II And No. 44900-5-II
In re Personal Restraint Petition of SPENCER LAWRENCE OBERG, Petitioner.	UNPUBLISHED OPINION

HUNT, J. — Spencer Lawrence Oberg appeals his sentences and a community custody condition requiring him to undergo drug and alcohol evaluation and treatment related to three guilty plea convictions. He argues that (1) the Pierce County Superior Court failed to make the statutorily required finding that a chemical dependency contributed to his offenses and there was no evidence that alcohol was a factor in the current offenses, prerequisites for the drug and alcohol related community custody condition of his sentences; and (2) his total sentence for his third degree assault conviction exceeds the 60-month statutory maximum for that offense. In a pro se Statement of Additional Grounds for Review[1] (SAG), Oberg asserts that (1) the superior court erred in imposing a consecutive sentence, in violation of a global plea agreement

[1] RAP 10.10.

encompassing both Pierce County's and King County's charges; (2) the State breached this agreement by failing to advise the superior court that it was bound by the global plea agreement, suggesting that his King County convictions for charges that were part of the global plea agreement were "separate"[2] offenses, failing to list the King County convictions as "other current offenses"[3] on the plea statements and the judgment and sentences, and misrepresenting the jail-time credit to which Oberg was entitled under the global plea agreement; (3) the superior court erred in not awarding him full credit for his time served; and (4) his plea statements incorrectly stated that he was ineligible for a Drug Offender Sentencing Alternative (DOSA)[4] sentence. Finally, in a personal restraint petition (PRP), which we consolidated with this direct appeal, Oberg essentially repeats the claims he makes in his SAG.

The State concedes that Oberg's third degree assault sentence exceeds the statutory maximum for that offense and that remand for resentencing on this conviction is required; we accept this partial concession. Because the record contains no evidence that alcohol was a factor in Oberg's convictions, we also hold that the superior court erred in imposing alcohol related community custody conditions. Accordingly, we remand to the superior court to resentence Oberg on the third degree assault conviction and to strike the alcohol related community custody conditions in the judgments and sentences for cause numbers 10-1-03778-2 and 11-1-02533-2.

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[2] SAG at 2.

[3] SAG at 2.

[4] RCW 9.94A.660(1).

We otherwise affirm Oberg's sentences and his drug-related community custody condition. And we deny his personal restraint petition.

FACTS

I. PIERCE COUNTY AND KING COUNTY PLEA AGREEMENTS

In September 2010, the Pierce County prosecutor charged Spencer Lawrence Oberg with unlawful possession of a controlled substance (methadone) and unlawful possession of a controlled substance (oxycodone) under Pierce County cause number 10-1-03778-2. In January 2011, the Pierce County prosecutor charged Oberg with residential burglary and third degree malicious mischief under cause number 11-1-00523-4. And in June 2011, the Pierce County prosecutor charged Oberg with obtaining or attempting to obtain a controlled substance (oxycodone) by fraud, deceit, or misrepresentation; unlawful possession of a controlled substance (oxycodone); third degree assault of a law enforcement officer; and possession of another's identification under cause number 11-1-02533-2. During this same time period, Oberg committed a series of offenses in King County, which resulted in several additional charges under two separate King County cause numbers (11-1-06655-6 and 11-1-06585-1).

Oberg entered into several plea agreements to resolve all charges in both counties. On November 15, 2011, Oberg agreed to enter *Alford/Newton*[5] pleas to the following amended Pierce County charges and the State agreed to recommend the following sentences:

(1) residential burglary—84 months (cause number 11-1-00523-4);

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[5] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

(2) obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation—24 months, and third degree assault—51 months (cause number 11-1-02533-2); and

(3) second degree identity theft—57 months, and unlawful possession of a controlled substance (oxycodone)—24 months (cause number 10-1-03778-2).

The State further agreed to recommend that (1) these sentences run concurrently with each other and with the King County sentences; (2) Oberg receive credit for time served; and (3) the superior court impose "drug/alcohol treatment per [community corrections officer] CCO" for cause numbers 10-1-03778-2 and 11-1-02533-2. Clerk's Papers (CP) at 39, 98. Each "Statement of Defendant on Plea of Guilty" advised Oberg, "The judge does not have to follow anyone's recommendation as to sentence." CP at 39, 98 (emphasis omitted). Each of the attached offender score stipulations listed the King County offenses as "convictions" rather than "other current offenses." CP at 16, 46, 107.

