

NO. 68812-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRIS MORTENSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court's denial of Mr. Mortenson's motion for a new jury panel denied his constitutional rights to an impartial jury, a fair trial and the presumption of innocence.

2. The trial court abused its discretion by denying Mr. Mortenson's motion for a new jury panel.

3. Mr. Mortenson's constitutional right to a unanimous jury was violated by jury instruction 17.

4. Mr. Mortenson's due process right to a fair trial was denied by jury instruction 17, which is incomplete.

5. The court denied Mr. Mortenson a fair trial by admitting evidence of his failure to offer potentially incriminating evidence to the police after his arrest when his post-arrest silence was based on his constitutionally and statutorily protected right to confidentially communicate with his attorney.

6. The trial court abused its discretion in admitting evidence of Mr. Mortenson's refusal to submit to a breathalyzer test, which decision was based on advice of counsel.

7. By ruling that Mr. Mortenson would open the door to details of his conversation with counsel if he admitted evidence that his decision to refuse a breathalyzer test came after a discussion with his attorney, the

trial court abused its discretion and violated Mr. Mortenson's constitutional right to counsel and statutory right to confidentially communicate with his attorney.

8. In the absence of sufficient evidence to establish beyond a reasonable doubt Mr. Mortenson drove recklessly, his conviction for attempting to elude a pursuing police vehicle violates his constitutional right to due process.

9. Cumulative error denied Mr. Mortenson his due process right to a fair trial.

10. The trial court exceeded its statutory authority in imposing its sentence.

11. The offender score was not properly calculated.

12. The State failed to prove the facts supporting the offender score by a preponderance of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Washington and federal constitutions guarantee a criminal defendant the right to a fair trial, a fair and impartial jury, and the presumption of innocence. The evidence rules also limit the extent to which a jury may consider a defendant's prior offenses. In a felony DUI trial, the State must prove the accused has four or more prior offenses. The prejudicial effect of these prior offenses can be limited and sanitized

if the defendant stipulates to the existence of the prior offenses, the jury instructions or evidence are bifurcated, the specific type of prior offenses is excluded, and a limiting instruction is provided. Mr. Mortenson took each of these steps to limit the prejudicial effect of his prior convictions. However, the trial court informed the jury panel that Mr. Mortenson had four or more prior DUI offenses and a prospective juror repeated the information. Did the trial court abuse its discretion when it denied Mr. Mortenson's motion for a new jury panel?

2. Criminal defendants have a state constitutional right to a unanimous jury verdict and a federal constitutional right to a jury trial. The federal and state constitutional guarantees of due process and a fair trial also require jury instructions be manifestly apparent to the average juror and do not relieve the State of its burden of proof. Were Mr. Mortenson's rights to a fair trial and unanimous jury violated by the court's instruction, which informed the jury simply that it "must fill in the blank in verdict form C [relating to count two, DUI] with the words 'not guilty' or the word 'guilty', according to the decision you reach[.]" and did not inform the jury how to proceed if it could not reach a verdict or that its verdict on this count had to be unanimous?

3. The court's obligation to ensure an accused person receives a fair trial requires it to exclude evidence that is more prejudicial than

probative. Furthermore, an accused has a constitutional right to an attorney and a statutory right to confidential attorney-client communications. After Mr. Mortenson's arrest for driving under the influence, he first told police he would provide a breathalyzer test but then changed his mind after speaking with an attorney. Where the court admitted evidence that Mr. Mortenson originally agreed to a breath test and then changed his mind, which he could not rebut without revealing his confidential communication with his attorney, and evidence of his post-arrest silence had little probative value but unfairly painted him as an uncooperative and guilty person, did the court improperly allow the jury to infer Mr. Mortenson's guilt based on impermissible characteristics? Did the trial court further err by ruling that if Mr. Mortenson introduced evidence that his refusal to submit to the test came after communication with an attorney the State could elicit additional information about the attorney-client communication including Mr. Mortenson's demeanor?

4. The federal and state constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. Where the State failed to show beyond a reasonable doubt Mr. Mortenson drove recklessly, should the attempting to elude conviction be reversed?

5. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the

Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Mortenson denied a fundamentally fair trial?

6. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority for felony offenses. Under RCW 9.94A.701(9) the trial court must reduce the term of community custody where the combined term of community custody and confinement exceed the statutory maximum for an offense. Where the trial court imposed a 60-month sentence for a Class C felony yet also imposed a 12-month term of community custody, must this Court order the trial court to correct the erroneous sentence?

