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Supreme Court No. 97396-2
Court of Appeals No. 35575-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CASTRO,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

John Castro, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review.[1]

B. ISSUES PRESENTED FOR REVIEW

1. The jury must find every fact that increases the punishment for a crime. A narrow exception exists for the simple fact of a prior conviction. Contrary to subsequent United States Supreme Court precedent, this Court in 2006 read its exception broadly to permit judicial fact finding for facts "intimately related" to a prior conviction. Mr. Castro's sentence was increased by five years when a court, rather than a jury, found he had been armed with a firearm when he committed a prior offense. Should this Court overrule its incorrect decision permitting judicial fact-finding and hold the enhanced sentence unlawful?

2. In the first appeal, the Court of Appeals held one of Mr. Castro's a prior conviction was "a nonexistent crime" and could not be used in sentencing Mr. Castro to a life sentence as a "persistent offender." Still, the trial court considering this invalid conviction as part of Mr. Castro's criminal history in calculating his offender score. Rewriting its decision,

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[1] A copy of the unpublished opinion, dated June 6, 2019 is attached in Appendix A. A copy of the Court of Appeals' previous unpublished decision and order amending that opinion is attached in Appendix B. A copy of the judgment and sentence, relevant to the primary issue, is attached in Appendix C.

the Court of Appeals held the prior conviction was actually an "existent" crime for purposes of calculating an offender score. Did the Court of Appeals violate the law of the case doctrine, under which its prior decision was binding on the Court of Appeals?

C. STATEMENT OF THE CASE

On November 27, 2011, a fight broke out between a large group of men at a hotel. No. 31701-3-III, Slip op. at 2; RP 16. John Castro, a musician and a father, was among the men present during the confrontation. RP 16, 20-21. During the confrontation, a man was shot and died as a result. No. 31701-3-III, Slip op. at 2. Believing Mr. Castro to be the shooter, the prosecution charged Mr. Castro with second degree murder, riot, and unlawful possession of a firearm. CP 1-11. The prosecution alleged a firearm enhancement on the murder charge. CP 10. Mr. Castro contested the charges, but was convicted of these offenses and was found to have been armed with a firearm. CP 12-13. Based on a prior conviction for conspiracy to deliver a controlled substance, which purported to have a deadly weapon enhancement, the trial court sentenced Mr. Castro to life in prison. No. 31701-3-III, Slip op. at 1-2, 5; CP 16.

In the first appeal, The Court of Appeals rejected Mr. Castro's challenges to the convictions, but agreed with him that he should not have been sentenced to life in prison. No. 31701-3-III, Slip op. at 5-15. The

Court held that the conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement was an invalid conviction. No. 31701-3-III, Slip op. at 11-12; Order amending opinion at 2 ("Order"). Therefore, it could not serve as a predicate to justify the life sentence. No. 31701-3-III Slip op. at 11-12; Order at 2.

The Court of Appeals denied the State's motion to reconsider. Order at 1. The Court amended the opinion, replacing language in the opinion with language further supporting the court's holding that the conspiracy to deliver a controlled substance conviction was invalid. Order at 2. The opinion was also amended to indicate that Judge Korsmo dissented in part. Order at 2.

The mandate issued on February 28, 2017. The Court of Appeals mistakenly attached a copy of the opinion without the order amending the opinion. CP 23-38.

The parties appeared for resentencing on August 18, 2017. RP 2. The State provided a summary purporting to represent Mr. Castro's criminal history and estimated his offender score "in excess of 9 for each offense." CP 40-41. This summary included the conviction for conspiracy to deliver a controlled substance, which the Court of Appeals had held invalid. CP 40. The State represented that the mandatory sentence of five additional years for the firearm enhancement must be doubled to 10 years

because Mr. Castro had previously been found to have a "prior deadly weapon finding." CP 41. Based on the foregoing, the State asked the court to impose a high end standard range sentence of 397 months with 120 additional months for the firearm enhancement on the murder conviction. CP 42; RP 9. The State asked that the two other convictions run concurrently. RP 9.

Mr. Castro asked for an exceptional sentence downward, or in the alternative, a sentence at the low end of the standard range. RP 18; CP 45. The request for an exceptional sentence downward was based on recently discovered exculpatory evidence that supported Mr. Castro's claim of innocence. RP 18; CP 46.

The Court accepted the State's representations and recommendations, sentencing Mr. Castro to 517 months of confinement. RP 27; CP 94.

Mr. Castro again appealed. In the second appeal, Mr. Castro argued the trial court committed numerous sentencing errors and that he should receive a new sentencing hearing. Among these arguments was that the (1) the trial court had unlawfully increased Mr. Castro's sentence by five years by finding that a prior conviction had been committed with a firearm; and (2) the trial court had improperly used the conviction held by the Court of Appeals to be a "nonexistent crime" in calculating Mr.

Castro's offender score. The Court of Appeals rejected these and other related arguments, and remanded to correct two ministerial errors.

D. ARGUMENT

1. This Court should grant review to reconsider its holding from 2006 that sentencing courts may find facts "intimately related" to a prior conviction and impose punishment based on these facts. Recent precedent from the United States Supreme Court undermines this holding.

The state and federal constitutions guarantee the right to trial by jury. U.S. Const. amends. VI, XIV; Const. art. I, § 22. "The constitutional right to jury trial requires that a sentence must be authorized by a jury's verdict." State v. Clark-El, 196 Wn. App. 614, 624, 384 P.3d 627 (2016) (quoting State v. Morales, 196 Wn. App. 106, 109, 383 P.3d 539 (2016)). See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Under the jury trial right, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); accord Hurst v. Florida, __ U.S. __, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016). For example, a

fact that requires a judge to impose a mandatory minimum sentence must be found by the jury. Alleyne, 570 U.S. at 108.

The jury found that Mr. Castro was armed with a firearm at the time of the commission of the homicide. CP 91; Supp. CP _ (sub. 173). Based on this finding, the sentencing court was required to impose a firearm enhancement, increasing Mr. Castro's sentence. RCW 9.94A.533(3). For class A felonies, which includes second degree murder, the increased sentence for a firearm enhancement is five years. RCW 9.94A.533(3)(a); 9A.32.050(2). However, if "the offender has previously been sentenced for any deadly weapon enhancements," the length is doubled. RCW 9.94A.533(3)(d). In other words, the punishment is increased from five years to 10 years.

The State represented that Mr. Castro had previously been sentenced for a deadly weapon enhancement. CP 41. And therefore the firearm enhancement term had to be doubled from five years to 10 years. CP 41. The court accepted the State's representation and 10 years was added to Mr. Castro's sentence.[2] CP 94.

Increasing the punishment by five years based on facts not found by the jury violated Mr. Castro's jury trial rights. Although the jury in this

[2] A copy of the judgment and sentence that this determination appears to be based on is attached in Appendix C.

case found that Mr. Castro was armed with a firearm, the jury did not find that Mr. Castro had been previously sentenced for a deadly weapon enhancement. Supp. CP __ (sub. nos. 168-175). Therefore, the sentencing court unlawfully doubled the punishment on the firearm enhancement in violation of Mr. Castro's jury trial rights. Alleyne, 570 U.S. at 103, 108.