II. GUILTY PLEAS AND SENTENCING

On November 15, 2011, Oberg pled guilty to the amended Pierce County charges. Oberg's counsel advised the superior court that the pleas were all *Alford/Newton* pleas and that they represented a "global resolution" that also included the two King County cases noted in the Oberg's guilty plea statements. Report of Proceedings (RP) at 3. The State also told the superior court that "Mr. Oberg has already pled guilty and been sentenced on two separate felony cause

numbers up in King County."[6] RP at 4.

The superior court then engaged in an extensive colloquy, during which Oberg confirmed that he had reviewed the Statements of Defendant on Plea of Guilty with his counsel, that he had read the documents himself, and that he had no questions about these documents. The superior court then reviewed with Oberg each of the charges under each cause number, the standard sentencing ranges for each charge, and the State's sentencing recommendations (1) to run the Pierce County sentences concurrently with all other Pierce County sentences and with the previously imposed King County sentences, and (2) that Oberg "get a drug and alcohol evaluation and treatment according to the community corrections officer." RP at 8. Oberg acknowledged that he understood the State's recommendations. RP at 8. For each charge, the superior court advised Oberg that it was not bound by the State's sentencing recommendations and that it (the court) could impose consecutive sentences; Oberg also stated that he understood this. Oberg then pled guilty to each of the charges. The superior court accepted his pleas and proceeded to sentencing.

During sentencing, the State (1) noted Oberg's numerous previous offenses; (2) advised the superior court that Oberg had unsuccessfully participated in both the Pierce County Drug Court Program and a DOSA program through the Department of Corrections; (3) stated, "Not

[6] On November 4, 2011, the King County Superior Court sentenced Oberg to a total of 76 months of confinement for (1) two counts of forged prescriptions (oxycodone) and one count of unlawful possession of a controlled substance (methamphetamine) under cause number 11-1-06585-1; and (2) two additional counts of forged prescriptions (oxycodone), one count possession of stolen firearm, and one count of second degree identity theft, under cause number 11-1-06655-6. The King County Superior ran all sentences concurrently and noted that these sentences should also run concurrently with the Pierce County sentences.

only is [Oberg] young, but it is obvious that controlled substances have had a pretty significant hold on him"; and (4) recommended a "high end," 84-month sentence based on Oberg's extensive criminal history and "that he was basically on a crime spree happening over two different counties." RP at 18, 19. When the superior court asked what Oberg's King County sentences were, the State responded that King County had given Oberg 76 months.

Defense counsel (1) presented the "agreed recommendation of 84 months"[7]; (2) acknowledged that over time, as the charges had increased in number, "[i]t became really apparent in this case that drug addiction was pushing this thing"[8]; (3) commented that "[e]very time [Oberg] got arrested" he was carrying drugs[9]; and (4) stated:

> What I'm asking the Court to impose, don't go beyond any sort of consecutive sentences, keep it at 84 months, the maximum concurrent as the global offer thing. Anything the Court can do to make sure that Mr. Oberg gets some additional treatment, whatever resources are available for him to do that.

RP at 25. Oberg's wife asked the superior court to allow Oberg to have treatment and to sentence him to 76 months, like the King County court had done, "because of the drug problems that he has." RP at 22. Oberg similarly acknowledged his substance abuse issues.

The superior court commented extensively on Oberg's young age (23), criminal history (24 or 25 felonies), family support, drug use (including failed drug court), and the following sentencing considerations:

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[7] RP at 20.

[8] RP at 23.

[9] RP at 24.

> I am also troubled by the sheer volume of the crimes here, and in this particular case what is an ongoing pattern of you being under the supervision of the court and being out committing crimes on multiple occasions, not only here in Pierce County, but also in King County. . . . Basically what I'm being asked to do is to wrap up what would be 12 felonies into one sentence, 76 months, which is about six months a felony, on top of somebody who has already maxed out, even before you consider those.
>
> I understand the work that has gone into this by your attorney, by the prosecutors in Pierce County and King County. Some judge has to put the first number up, and apparently the judge in King County has with 76 months. The second judge then has the option of going along with the concurrent sentence or doing a consecutive sentence. That's my decision here today.
>
> . . . .
>
> I guess the bottom line is *I don't think 76 months is enough for everything that has gone on here*. What I'm going to do is on the cause number that ends in 78-2, Count I, the range is 43 to 57 months. I'm going to impose 43 months. I am going to run that *consecutive* to the King County cause numbers. The other counts, the other sentences, would be as recommended, to be concurrent, so the bottom line would be that it would be an additional 43 months for these five felonies that were committed here in Pierce County.