7. Was the offender score miscalculated where the State's proof of Mr. Mortenson's criminal history supports an offender score of 4 on the DUI count and 15 on the attempting to elude count, but the court calculated his offender score as a 16 on each count?

8. Pursuant to the SRA and the Due Process Clause, the State must prove an offender score by a preponderance of the evidence. Did the State fail to satisfy its burden where the records submitted do not support the proffered offender score?

C. STATEMENT OF THE CASE

1. **The morning of August 21, 2010.**

Early in the morning on August 21, 2010, Deputy Petrenchak observed a vehicle driven by Mr. Mortenson on Military Road South, in south King County, traveling approximately 65 miles per hour in a 45 mile per hour zone.¹ 3/20/12 RP 37-41. Deputy Petrenchak was in uniform, driving a marked Sheriff's vehicle equipped with emergency lights and sirens. 3/20/12 RP 38. According to Deputy Petrenchak, his vehicle was facing southbound—the opposite direction of Mr. Mortenson's vehicle. 3/20/12 RP 39-40. The deputy pulled onto the shoulder and activated his emergency lights as Mr. Mortenson's vehicle approached without slowing down. 3/20/12 RP 43. Deputy Petrenchak turned his vehicle and followed Mr. Mortenson's vehicle, getting close to it within six to eight blocks. 3/20/12 RP 43-44. Deputy Petrenchak's only concern was the vehicle's speed. 3/20/12 RP 94-101.

Mr. Mortenson's vehicle slowed significantly and turned onto westbound 342nd Street and then made six or seven controlled turns onto

¹ The separately-paginated volumes of the verbatim report of proceedings are referred to herein by date, e.g., "1/10/12 RP." There are two volumes from January 24, 2012, which are referred to respectively by the court reporter: for the morning session "1/24/12 (Runnels) RP" and for the afternoon session "1/24/12 (DeCuire) RP." There are also two volumes from March 13, 2012, which are referred to respectively by the presiding judge: for the morning session "3/13/12 (Gain, J.) RP" and for the later session "3/13/12 (Smith, J.) RP."

other roads before coming to a stop. 3/20/12 RP 50-56, 102-04, 122-25.

After turning onto 342nd Street, Deputy Petrenchak activated his patrol car siren. 3/20/12 RP 45. At one point, Catherine Lowrey, sitting in the front seat of Mr. Mortenson's vehicle, reached her arms out the window.

3/20/12 RP 45. After the initial turn, Mr. Mortenson's vehicle touched or crossed the center line and fog line. 3/20/12 RP 46-47. Otherwise, Mr. Mortenson's driving was at or below the speed limit and in control.

3/20/12 RP 102-04, 122-25.

During the 1.6 miles that Deputy Petrenchak followed Mr. Mortenson's vehicle, no other cars or pedestrians were in sight. 3/20/12 RP 53, 137-38.

After coming to a stop, Mr. Mortenson exited his vehicle. 3/20/12 RP 58-60. Deputy Petrenchak issued several rounds from his Taser into Mr. Mortenson and secured him in the patrol vehicle. 3/20/12 RP 61-67.

Deputy Lee then arrived at the scene. 3/20/12 RP 67, 158.

Law enforcement did not conduct a field sobriety test. 3/20/12 RP 88. Mr. Mortenson initially agreed to submit to a breathalyzer test. 3/20/12 RP 79-80. However, after speaking with an attorney, he declined. 3/20/12 RP 81-84; 3/20/12 RP 150-52. Law enforcement did not pursue a warrant for a blood test. 3/20/12 RP 152. Deputy Petrenchak testified that he had never had contact with Mr. Mortenson before but thought he had

bloodshot, watery eyes, smelled of intoxicants, and had a flushed face and poor coordination. 3/20/12 RP 86-87, 131; *see* 3/20/12 RP 138-39 (eyes could be bloodshot and watery for a number of reasons). According to Deputy Lee, he could smell alcohol on Mr. Mortenson's breath. 3/20/12 RP 159.