The fact that a defendant has been previously sentenced for a deadly weapon enhancement is a fact that increases the punishment for the crime. It doubles the mandatory enhanced sentence. RCW 9.94A.533(3)(d). That a jury finds a defendant is armed with a firearm is not the same as finding a defendant has been previously sentenced for a deadly weapon enhancement. These are two different facts. The maximum Mr. Castro faced for the firearm enhancement without the judge's finding was five years. This judicial fact-finding violated Mr. Castro's right to have the jury find every fact necessary to justify the punishment imposed by the court.

In reaching the contrary result, the Court of Appeals cited this Court's opinion in State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006). Slip op. at 4-5. There, this Court broadly interpreted the "prior conviction exception" set out in Apprendi and held trial courts may find facts if these facts are "intimately related" to the prior conviction. Jones, 159 Wn.2d at 241.

The "prior conviction" exception is traced to Almendarez–Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). It is a "narrow exception."[3] Alleyne, 570 U.S. at 112 n.1.

This Court's broad reading of the narrow exception for prior convictions should be reexamined and overruled. Since this Court's decision, the United States Supreme Court has read statutes narrowly to avoid serious Sixth Amendment issues about the scope of the "prior conviction" exception. For example, in a 2013 case, the Supreme Court reasoned that a "finding [by the trial court] would (at the least) raise serious Sixth Amendment concerns *if it went beyond merely identifying a prior conviction*." Descamps v. United States, 570 U.S. 254, 269, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) (emphasis added). And in a 2016 case, the Supreme Court commented that "except for *the simple fact* of a prior conviction," "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." Mathis v. United States, __ U.S. __, 136 S. Ct. 2243, 2252, 195 L. Ed. 2d 604 (2016). The judge "can do no more, consistent with the

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[3] Ultimately, the United States Supreme Court will likely reconsider and overrule this exception. See Sessions v. Dimaya, __ U.S. __, 138 S. Ct. 1204, 1253, 200 L. Ed. 2d. 549 (2018) (Thomas, J., dissenting). ("The exception recognized in *Almendarez–Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered.").

Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." Id.

Moreover, in Alleyne, the Supreme Court clarified that any fact which "by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne, 570 U.S. at 103. The Court held this meant any fact that increased a mandatory minimum sentence for a crime was an "element" and overruled a previous case holding otherwise. Id. This Court recently recognized that Alleyne undermined its caselaw interpreting Apprendi. State v. Allen, 192 Wn.2d 526, 534, 431 P.3d 117 (2018) ("because the legal underpinnings of our precedent have changed so significantly, we are compelled to revisit the issue in light of subsequent decisions of the United States Supreme Court") (internal quotation omitted).

In light recent precedent from the United States Supreme Court clarifying the scope of the narrow "prior conviction" exception, this Court should grant review and reexamine its 2006 decision in Jones. The issue presented is a significant constitutional question meriting review. RAP 13.4(b)(3). It is also an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

2. **Under the law of the case, the conviction for conspiracy to deliver a controlled substance is "a nonexistent crime." Disregarding the law of the case, the Court of Appeals held the previous conviction was an "existent" crime that was properly counted in calculating Mr. Castro's offender score.**

In the first appeal, Mr. Castro successfully challenged the trial court's determination that he was a "persistent offender" and the life sentence. No. 31701-3-III, Slip op. at 11-12. A persistent offender is a person who is currently being sentenced for a "most serious offense" and has two prior convictions most serious offenses. RCW 9.94A.030(37). The trial court had concluded that Mr. Castro's 2008 conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement was a most serious offense. No. 31701-3-III, Slip op. at 11. The Court of Appeals reasoned this was improper because a deadly weapon enhancement cannot apply to an unranked offense and conspiracy to deliver a controlled substance is an unranked offense. No. 31701-3-III, Slip op. at 12-13.

But the Court of Appeals did more than simply hold that the previous conviction was not a "most serious offense." The Court of Appeals went on to hold the conviction for conspiracy to deliver a controlled substance was "facially invalid." No. 31701-3-III, Slip op. at 13. And, as stated in the order amending the opinion, "A sentencing court may not base its sentence on a prior conviction that is facially invalid."

No. 31701-3-III, Order at 2. The Court reasoned that a "conviction for a nonexistent crime is facially invalid" and that conspiracy to deliver a controlled substance with a deadly weapon enhancement is "*a nonexistent crime*." No. 31701-3-III, Order at 2 (emphasis added).

All the foregoing is the "law of the case." Bank of Am., N.A. v. Owens, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). Under the law of the case doctrine, "once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation." Id. at 189-90. It "binds the parties, the trial court, *and subsequent appellate courts* to the holdings of an appellate court in a prior appeal until such holdings are authoritatively overruled." Id. at 190 (emphasis added).

Under the Court of Appeals' decision, the conviction for conspiracy to deliver a controlled substance is a nonexistent crime. In the decision, the Court of Appeals reasoned a prior conviction that is invalid on its face cannot be used at sentencing. Order at 2; accord State v. Webb, 183 Wn. App. 242, 250, 333 P.3d 470 (2014). Thus, it was error for the trial court to use that offense as part of Mr. Castro's criminal history at resentencing.

Still, the Court of Appeals held the conviction could count in Mr. Castro's criminal history. No. 35575-6-III, Slip op. at 8-9. The Court of

Appeals reasoned that its previous decision "held that the *enhanced* conspiracy to deliver a controlled substance was facially invalid." No. 35575-6-III, Slip op. at 9. Although its previous decision could have so reasoned, it did not. Instead, the Court of Appeals broadly held the previous conviction was a nonexistent crime. The Court of Appeals was not permitted to rewrite its decision. See State v. Jones, 148 Wn.2d 719, 722, 62 P.3d 887 (2003) (law of the case required a new trial; Court of Appeals' erred in reading its previous decision reversing to not require a new trial).

The Court of Appeals decision to rewrite its previous decision and disregard the law of the case doctrine is in conflict with precedent. RAP 13.4(b)(1), (2). And proper interpretation of the law of case doctrine is an issue of substantial public interest. RAP 13.4(b)(4). This Court should grant review, reverse, and remand for a new sentencing hearing.[4]

E. CONCLUSION

For the foregoing reasons, Mr. Castro respectfully requests that this Court grant his petition for review.

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[4] This would not be a meaningless exercise because if this prior conviction is not counted, many of Mr. Castro's prior convictions may "wash" and not count in calculating his offender score. Br. of App. at 20-21. Following a correct calculation, the sentencing court could decide a lower sentence is appropriate. Br. of App. at 20-23.

DATED this 8th day of July, 2019.

Respectfully submitted,

/s Richard W. Lechich

Richard W. Lechich – WSBA #43296
Washington Appellate Project (#91052)
Attorney for Petitioner

Appendix A

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

June 6, 2019

E-mail
Richard Wayne Lechich
Gregory Charles Link
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-1683

E-mail
Larry D. Steinmetz
Brian Clayton O'Brien
Spokane County Pros Atty
1100 W Mallon Ave
Spokane, WA 99260-2043

CASE # 355756
State of Washington v. John Anthony Castro
SPOKANE COUNTY SUPERIOR COURT No. 111036988

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enclosure

c: **E-mail**—Hon. Julie M. McKay

c: **E-mail** — John Anthony Castro, #849936
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

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

STATE OF WASHINGTON,	)	
	)	No. 35575-6-III
Respondent,	)	
	)	
v.	)	
	)	
JOHN ANTHONY CASTRO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — In 2016, this court affirmed John Anthony Castro's several convictions for crimes committed in 2011 but reversed his sentence to life in prison as a persistent offender. The court held that a prior "most serious offense" relied on for the sentence was facially invalid for that purpose. When resentenced as directed by this court, Mr. Castro was sentenced to 517 months' incarceration. He appeals, making eight assignments of error.