RP at 31-33 (emphasis added).

The superior court sentenced Oberg to (1) 84 months of confinement for residential burglary; (2) 24 months for obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation; (3) 51 months for third degree assault; (4) 43 months for second degree identity theft; and (5) 24 months for unlawful possession of a controlled substance. The superior court ran the 43-month sentence on the second degree identity theft consecutively to Oberg's 76-month King County sentences; it ran the remaining sentences concurrently with each other and with the King County sentences.

In addition to the 51-month sentence for third degree assault (cause number 11-1-02533-2), the superior court imposed 12 months of community custody, noting that the total term of confinement for this conviction should not exceed the 60-month statutory maximum. The

superior court also ordered Oberg to submit to "Drug/Alcohol evaluation and treatment per CCO" under cause numbers 10-1-03778-2 (second degree identity theft and unlawful possession of a controlled substance (oxycodone)) and 11-1-02533-2 (obtaining or attempting to obtain a controlled substance by fraud, deceit or misrepresentation; and third degree assault), and gave him 8 days credit for time served under each cause number. CP at 60, 116.

Oberg appeals his consecutive sentences for second degree identity theft, his third degree assault sentence, the drug and alcohol evaluation and treatment community custody requirements, and the credit he received for time served.

ANALYSIS

I. SENTENCE IN EXCESS OF STATUTORY MAXIMUM

Oberg argues that the superior court erred when it sentenced him to 51 months plus 12 months of community custody for third degree assault because the total sentence exceeded the 60-month statutory maximum for this offense and the court's notation limiting his total confinement to 60 months was not sufficient to cure this error. The State concedes that under our Supreme Court's decision in *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012), this "*Brooks* notation"[10] no longer operates to ensure the sentence's validity. We agree with

[10] A "*Brooks* notation" is a hand-written addition to the judgment and sentence stating that the total combined term of confinement and community custody actually served may not exceed the statutory maximum. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009), *superseded by Boyd*, 174 Wn.2d at 472-73.

Oberg, accept the State's concession, and remand for resentencing.[11]

II. COMMUNITY CUSTODY CONDITIONS

Oberg further argues that the superior court erred by requiring him to undergo drug and alcohol evaluations and treatment as a community custody condition related to his convictions under cause numbers 10-1-03778-2 (second degree identity theft and unlawful possession of oxycodone) and 11-1-02533-2 (obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation and third degree assault) because the superior court failed to make an express finding, under RCW 9.94A.607(1), that he had a chemical dependency that contributed to these offenses.[12] The State counters that (1) a finding that drug use contributed to Oberg's crimes "was implicit in the court's statements to defendant"[13]; (2) the plain language of RCW 9.94A.607(1) does not require the court to use any specific language; thus (3) the court's

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[11] The superior court's total sentence of 63 months for Oberg's third degree assault conviction exceeded the 60-month statutory maximum by 3 months. RCW 9A.20.021; RCW 9A.36.031(2). Applying *Boyd* here, the sentencing court must reduce the term of community custody so that the confinement combined with the community custody term does not exceed the statutory maximum. *Boyd*, 174 Wn.2d at 472.

[12] The superior court did not impose community custody under the remaining cause number.

[13] Br. of Resp't at 5. We agree with the State that Oberg misinterprets our decision in *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003), as requiring the superior court to make an explicit finding. In *Jones*, we addressed only whether the trial court had authority to order the defendant to participate in mental health treatment and counseling, which involved statutory procedures specific to mental health evaluation and treatment that do not apply here. *Jones*, 118 Wn. App. at 208, 209 (citing former RCW 9.94A.505(9) (2001)). Contrary to Oberg's argument, *Jones* does not require that the superior court's findings be "express"; nor does it discredit the factors on which we rely above to satisfy RCW 9.94A.607(1).

implicit finding is sufficient to support the community custody condition.[14] We agree with the State that the superior court's findings were sufficient to support the drug evaluation and treatment community custody condition imposed under RCW 9.94A.607(1). But we agree with Oberg that the superior court did not make findings sufficient to support the alcohol-related condition.

A. Standard of Review

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *Jones*, 118 Wn. App. at 204. We review de novo whether the trial court had statutory authority to impose community custody conditions. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily authorized, we review the imposition of crime-related prohibitions for abuse of discretion. *Armendariz*, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). We apply these standards separately to the drug and alcohol related conditions imposed here.