By her own admission, Ms. Lowrey was very intoxicated that morning from consuming alcohol. 3/21/12 RP 34, 42-43. She was also on medication that could affect her memory and recall. 3/21/12 RP 42. She had been out with Mr. Mortenson and her housemate, a second passenger, but she remained separate from them during the evening and procured her own drinks. 3/21/12 RP 31-33, 43. She did not know if Mr. Mortenson consumed alcohol; he was playing pool with the other passenger. 3/21/12 RP 43. Despite her obvious intoxication, Deputy Lee took a statement from Ms. Lowrey. 3/20/12 RP 158-59, 164-66; 3/21/12 RP 47. At trial, she denied any recollection of the statement, largely disavowed its contents, and could not recall much of Mr. Mortenson's driving. *E.g.*, 3/21/12 RP 34 ("I was impaired myself that night. Most of the ride I don't recall except for when the police attempted to pull us over."), 35-38 (does not recall making statement), 34, 39-40 (does not remember much of driving), 53-55.

The State did not present any evidence from the second passenger, who was Ms. Lowrey's housemate. 3/21/12 RP 43.

2. The first trial, presided over by Judge Brian Gain, ended in a mistrial due to misconduct by the State's witnesses.

The State charged Mr. Mortenson with attempting to elude a pursuing police vehicle (RCW 46.61.024) and DUI (RCW 46.61.502; RCW 46.61.5055). CP 1, 11-13.² The State added a special allegation of endangerment: that during the commission of attempting to elude, one or more persons other than Mr. Mortenson or Deputy Petranchak were threatened with physical injury or harm (RCW 9.94A.533(11); RCW 9.94A.834). CP 11.

Prior to trial, Mr. Mortenson moved to bifurcate the evidence and instructions on the DUI charge, to prevent the jury from hearing evidence of or considering prior DUI offenses while considering the substantive charge in the instant case. CP 14-19; *see also* 1/24/12 (Runnels) RP 6-8 (moving to sever counts). After considering the parties' arguments, the Hon. Brian Gain granted Mr. Mortenson's motion in part, allowing for bifurcated jury instructions. 1/10/12 RP 30-36, 112-21; 1/24/12 (Runnels) RP 8-10.

² Mr. Mortenson pled guilty to misdemeanor driving with a license suspended in the second degree. CP 1, 12, 55, 153; 1/11/12 RP 14-24. That charge is not contested here.

To limit the propensity effect, Mr. Mortenson waived his right to have the State prove each element of the DUI offense to the jury beyond a reasonable doubt by stipulating that he had four or more prior offenses as defined in RCW 46.61.5055. CP 75-76.

Despite pretrial rulings excluding the evidence, the State's witnesses testified about Mr. Mortenson's communication with an attorney and referenced racial comments he allegedly uttered. 1/24/12 (DeCuire) RP 13, 76. Mr. Mortenson moved for, and Judge Gain granted, a mistrial. 1/25/12 RP 3-7; CP 78.

3. The second trial, presided over by Judge Lori Smith.

The retrial was assigned out to the Hon. Lori Smith, who adopted Judge Gain's pretrial rulings. 3/13/12 (Smith, J.) RP 3; 3/14/12 RP 22-25, 29-64.

Still seeking to limit the jury's knowledge and consideration of any prior offenses, Mr. Mortenson again stipulated to the existence of four or more prior offenses under RCW 46.61.5055(14)(a). CP 109-10, 137; 3/15/12 RP 5, 8-9. The court also provided an instruction substantially limiting the purpose for which the jury could consider the stipulation. CP 120; 3/22/12 RP 61. However, during preliminary voir dire, the court advised the jury of the charges against the defendant without sanitizing the prior offenses. The jury panel thus learned Mr. Mortenson was charged

with having four or more DUI offenses that preceded the instant DUI charge. 3/15/12 RP 24. One of the panel members repeated this information to the entire panel while explaining it would be difficult for her to be fair in light of that knowledge. 3/15/12 RP 80-81, 148. Judge Smith denied Mr. Mortenson's motion to call a new jury panel. 3/15/12 RP 46-52, 148.

Ultimately, Mr. Mortenson declined to have the jury provided with bifurcated instructions as it had already received the information in voir dire and through the parties' stipulation. 3/22/12 RP 38-44, 62-63. The jury was provided with verdict forms for attempting to elude, a lesser-included failure to obey, and DUI, as well as a special verdict form regarding the allegation of endangerment of others. CP 138-41. The jury found Mr. Mortenson guilty of attempting to elude a police vehicle and DUI, but answered "no" to the special verdict. CP 138-42.

With regard to sentencing, the State submitted a presentence statement listing alleged prior offenses and documents purporting to show Mr. Mortenson had an offender score of 16 on each count. CP 156-376, 378-94. The State did not prove the offender score beyond the filing of these documents and listing the prior offenses in court. 4/13/12 RP 3-5. Mr. Mortenson objected to the State's proposed score. 4/13/12 RP 6-7, 8. Nonetheless, the court accepted the State's scoring, finding Mr. Mortenson

had an offender score of 16 for each count. CP 143, 148; 4/13/12 RP 33.