He identifies two scrivener's errors in his judgment and sentence but raises no issue that requires a second resentencing. We remand with directions to make ministerial corrections to the judgment and sentence.

ISSUES ON APPEAL

Mr. Castro makes the following assignments of error to his resentencing: (1) before the trial court could use a prior deadly weapon enhancement to double the length of his current firearm enhancement, the existence of the prior enhancement had to be found by a jury, not the court; (2) the State failed to prove Mr. Castro's criminal history at resentencing; (3) the trial court erred when it estimated, rather than calculated, his offender score; (4) the trial court included Mr. Castro's 2008 conviction for conspiracy to deliver a controlled substance in his offender score despite "law of the case" that the conviction was invalid; (5) the trial court failed to determine if any of Mr. Castro's prior convictions were the same criminal conduct; (6) the trial court mistakenly increased Mr. Castro's monthly legal financial obligation (LFO) payments despite its avowed intention to leave them unchanged; (7) the trial court failed to consider whether Mr. Castro had the ability to make monthly payments of $10 while imprisoned; and (8) Mr. Castro's 2017 judgment and sentence erroneously identifies him as a persistent offender.

We address the assignments of error in that order. We include factual background as relevant.

I. MR. CASTRO'S PRIOR DEADLY WEAPON ENHANCEMENT WAS PROPERLY FOUND BY THE TRIAL COURT

Mr. Castro was convicted in his 2013 trial for second degree murder with a firearm enhancement, felony riot (now criminal mischief), and first degree unlawful

possession of a firearm. The firearm enhancement was based on the jury's verdict that he was armed with a firearm during the commission of the second degree murder. Mr. Castro concedes that when the jury returns such a verdict, the court must impose a consecutive term for the firearm enhancement. RCW 9.94A.533. If there has been a previous finding that the defendant was armed with a deadly weapon or firearm during the commission of a qualifying felony, the term of the mandatory sentence is doubled. RCW 9.94A.533(3)(d).

Having determined that Mr. Castro was previously convicted with a firearm enhancement, the trial court doubled the firearm enhancement to his second degree murder conviction from 60 months to 120 months. Mr. Castro contends that it was error for the court, rather than a jury, to decide whether such a finding had previously been made.

"Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); *see also State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). Prior convictions are not "elements," however, and do not require a jury determination beyond a reasonable

doubt. *Apprendi*, 530 U.S. at 490; *State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014). The existence of a prior conviction may be determined by a judge after the jury's verdict. *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Mr. Castro concedes that *prior convictions* do not have to be determined by a jury, but argues that a prior finding supporting a firearm enhancement is not a prior conviction.

In *Almendarez-Torres*, the United States Supreme Court held that the reason the existence of a prior conviction does not have to be determined by a jury is because such a conviction "'does not relate to the commission of the offense, *but goes to the punishment only*, and therefore . . . may be subsequently decided.'" *Id.* (alteration in original) (quoting *Graham v. West Virginia*, 224 U.S. 616, 629, 32 S. Ct. 583, 56 L. Ed. 917 (1912)). The Washington Supreme Court has interpreted the prior conviction exception as a "determination [that] involves nothing more than a review of the defendant's status as a repeat offender." *State v. Jones*, 159 Wn.2d 231, 241, 149 P.3d 636 (2006). It has characterized the "core concern" of *Apprendi*, by contrast, as being the offense conduct and the elements of the charged crime. *Id.* "To give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts 'intimately related to

[the] prior conviction.'" *Id.* (alteration in original) (quoting *United States v. Moore*, 401 F.3d 1220, 1225 (10th Cir. 2005)).

The fact that a jury previously found Mr. Castro to be armed with a firearm in committing a qualifying felony is a fact intimately related to his prior conviction and one determinable from reviewing the record of his prior offenses. The trial court was permitted to make the finding. His right to a jury trial was not violated.

II. MR. CASTRO'S AFFIRMATIVE ACKNOWLEDGMENT OF HIS CRIMINAL HISTORY AND ITS MATERIAL CONSEQUENCES EXCUSED THE STATE FROM ITS BURDEN OF PROOF

Mr. Castro complains that the State did not submit evidence at the resentencing hearing to substantiate his criminal history.

The State bears the burden of proving a defendant's prior convictions at sentencing by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The best evidence of a prior conviction is a certified copy of the defendant's prior judgment and sentence. *Id.* at 910. If there is "an affirmative acknowledgment by the defendant of facts and information introduced for the purposes of sentencing," the State is relieved of its burden. *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009) (emphasis omitted).

By the time Mr. Castro was resentenced, the original sentencing judge had retired. The prosecutor explained to the trial court conducting the resentencing that when Mr.

Castro was originally sentenced in 2013, instead of filing the certified copies of Mr. Castro's prior judgment and sentences, they were offered and admitted as exhibits, which "maybe . . . was a mistake." Report of Proceedings (RP) at 10. Both the prosecutor and the lawyer who represented Mr. Castro on his direct appeal, Kenneth Kato,[1] who was present at resentencing, explained that the absence of the certified copies from the clerk's papers had created problems on appeal initially. The prosecutor represented, "I think they eventually got it straightened out." *Id.* at 11. Mr. Kato added:

> MR. KATO: Judge O'Connor did have those certified copies of the judgments and sentences in front of her. Usually they're filed in the court file. They weren't. But they were put away as exhibits. . . . And I knew what was before the court, I have copies of them, so I had no objection to having those certified copies of the judgments and sentences that weren't filed, be filed, because they were supposed to be before the court.

Id.

When the trial court asked if anything more needed to be done to fix the issue, Mr. Kato responded "[m]ost likely to be safe," and the prosecutor represented that he would file the certified copies after giving Mr. Kato a chance to review them again. *Id.* at 12. Evidently, he neglected to take that action.

The oversight does not change the fact that Mr. Castro's trial lawyer, Anna Nordtvedt, submitted a resentencing brief after the mandate issued in the prior appeal in

[1] We identify Mr. Castro's trial lawyer and his different appellate lawyer by name, to avoid confusion.

which she acknowledged the following:

> Mr. Castro's offender score is a 9+, so the standard range for this conviction is 298 - 397 months. A firearm enhancement on a Class A felony typically carries an additional 60 month[s], but since Mr. Castro has a prior conviction with a firearm enhancement under cause number 2003-1-02440-7, the enhancement in this case would be an additional 120 months. A standard range sentence for Mr. Castro on Count I would be 418 - 517 months, or approximately 34.8 to 43 years.

Clerk's Papers (CP) at 45. Ms. Nordtvedt's acknowledgment was sufficient to relieve the State of its burden of proving Mr. Castro's criminal history.

III. THE CLAIMED ERROR IN THE TRIAL COURT'S FAILURE TO DETERMINE BY HOW MANY POINTS MR. CASTRO'S OFFENDER SCORE EXCEEDED 9 DOES NOT WARRANT APPELLATE REVIEW

Mr. Castro argues that the trial court erred when it estimated, rather than calculated, that his offender score was a 9 plus.