B. Drug Evaluation and/or Treatment

RCW 9.94A.607(1) provides:

> Where the court *finds that the offender has a chemical dependency that has contributed to his or her offense*, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been

[14] The State does not discuss the drug and alcohol related conditions separately. Nor does it acknowledge that the superior court made an express written finding supporting drug evaluation and treatment in cause number 11-1-02533-2's judgment and sentence (obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation and third degree assault).

> convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

(Emphasis added.)

Cause number 11-1-02533-2's judgment and sentence for Oberg's obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation and third degree assault convictions includes an express written finding supporting the drug evaluation and treatment condition: "The court finds that the offender has a chemical dependency that has contributed to the offense(s)." CP at 51. Thus, the court clearly complied with RCW 9.94A.607(1) as to this cause number.

In contrast, the judgment and sentence for cause number 10-1-03778-2 (second degree identity theft and unlawful possession of oxycodone) contains no finding about whether Oberg has a chemical dependency that contributed to these offenses. Accordingly, we must determine whether the superior court satisfied this finding requirement some other way. Although RCW 9.94A.607(1) requires the superior court to "find" that Oberg had a chemical dependency that contributed to his offenses, the State is correct that the statute does not specify what type of finding the court must make. Here, (1) Oberg admitted to having a substance abuse problem; (2) the parties and the court discussed at length how Oberg's drug use contributed to his offenses; (3) the record clearly establishes that the court found that Oberg had a chemical dependency and that this chemical dependency was a, if not *the*, driving force behind his offenses; and (4) the nature of the charges clearly reflect that drug use contributed to Oberg's offenses because the charges were all related to drug offenses. We hold that in this context it is clear that the superior court made the required finding.

Accordingly, we affirm the community custody condition requiring Oberg to undergo drug evaluations and treatment under cause numbers 11-1-02533-2 and 10-1-03778-2.

C. Alcohol Evaluation and/or Treatment

Unlike the drug-related condition, nothing in the record suggests that the superior court made any findings about whether Oberg's alcohol use contributed to his offenses. Nor is there any independent evidence of such a relationship. Because the record does not support the alcohol evaluation and treatment condition, we remand to the superior court to strike this alcohol-related portion of Oberg's community custody conditions in cause numbers 10-1-03778-2 and 11-1-02533-2.[15] *See Jones*, 118 Wn. App. at 207-08.

III. SAG AND PRP ISSUES

Most of Oberg's PRP repeats the issues he raises in his SAG. Therefore, unless otherwise noted, we address these issues together.

A. Consecutive Sentence

Oberg challenges his consecutive sentence under cause number 10-1-03778-2. He asserts that (1) the superior court violated the global plea agreement by imposing the consecutive sentence; (2) the State breached the plea agreement by not reminding the court that it was bound by the plea agreement and failing to state in his (Oberg's) criminal history that the King County

[15] The State requests that we strike the superior court's notation "Drug/Alcohol eval. and follow up treatment recommended" under section 4.4 "**OTHER**" of the judgment and sentence in cause number 11-1-02533-2, because the treatment recommendation does not relate to property held in evidence. Br. of Resp't at 7 (note 3) (quoting CP at 54). Instead, as we discuss above, the superior court need strike only the reference to alcohol in section 4.4, leaving the drug evaluation and treatment recommendation intact.

convictions were other current offenses; and (3) if the superior court did not err, his guilty pleas were not knowing, intelligent, and voluntary because he was advised that the superior court was required to impose consecutive sentences under the global plea agreement. These assertions lack merit.[16]

Every document related to Oberg's pleas clearly states that the State would *recommend* concurrent sentences. Nothing in the record shows otherwise.[17] Almost every plea document states that the superior court was not bound by this agreed sentencing recommendation. And the Superior Court's plea colloquy with Oberg shows that concurrent sentencing was a mere recommendation, which that the court was not required to follow.

Similarly, the record does not support Oberg's contention that the State breached the plea agreement. On the contrary, as agreed, the State clearly recommended that the superior court impose concurrent sentences, and the superior court understood that this was the State's recommendation. Nor does the record supports Oberg's assertion that he was not advised that the superior court could ignore the State's recommendation. Again, (1) all the relevant documents that Oberg signed warned him that the sentencing court was not bound by the State's sentencing recommendation; (2) the Pierce County Superior Court specifically advised him during the plea colloquy that it was not bound by any part of the agreed recommendation,

[16] Because we consider the documents Oberg attached to his PRP, we need not address his PRP reply request for an order to produce certified records.