A defendant's offender score, together with the seriousness level of his current offense, dictates the standard sentence range used in determining his sentence. RCW 9.94A.530(1); *see also State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010) (stating "the offender score statute has three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) 'count' the prior convictions that remain in order to arrive at an offender score."). "A defendant's standard range sentence reaches its maximum limit at an offender score of '9 or more.'" *State v. France*, 176 Wn. App. 463, 468, 308 P.3d 812 (2013) (citing RCW 9.94A.510).

At Mr. Castro's 2017 resentencing hearing, the trial court stated:

> Obviously the offender score for all of [Mr. Castro's current convictions] is a 9 plus. I don't believe that is disputed by either [Mr. Castro's] attorneys [ ]or the State under these circumstances, with the seriousness levels and . . . the class of these felonies that the court is dealing with here.

RP at 23-24. Mr. Castro argues that the trial court should have counted all his points and arrived at a sum rather than rely on an understanding, agreed by the parties, that any calculation would result in a score greater than 9.

Mr. Castro cites no authority in support of this argument, which was never raised in the trial court. It does not merit review. RAP 10.3(a)(6), 2.5(a).

IV. MR. CASTRO'S 2008 CONVICTION FOR CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE WAS NOT VACATED AND WAS PROPERLY INCLUDED IN CALCULATING HIS OFFENDER SCORE

Mr. Castro argues that because this court held in his prior appeal that his conviction for conspiracy to deliver a controlled substance was facially invalid, law of the case barred the trial court from including it in counting prior convictions.

In Mr. Castro's first appeal, he argued "that the trial court mistakenly classified one of his prior offenses, conspiracy to deliver a controlled substance with a deadly weapon enhancement, as a most serious offense." *State v. Castro*, No. 31701-3-III, slip op. at 11 (Wash. Ct. App. Aug. 30, 2016) (unpublished), http://www.courts.wa.gov /opinions/pdf/317013_ord.pdf. Under former RCW 9.94A.030(32)(t) (2012) (now

RCW 9.94A.030(33)(t)), a "most serious offense" includes a felony with a deadly weapon verdict under RCW 9.94A.825.

This court agreed with Mr. Castro that because his 2008 conviction for conspiracy to deliver a controlled substance was an unranked felony, a deadly weapon enhancement could not apply. *Castro*, No. 31701-3-III, slip op. at 12. Citing *State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), this court observed that an unranked felony with a firearm enhancement was "a nonexistent crime, rendering the judgment and sentence facially invalid." Ord. Den. Mot. for Recons., Granting Mot. to Suppl. Rec. & Amending Op., *State v. Castro*, No. 31701-3-III, at 2 (Wash. Ct. App. Aug. 30, 2016), http://www.courts.wa.gov/opinions/pdf/317013_ord.pdf.

The opinion thus held that the *enhanced* conspiracy to deliver a controlled substance was facially invalid. But Mr. Castro did not challenge, and this court did not vacate, the unenhanced conviction. The trial court properly included the conviction in arriving at Mr. Castro's offender score.

V. ANY ISSUE THAT SOME OF MR. CASTRO'S PRIOR CONVICTIONS WERE THE SAME CRIMINAL CONDUCT WAS NOT PRESERVED

Because some of the prior convictions included in arriving at his offender score involved offenses occurring on the same date and were sentenced on the same date, Mr. Castro asks us to instruct the trial court to determine, at a resentencing, if any of his prior convictions can be scored as the same criminal conduct.

A defendant has the burden to "establish [what] crimes constitute the same criminal conduct." *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). Whether a defendant's convictions were based on the same criminal conduct presents a factual determination and involves the exercise of discretion, and may not be raised for the first time on appeal. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000); RAP 2.5(a). The request that we remand for this purpose is denied.

VI. GIVEN THE TRIAL COURT'S APPARENT INTENT TO CARRY FORWARD THE LFO TERMS OF MR. CASTRO'S PRIOR JUDGMENT AND SENTENCE, WE REMAND FOR THE MINISTERIAL CORRECTION OF A SCRIVENER'S ERROR

If LFOs are ordered at sentencing, the trial court must "set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation[s]." RCW 9.94A.760(1). When originally sentenced, Mr. Castro was ordered to make payments of $5 per month toward his LFOs.

At resentencing, the trial court imposed only the single LFO imposed at the original 2013 sentencing hearing—a $500 victim assessment fee—stating that its intent was "to impose [what] Judge O'Connor did." RP at 30. Elsewhere, the court stated,

> The previous financial obligations that you were ordered to pay . . . will remain the same. I'm not changing those. I don't believe the Court of Appeals had any issues with regards to that portion of it, *and the payments on that as well*.

RP at 27 (emphasis added). Yet the judgment and sentence requires Mr. Castro to make payments at $10 per month.

A scrivener's error "is one that, when amended, would correctly convey the intention of the court." *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). The proper remedy for a scrivener's error is to remand to correct the error in the judgment and sentence. *E.g.*, *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). The record shows the trial court's intention to impose the same repayment plan imposed at Mr. Castro's original 2013 sentencing. We remand to the trial court to correct the repayment obligation to $5 a month. We need not, and would not, entertain Mr. Castro's alternative seventh assignment of error asking us to remand for a determination of his ability to pay $10 a month. RAP 2.5(a).

VII. TO AVOID FUTURE CONFUSION, WE REMAND WITH DIRECTIONS TO REPRODUCE THE TERMS OF MR. CASTRO'S JUDGMENT AND SENTENCE ON THE CORRECT JUDGMENT AND SENTENCE FORM

Mr. Castro's judgment and sentence entered following the resentencing was prepared using the felony judgment and sentence form for a persistent offender. To avoid future confusion, we remand to the trial court to enter Mr. Castro's judgment and sentence on the judgment and sentence form used for nonpersistent felony offenders.

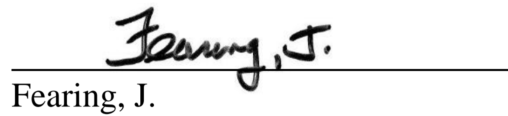
We remand with directions to make two ministerial corrections consistent with

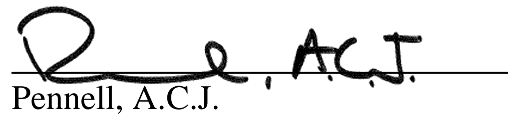
this opinion. No resentencing is required.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:


Fearing, J.


Pennell, A.C.J.

Appendix B

FILED
JANUARY 24, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 31701-3-III
Respondent,	)	
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION, GRANTING MOTION TO SUPPLEMENT THE RECORD, AND AMENDING OPINION
JOHN ANTHONY CASTRO,	)	
Appellant.	)	

THE COURT has considered respondent's motion for reconsideration and the answer thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of August 30, 2016 is hereby denied.

THE COURT has considered respondent's motion to supplement the record and the answer thereto, and is of the opinion the motion should be granted. Therefore,

IT IS FURTHER ORDERED the motion to supplement the record is granted.

IT IS FURTHER ORDERED the opinion filed August 30, 2016, is amended as follows: In the first full paragraph on page 13, the last sentence:

> This argument fails, however, because neither the judge nor a jury entered a deadly weapon finding in the earlier prosecution. Neither the amended information, nor the statement of the facts by the prosecutor at the plea hearing, mentioned a deadly weapon.

Is replaced with:

> This argument fails. A judgment and sentence is facially invalid if the trial court lacked authority to impose the challenged sentence. *In re Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014). A sentencing court may not base its sentence on a prior conviction that is facially invalid. *State v. Webb*, 183 Wn. App. 242, 250, 333 P.3d 470 (2014). A conviction for a nonexistent crime is facially invalid. *In re Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). An unranked felony with a firearm sentence enhancement is a nonexistent crime, rendering the judgment and sentence facially invalid. *State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), *as amended* (Jan. 14, 2014). The trial court erred in relying on John Castro's 2008 conviction to find him a persistent offender.

On page 15 after Judge Korsmo's signature add "dissents in part".

PANEL: Judges Fearing, Korsmo, Lawrence-Berrey

FOR THE COURT:

GEORGE B. FEARING, Chief Judge

FILED
AUGUST 30, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31701-3-III
Respondent,	)	
	)	
v.	)	
	)	
JOHN ANTHONY CASTRO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, C.J. — The trial court, after a jury trial, convicted John Castro of second degree murder, among other charges. Castro assigns three errors on appeal. First, the trial court erred by denying his motion for a mistrial after Detective Kip Hollenbeck violated the trial court's order to exclude testimony of gangs. Second, the trial court erred by barring his wife from the courtroom during trial when the State never called her to testify. Third, the trial court erred when imposing a life sentence on the assumption that he was a persistent offender. We reject Castro's first two assignments of error, but agree that the evidence did not support a life sentence. We remand for resentencing.

FACTS

Defendant John Castro pled guilty, in 2008, to conspiracy to deliver a controlled

substance with a deadly weapon enhancement. The felony judgment did not classify the crime as a particular class of felony.

Defendant John Castro performs rap music. On the evening of Friday, November 26, 2011, Castro attended a rap concert at the Ichiban restaurant in Spokane. A group from Moses Lake, including members of a rap band intending to perform that evening, also attended the concert. The Moses Lake entourage included the murder victim, Jose Solis.

During the course of the rap music concert, John Castro and Stafone Fuentes fought in the entrance to Ichiban. Restaurant security quickly ended the fisticuffs, and the restaurant terminated the rap concert.

Upon the closing of the rap concert, many concertgoers, including John Castro and Jose Solis, went to the Quality Inn, a nearby hotel. A fight among a dozen men broke out on the fourth floor of the hotel. The men included John Castro and Jose Solis. Tera Quarles observed the fight. A handful of men came downstairs from an upper floor and joined the chaos. Objects flew through the air. Quarles saw Castro with a gun, saw him lift and point the gun, and saw him shoot Solis. Shamela Freeman saw Castro with a gun, although she saw no shot. After the shot, Tera Quarles grabbed Castro and asked him why he shot Solis. Jose Solis died from a gunshot wound.

PROCEDURE

The State of Washington charged John Castro with murder in the second degree, two counts of second degree assault, riot, and first degree unlawful possession of a firearm. The State brought an ER 404(b) motion to submit evidence of Castro's gang affiliation and criminal history to the jury. The State argued Castro's gang association served as his motive to participate in the hotel melee. The trial court rejected the argument and ordered that "all gang evidence is excluded from the trial." Clerk's Papers (CP) at 265. The court also directed the State to "instruct the witnesses not to mention gang membership or evidence." CP at 265.

At the request of the State, the trial court excluded all potential witnesses from inside the courtroom during trial. The ruling barred John Castro's wife, Dyneshia Sleep, from the courtroom during testimony. John Castro complained to the court about the exclusion of his wife. The State responded that it would prefer to avoid calling Sleep as a witness. The State, nonetheless, argued that it subpoenaed Sleep as a witness because she was at the Quality Inn when the shooting occurred and she might testify to facts essential to the State proving its case. The trial court maintained its ruling that prevented Sleep from viewing the trial. Sleep was not called to testify during trial.

During trial, Detective Kip Hollenbeck testified for the State. During cross-examination, Hollenbeck testified, in part:

> Q. No. No. Detective Hollenbeck, you've heard some testimony

> about showing people photo montages. When you showed all these people photo montages, did you ever once say to them that the person may not be in the photograph?
>
> A. Yes. There's a warning at the bottom of the form, and each time I show the lineup I read that warning [to] them. That warning explains that this person may or may not be included in this photo lineup.
>
> Q. Okay. And then you heard Mr. Powell testify, and I asked him some questions about this. Mr. Powell actually identified Jason St. Mark in a photograph.
>
> A. Yes.
>
> Q. You've just shown [ ] us all sorts of video. Where was Mr. St. Mark?
>
> A. The first day, the day of this incident, I was reviewing videos with gang experts.
>
> MS. REARDON: Objection.
>
> THE COURT: Ladies and gentlemen, you will disregard the witness's last answer. If you would answer the question, detective.
>
> THE WITNESS: Yes. We were viewing the video and Anthony Fuentes was seen on the video.

Report of Proceedings (RP) at 1382-83.

Based on Detective Hollenbeck's violation of the pretrial ruling to exclude gang evidence, John Castro made a half-time motion to dismiss. The trial court denied the motion.

The State initially requested a jury instruction for the lesser included offense of manslaughter, but withdrew the request. John Castro, preferring an "'all or nothing' defense," opposed a manslaughter instruction. CP at 397.

At the conclusion of the trial, the trial court dismissed the two assault charges for insufficient evidence. The jury found John Castro guilty of second degree intentional murder, second degree felony murder, felony riot, and first degree unlawful possession of

a firearm.

After the jury verdict, John Castro again sought a new trial because of Detective Kip Hollenbeck's violation of the trial court's order excluding testimonial references to gangs. As part of the motion, defense counsel filed a declaration that repeated a posting on a Spokane news station's website. The post read:

> I was a juror on this trial, and yes, they were all a bunch of gang bangers. I saw it first hand. I was blown away by their cocky attitudes, and pure lack of respect towards the attorneys and the judge. He is exactly where he should be.

CP at 629. The trial court denied the motion for a new trial.

The State of Washington requested the trial court sentence John Castro, as a persistent offender, to a sentence of life without the possibility of parole. The State contended that Castro incurred two previous strikes, one from his 2004 conviction, and the other from a 2008 conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement. The trial court sentenced Castro to life imprisonment as a persistent offender because of his 2004 and 2008 convictions.

LAW AND ANALYSIS

Hollenbeck Testimony

John Castro contends the trial court erred by denying the defense motion for mistrial after Detective Kip Hollenbeck intentionally violated the court's order prohibiting any mention of gangs and so tainted the proceedings that Castro could not get

a fair trial. We do not know if Hollenbeck intentionally violated the order. The State responds that Detective Hollenbeck's reference to gang experts was harmless because it was ambiguous, lacked sufficient detail for the jury to infer Castro had gang affiliations, the court ordered the jury to disregard the comment, and Castro never requested a curative instruction.

We deny the request for a new trial. Detective Hollenbeck should have been instructed to not mention the word "gangs," and he should have obeyed that instruction. Nevertheless, under case law, the trial court did not abuse its discretion in denying the motion for a mistrial.

Denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. *State v. Johnson*, 124 Wn.2d at 75; *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A mistrial is required only when a defendant has been so prejudiced by a trial irregularity that only a new trial can ensure that the defendant will be tried fairly. *Johnson*, 124 Wn.2d at 76.

One former United States Supreme Court Associate Justice observed that all practicing lawyers recognize as unmitigated fiction the naïve assumption that prejudicial effects can be overcome by instructions to the jury. *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Justice Jackson, concurring opinion).