[17] In his PRP, Oberg specifically asserts that a September 2, 2011 King County memorandum stated that the concurrent sentencing aspect of his plea agreement was not merely a sentencing recommendation. Oberg is incorrect: This memorandum expressly stated that the concurrent sentencing aspect of the plea was part of the "[a]greed sentencing *recommendation.*" PRP Attach. 1, Ex. A at 2.

including the concurrent sentence recommendation; and (3) Oberg assured the superior court that he understood this.

B. No Exceptional Sentence

Oberg also argues that the superior court erred by imposing the consecutive sentence without finding any aggravating factors to support an exceptional sentence. We disagree. The Pierce County Superior Court ran the sentences for all of the Pierce County convictions (entered on the same day) concurrently, in compliance with RCW 9.94A.589(1)(a). Because the consecutive sentence was solely in relation to the King County convictions, which the King County Superior Court had previously entered on a different day, the consecutive sentence was not an exceptional one that required aggravating factors for support.[18] Accordingly, the Pierce County Superior Court did not violate RCW 9.94A.589(1)(a).

C. Credit for Time Served

Oberg next challenges the superior court's award of only eight days of jail time credit, claiming that the plea agreement *required* the superior court to give him credit for all time served

[18] *See, in contrast, In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 507-08, 301 P.3d 450 (2013) (RCW 9.94A.589(1)(a) requires sentencing court to impose concurrent sentences for convictions entered or sentenced *on the same day* unless imposing exceptional sentence under RCW 9.94A.535).

since his arrest on July 13, 2011.[19] This challenge also fails. As we have already explained, the superior court was not bound by the plea agreement's sentencing recommendation, and the record shows that Oberg was aware of that fact.

Nor does Oberg show that the superior court failed to comply with RCW 9.94A.505(6), which provides: "The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was *solely in regard to the offense for which the offender is being sentenced.*" Under this statute, the Pierce County Superior Court had authority to give Oberg credit for time he had served on only the Pierce County charges for which it was sentencing him, not for time served in connection with other charges, including those in King County.

D. DOSA ELIGIBILITY

Finally, Oberg argues that his "eligibility for DOSA is improperly stricken from the Pierce County plea statements as he is eligible for a DOSA sentencing alternative." SAG at 3.

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[19] Oberg also asserts that the State breached the plea agreement by writing on the judgment and sentence that he was to receive eight-days credit for time served. But whether the State entered this notation on the judgment and sentence is outside the record before us. Accordingly, we do not address this assertion. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In its response to Oberg's PRP, the State argues that the court erred in awarding Oberg credit for eight days of time served when he received credit for the King County convictions and was serving those sentences in the Pierce County jail pending the November 15 hearing. Because a personal restraint petition is intended to allow a *petitioner*, and not the State, to seek relief from improper restraint, *see* RAP 16.6(a), and the State does not raise this issue in a cross appeal, we decline to address it.

Whether Oberg could qualify for a DOSA sentence is outside the record before us.[20] Accordingly, we need not address this assertion. *McFarland*, 127 Wn.2d at 335.

We remand for resentencing on the third degree assault conviction (cause number 11-1-02533-2) and to strike the alcohol related community custody conditions related to the second degree identity theft and unlawful possession of oxycodone convictions (cause number 10-1-03778-2) and to the obtaining or attempting to obtain a controlled substance by fraud, deceit, or misrepresentation and third degree assault convictions (cause number 11-1-02533-2). We otherwise affirm Oberg's sentences, including his drug-related community custody condition; and we deny his personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, P.J.

We concur:

Bjorgen, J.

Maxa, J.

[20] Moreover, because the State did not recommend and Oberg did not request a DOSA, his DOSA eligibility is irrelevant.

Appendix B.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SPENCER LAWRENCE OBERG,

Appellant.

No. 43472-5-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **May 6, 2014** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Hunt, Bjorgen, Maxa

DATED this 12th day of June, 2014.

FOR THE COURT:

Hunt, J.

PRESIDING JUDGE

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CERTIFICATION OF MAILING

I, SPENCER OBERG, declare that, on the date below, I deposited the foregoing PETITION FOR DISCRETIONARY REVIEW and LETTER TO CLERK, or copies thereof, in the internal mail system of Monroe Correctional Complex-WSR and made arrangements for postage, addressed to:

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I hereby invoke the "Mail Box Rule" set forth in GR-3.1 -- the above listed documents are considered filed on the date that I deposited them into DOC's legal mail system.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of July, 2014.

SIGNED: _____

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