Nevertheless, under Washington law, we presume in all cases that the jury obeyed the instructions of the court, and this presumption must prevail until it is overcome by some showing otherwise. *In re Municipality of Metropolitan Seattle*, 67 Wn.2d 923, 930-31, 410 P.2d 790 (1966).

In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity, (2) whether the statement was cumulative of evidence properly admitted, and (3) whether the irregularity could be cured by an instruction. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. *State v. Post*, 118 Wn.2d at 620.

John Castro's trial court immediately instructed the jury to disregard Detective Kip Hollenbeck's reference to a gang expert. The jury heard no other references to gangs. The trial court gave thorough consideration to the seriousness of Detective Kip Hollenbeck's testimony, but determined it was not prejudicial because it "simply indicated he had used the task force . . . when he was trying to identify individuals." RP at 1425.

John Castro emphasizes a juror's posting of a message on a news station's website. We have no confirmation that a juror wrote the message. Nevertheless, the message does not suggest that the juror concluded that Castro was a gang member

because of Kip Hollenbeck's statement. The juror wrote that he or she concluded Castro and others were gang members because of the cocky attitudes and lack of respect for others.

John Castro claims that gang evidence cannot be cured by instructing the jury to disregard it, but he does not provide any authority for this contention. The two cases Castro cites, *State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999) and *State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004), are inapposite. Neither case involves gang evidence, nor a curative instruction to the jury.

Exclusion of Dyneshia Sleep

John Castro contends that the prosecutor committed misconduct by requesting that the trial court exclude Castro's wife from the courtroom as a potential witness when the State had no intention to call her to testify. Castro also briefly suggests that the exclusion of Sleep violated his public trial right. The State responds that the exclusion of witnesses is a matter within the discretion of the trial court and Castro forwards no evidence that the prosecutor surreptitiously requested Sleep's exclusion or that the State subpoenaed her for a nefarious purpose. Also, the State argues that the trial court did not violate Castro's public trial right because the exclusion of a witness is a matter of courtroom governance within the discretion of the trial court. We agree with the State.

In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record

and the circumstances at trial. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). The burden to establish prejudice requires the defendant to prove a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

John Castro misconstrues the record to raise the specter of malfeasance where none existed. When Castro questioned the State's motivation for excluding Dyneshia Sleep from the proceedings, the State provided a sound explanation. Although the State preferred to avoid calling Sleep as a witness, the State kept her under subpoena because she possessed percipient knowledge of facts the State needed to prove. Castro also fails to show how Sleep's presence in the audience during the trial would have altered the jury's determination of guilt.

John Castro, in a short passage in his brief, claims the exclusion of Dyneshia Sleep violated his public trial right. He cites *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), and *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012). In *Strode*, *Wise*, and *Paumier*, the Supreme Court found a public trial right violation because the trial court performed juror interviews in the judges' chambers. *In re Personal Restraint of Orange* involved a public trial right violation when the trial court excluded the family of the victim and the defendant during voir dire because of limited space in the courtroom with a ninety-eight-person venire. None of the decisions

entail the exclusion of witnesses during an ongoing trial. Castro forwards no decision that holds that exclusion of a witness constitutes a violation of an accused's right to a public trial.

To successfully raise a public trial right violation, the defendant bears the initial burden of showing a closure occurred. *State v. Gomez*, 183 Wn.2d 29, 34, 347 P.3d 876 (2015). The appellant must show that the judge acted to close the courtroom to the public as opposed to acting to manage the in-court proceedings. *State v. Gomez*, 183 Wn.2d at 36. The exclusion of only one or a few individuals is a matter of courtroom operations, in which the trial judge possesses broad discretion to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings. *State v. Lormor*, 172 Wn.2d 85, 93-94, 257 P.3d 624 (2011); *State v. Gomez*, 183 Wn.2d at 36. The Supreme Court declared in *State v. Johnson*, 77 Wn.2d 423, 428, 462 P.2d 933 (1969):

> The power to exclude witnesses from the courtroom, we think, falls within the general discretionary powers of the court to be exercised during trial in aid of eliciting the truth, promoting the orderly presentation of evidence, and to assure that all parties, in the exercise of reasonable diligence, are afforded fair opportunity to offer all relevant evidence.

We hold that the trial court did not close the courtroom when it excluded a potential witness from the courtroom during trial testimony. In turn, the trial court did not breach John Castro's right to a public trial.

Life Sentence

John Castro contends the trial court erred by finding him a persistent offender. He argues that the trial court mistakenly classified one of his prior offenses, conspiracy to deliver a controlled substance with a deadly weapon enhancement, as a most serious offense. The State responds that the conspiracy to deliver a controlled substance with a deadly weapon enhancement was a most serious offense because the offense was a felony with a deadly weapon finding, even if the deadly weapon enhancement is not valid. This court must remand for resentencing because the conspiracy to deliver a controlled substance conviction is facially invalid and cannot count as a most serious offense.

Under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, a trial court must impose a life sentence for a persistent offender. A persistent offender is someone who is currently being sentenced for a most serious offense and also has two prior convictions for most serious offenses. RCW 9.94A.030 reads in relevant part:

> (37) "Persistent offender" is an offender who:
> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

In turn, RCW 9.94A.030 defines, in relevant part, as a "most serious offense"

> (32) "Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:
> (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
> . . . .
> (s) Any other class B felony offense with a finding of sexual motivation;
> (t) Any other felony with a deadly weapon verdict under RCW 9.94A.825.

Under the POAA, the State bears the burden of proving, by a preponderance of the evidence, the existence of prior convictions that constitute predicate offenses for application of the POAA. *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009).

John Castro contends the conspiracy to deliver a controlled substance with a deadly weapon enhancement does not qualify as a most serious offense under the POAA. He argues that a deadly weapon enhancement does not create either a Class A or Class B felony and thus does not fall under RCW 9.94A.030(32)(a) or (s). In other words, his 2008 conviction was for an unranked felony. We agree.

Under *State v. Soto*, 177 Wn. App. 706, 716, 309 P.3d 596 (2013), the deadly weapon enhancement cannot apply to an unranked felony. Conspiracy to deliver a controlled substance is an unranked felony. *State v. Hebert*, 67 Wn. App. 836, 837, 841 P.2d 54 (1992).

John Castro may challenge the 2008 deadly weapon enhancement in the pending prosecution. When a defendant is convicted of a nonexistent crime, the judgment and

sentence is invalid on its face. *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). Although Castro pled guilty to the challenged offense, exceptions to the foreclosure of collateral attack on a guilty plea exist when, on the face of the record, the court had no power to enter the conviction or impose the sentence. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 720, 10 P.3d 380 (2000).

The State claims the conspiracy to deliver a controlled substance with a deadly weapon enhancement is a serious offense under RCW 9.94A.030(32)(t), which provides: "[a]ny other felony with a deadly weapon verdict under RCW 9.94A.825" is a serious offense. The State argues that, even if the enhancement is not valid, the crime is a serious offense because of a deadly weapon finding. This argument fails, however, because neither the judge nor a jury entered a deadly weapon finding in the earlier prosecution. Neither the amended information, nor the statement of the facts by the prosecutor at the plea hearing, mentioned a deadly weapon.

John Castro's second strike, a 2008 conviction for conspiracy to deliver a controlled substance with a weapon enhancement, is a facially invalid conviction. Therefore, he suffered no deadly weapon verdict to raise the conviction to a most serious offense.

Statement of Additional Grounds

John Castro asserts five additional grounds for reversal in his statement of additional grounds:

1. Prosecutor and police misconduct committed by introducing gang evidence in violation of the court's order.

2. Introduction of gang evidence violated John Castro's constitutional right to a fair trial by an impartial jury.

3. The trial court abused its discretion in excluding Dyneshia Sleep from the courtroom when she was not obligated to testify against her husband, pursuant to RCW 5.60.060(1).

4. John Castro was entitled to a lesser included instruction on manslaughter because the evidence at trial only proved an accidental death.

5. It was fundamentally unfair to use the conspiracy to deliver a controlled substance conviction as a strike for establishing a sentence of life without parole.

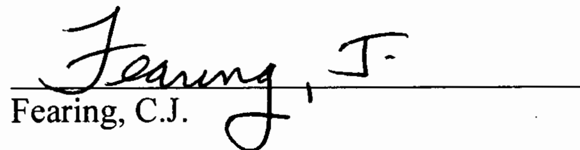
Statements of additional grounds 1, 2, 3, and 5 mirror contentions raised by appellant's counsel. We will not repeat our analysis.

John Castro contends that the trial court erred because he was entitled to receive a jury instruction on the lesser included offense of manslaughter. A defendant who is entitled to a lesser included instruction may choose to forgo such instruction. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Even if Castro was entitled to a lesser included instruction, he intentionally waived his right to the instruction. Castro opposed any manslaughter instruction because of a preference for an "'all or nothing'" defense. CP at 397.

CONCLUSION

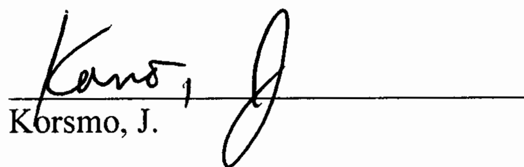
We affirm John Castro's convictions. We vacate his life sentence under the POAA. We remand the case to the trial court to exclude Castro's 2008 conviction for conspiracy to deliver a controlled substance with a deadly weapon enhancement from a POAA calculation and to resentence Castro.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

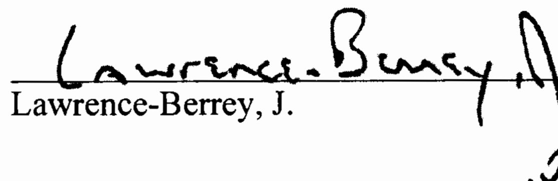


Fearing, C.J.

WE CONCUR:



Korsmo, J.



Lawrence-Berrey, J.

Appendix C

COURT COSTS $110-
VICTIM ASSESS $500-
RESTITUTION
FINE
ATTY FEES
SHERIFF COSTS
METH
DNA FEE $100-
CRIME LAB
OTHER COST

FILED
FEB 27 2004
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

STATE OF WASHINGTON	
Plaintiff,	No. 03-1-02440-7
v.	PA# 03-9-13027-1
	RPT# 002-03-0220681
JOHN ANTHONY CASTRO	RCW 9A.56.210-F
BM 07/06/84	(9.94A.602) (#68313)
	JUDGMENT AND SENTENCE (JS)
Defendant.	[X] Prison [ ] RCW 9.94A.712 Prison Confinement
	[ ] Jail One Year or Less [ ] RCW 9.94A.712 Prison Confinement
SID: 018275224	[ ] First Time Offender
	[ ] Special Sexual Offender Sentencing Alternative
	[ ] Special Drug Offender Sentencing Alternative
	[X] Clerk's Action Required, para 4.1 and 5.8

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the deputy prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 2.27.04

by [A] plea [ ] jury verdict [ ] bench trial of:

Count No.: I **SECOND DEGREE ROBBERY**
RCW **9A.56.210-F (9.94A.602) (#68313)**
Date of Crime **July 15, 2003**
Incident No. **002-03-0220681**

$710

04901430-1 hm

as charged in the Second Amended Information

[ ] The court finds that the defendant is subject to sentencing under **RCW 9.94A.712.**

[✓] A special verdict/finding for use of **a firearm** was returned on Count(s) 1. RCW 9.94A.602, (Ch. 290 L 2002 § 11, effective 7/1/03 Ch. 379 L 2003 § 10).

[ ] A special verdict/finding for use of **a deadly weapon other than a firearm** was returned on Count(s) ___. RCW 9.94A.602, (Ch. 290 L 2002 § 11, effective 7/1/03 Ch. 379 L 2003 § 10).

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) ___. RCW 9.94A.835

[ ] The offense in Count(s) ______ was committed in a county jail or state correctional facility. RCW 9.94A.510(5)

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s)________, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s)_____________. RCW 9..94A.605, RCW 69.50.401, RCW 69.50.440.

[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

[ ] The crime charged in Count(s)_______________ involve(s) **domestic violence.**

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 **CRIMINAL HISTORY:** (RCW 9.94A.525):

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
RIOT	101602		A	SPOKANE CO, WA	121702
ATT TO ELUDE	040101	FELONY TRAFFIC	J	SPOKANE CO, WA	050301
ASSAULT 3	040101	NV	J	SPOKANE CO, WA	050301
ASSAULT 3	040101	NV	J	SPOKANE CO, WA	050301
DRIVE BY SHOOTING	082999		J	SPOKANE CO, WA	102099
MAL MISCHIEF 2	050196	NV	J	SPOKANE CO, WA	110796
Del. of Cont. Subst		DRUG	A	SPOKANE CO	1/2004
Del. of Cont. Subst.		DRUG	A	SPOKANE CO	1/2004

[ ] Additional criminal history is attached in Appendix 2.2

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

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 **SENTENCING DATA:**

CT NO	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus enhance-ments*	Total Standard Range (including enhancements)	Maximum Term
1	3	IV	13-17mos	36	49-53mo.	10yrs

***(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile present.**

[ ] Additional current offense sentencing data in Appendix 2.3

2.4 [ ] **EXCEPTIONAL SENTENCE:** Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] within [ ] below the standard range for Count(s)____. Findings of fact and conclusions of law are attached in

Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): ______________________

____

____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows __________

____

____

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1

3.2 [ ] The Court **DISMISSES** Counts ______________________

[ ] The defendant is found **NOT GUILTY** of Counts ______________________

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of the Court

JASS CODE

RTN/RJN $__________Restitution to: ______________________

$__________Restitution to: ______________________

$__________Restitution to: ______________________

(Name and Address-address may be withheld and provided confidentially to Clerk's Office)

PCV $500.00 Victim Assessment RCW 7.68.035

CRC $110.00 Court costs, including: RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal Filing fee $______________ FRC

Witness costs $________________ WFR

Sheriff service fees $________________ SFR/SFS/SFW/SRF

Jury demand fee $________________ JFR

Extradition costs $________________ EXT

Other ____________ $____________

PUB $__________ Fees for court appointed attorney RCW 9.94A.760

WRF $__________ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH $__________ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] additional fine deferred due to indigency RCW 69.50.430

MTH $__________ Meth/Amphetamine Cleanup Fine, $3000. RCW 69.50.440, 69.50.401(a)(1)(ii)

CDF/LDI/ FCD/NTF/SAD/SDI $__________ Drug enforcement fund of ______________ RCW 9.94A.760

CLF $__________ Crime lab fee [ ] suspended due to indigency RCW 43.43.690

$ 100 — Felony DNA collection fee of $100 ☐ not imposed due to hardship RCW 43.43.7541

$__________ Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1,000 maximum) RCW 38.52.430

$__________ Other costs for: ______________________

$ 710 **TOTAL** RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor

[ ] is scheduled for ______________________

[ ] **RESTITUTION**. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:

RJN

NAME of other defendant CAUSE NUMBER (Victim Name) (Amount$)

____

____

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by the DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ 25 per month commencing 60 DAYS AFTER RELEASE RCW 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

[ ] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.760

[√] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190 and RCW 9.94A.780(5).

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

[ ] HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340

[ ] The victim, based upon their request, shall be notified of the results of the HIV test whether negative or positive. (Applies only to victims of sexual offenses under RCW 9A.44.) RCW 70.24.105(7)

4.3 The Defendant shall not have contact with Benjamin Smith 8-18-80 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 years (not to exceed the maximum statutory sentence.)

[ ] Domestic Violence Protection Order or Anti-Harassment Order is filed with this Judgment and Sentence.

4.4 **OTHER** ____________________

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT**. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

49 (months) on Count No. 1;

_____ (months) on Count No. _____;

_____ (months) on Count No. _____.

Actual number of months of total confinement ordered is: 49 MONTHS

_____ (Add mandatory firearm or deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

(b) CONFINEMENT. RCW 9.94A.712: The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____

Count _____ minimum term _____ maximum term _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: TBD jail

4.6 [ ] **COMMUNITY PLACEMENT** is ordered as follows: Count _____ for _____ months; Count _____ for _____ months; Count _____ for _____ months.

[ ] **COMMUNITY CUSTODY** for count(s) _____, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

[X] **COMMUNITY CUSTODY** is ordered as follows:

Count 1 for a range from 18 to 36 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offense, second degree assault, any crime against a person with a deadly weapon finding and Chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver Methamphetamine		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[ ] Defendant shall have no contact with: ______________________________ ______________________________.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: ______________________________ ______________________________.

[ ] The defendant shall participate in the following crime-related treatment or counseling services:____

[ ] The defendant shall undergo an evaluation for treatment for [ ]domestic violence [ ]substance abuse [ ]mental health [ ]anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions:

[X] Other conditions: NO CONTACT WITH CO-DEFENDANTS NO POSSESSION OF FIREARMS, AMMUNITION

[ ] For sentences imposed under RCW 9.94A.712, other conditions may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7 working days.

4.7 [ ] **WORK ETHIC CAMP**. RCW 9.94A.690, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: ____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT**. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

5.2 **LENGTH OF SUPERVISION**. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for the purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606

5.4 **RESTITUTION HEARING.**
[ ] Defendant waives any right to be present at any restitution hearing (sign initials): ____________

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph within the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

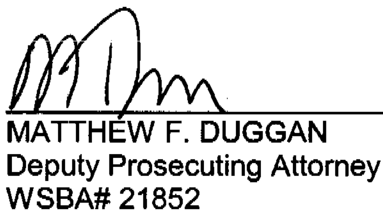
If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 [ ] The court finds that Count______ is a felony in the commission of which a motor vehicle was used. The court clerk is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

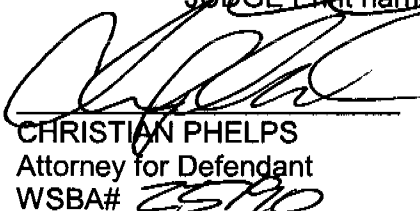
5.9 **OTHER**: ______________________________

DONE in Open Court in the presence of the defendant this 27 day of February, 2004.

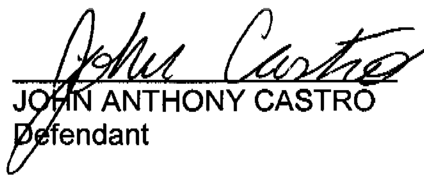
GREG SYPOLT
JUDGE Print name:



MATTHEW F. DUGGAN
Deputy Prosecuting Attorney
WSBA# 21852



CHRISTIAN PHELPS
Attorney for Defendant
WSBA# 25710



JOHN ANTHONY CASTRO
Defendant

Interpreter signature/Print name: ______________________________

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the ____________________ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case: 03-1-02440-7.

I, ________________________________, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date:

_______________. Clerk of said County and State, by:_________________________,

Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. 018275224

(If no SID take fingerprint card for State Patrol)

FBI No. 441170DB5

PCN No.

DOB 07/06/1984

Alias name

Date of Birth 07/06/1984

Local ID No. 0252131

Other

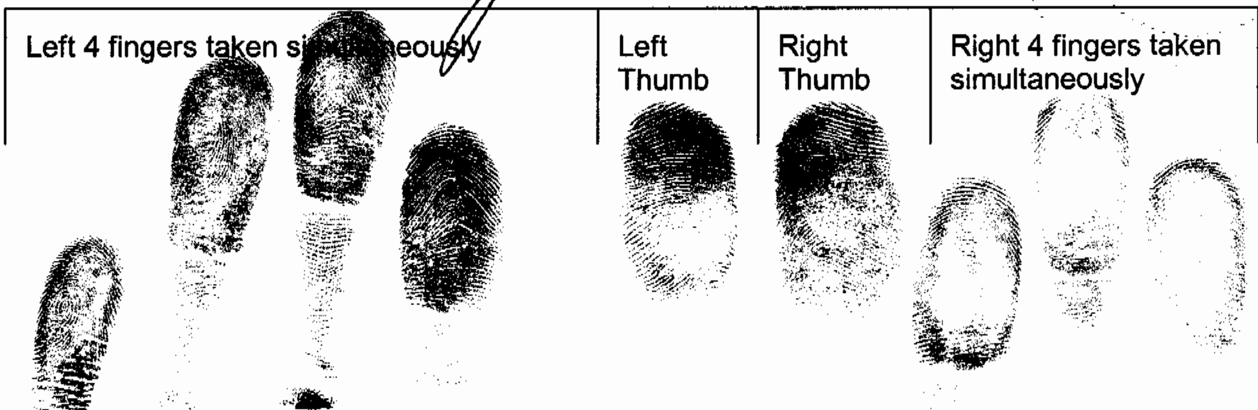
Race:			**Ethnicity:**	**Sex:**
[ ] Asian/Pacific Islander	[ ] Black/African-American	[ ] Caucasian	[ ] Hispanic	[ ] Male
[ ] Native American	[ ] Other:__________		[ ] Non-hispanic	[ ] Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

THOMAS R. FALLQUIST, County Clerk,

Clerk of the Court: ______________, Deputy Clerk. Dated: 2-27-04

DEFENDANT'S SIGNATURE: ______________



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 35575-6-III
	)	
JOHN CASTRO,	)	
	)	
PETITIONER.	)	

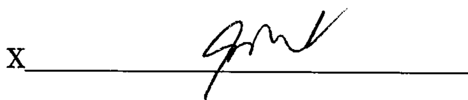
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JULY, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] LARRY STEINMETZ [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] JOHN CASTRO 849936 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JULY, 2019.

X_______________________________



Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

July 08, 2019 - 4:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35575-6
Appellate Court Case Title:	State of Washington v. John Anthony Castro
Superior Court Case Number:	11-1-03698-8

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Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Richard Wayne Lechich - Email: richard@washapp.org (Alternate Email: wapofficemail@washapp.org)

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SEATTLE, WA, 98101
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