Mr. Mortenson was sentenced to the top of the range for each count, with the two counts running concurrently, as well as a 12-month term of community custody. CP 142-45.³

D. ARGUMENT

1. Mr. Mortenson was denied a fair trial by an impartial jury when, after he went to great efforts to shield the jury from much of the taint from his prior offenses, the jury panel received prejudicial information about prior DUI offenses that was then repeated and the trial court failed to grant his request for a new panel.

a. Within the structure of the DUI offense, Mr. Mortenson sanitized the effect of his prior convictions to the greatest extent possible.

Before his first trial, Mr. Mortenson moved to have evidence of his prior driving while under the influence offenses excluded from the jury during its consideration of his guilt for the instant charges. CP 14-19 (trial memorandum seeking bifurcation). He sought severance of the DUI charge, so as to avoid any taint to the remaining counts, as well as bifurcation of the trial or jury instructions to prevent the jury from considering his prior offenses at the same time as the instant DUI charge. 1/10/12 RP 30-37, 112-22; 1/24/12 (Runnels) RP 6-7; *State v. Roswell*, 165 Wn.2d 186, 198, 196 P.3d 705 (2008) (“[I]f an element of the crime is

³ A copy of the felony judgment and sentence is included herein as Appendix A.

a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. We and other courts have recognized how highly prejudicial such evidence may be.”); *State v. Oster*, 147 Wn.2d 144, 147-48, 52 P.3d 26 (2002) (noting prejudicial effect of evidence of prior offenses and citing authorities discussing same). The trial court granted Mr. Mortenson’s request to bifurcate the jury instructions so that the jury would first determine whether Mr. Mortenson was driving under the influence during the instant charge and only if it was persuaded beyond a reasonable doubt would the jury consider whether the State met its burden on the prior offenses. 1/10/12 RP 116-19; 1/24/12 (Runnels) RP 9.

To further prevent the jury pool from being tainted with suggestions of prior offenses, the parties and the court agreed that reference to Mr. Mortenson’s prior offenses or to scenarios regarding multiple DUIs would not be made during voir dire. 1/10/12 RP 121.

Finally, to limit evidence regarding his prior offenses and the jury’s consideration thereof in the first trial, Mr. Mortenson stipulated that he had been convicted of four or more prior offenses within ten years for purposes of RCW 46.61.5055. CP 75-76; 1/24/12 (Runnels) RP 7-10. Because the State’s witnesses violated pretrial rulings unrelated to Mr.

Mortenson's prior offenses, a mistrial was declared before this jury considered the charges. 1/25/12 RP 6-7.

In this second trial, Mr. Mortenson asked Judge Smith to reconsider Judge Gain's ruling on bifurcation, renewing the motion for bifurcation of the DUI trial, as opposed to only the jury instructions. 3/14/12 RP 22-26, 29-32, 37. Judge Smith adopted Judge Gain's ruling that bifurcation of the instructions was appropriate, but not bifurcation of the evidence. 3/14/12 RP 37-38.

Mr. Mortenson again stipulated to the existence of four or more prior offenses pursuant to RCW 46.61.5055. CP 109-10, 137; 3/15/12 RP 5, 8-9. Like in the prior trial, the stipulation did not specify what type of crime or crimes the prior offenses were, only that they were prior offenses within 10 years pursuant to RCW 46.61.5055(14)(a).

To further sanitize the effect of the prior offenses, the jury was instructed that it could only consider the stipulation for a limited purpose. CP 120. Specifically, the jury was instructed the stipulation related only to a particular element of count two, the stipulation was not to be considered for any other purpose, and the jury could not speculate as to the nature of the prior offenses. Instruction 5 provides,

[the stipulation] has been admitted only to establish element (3) of the offense of felony driving under the influence as charged in Count II.

The jury is not to speculate as to the nature of the prior convictions.

You may not consider this evidence for any other purpose.

You must not consider this evidence for the purpose of judging whether the defendant was operating a motor vehicle while under the influence of, or affected by, an intoxicating liquor in this incident.

Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 120.

In sum, Mr. Mortenson went to great lengths to limit the prejudicial effect of his prior DUI offenses, including precluding the jury from learning that the prior qualifying offenses were for the same crime charged here, driving under the influence.

- b. The effect of the sanitization was thwarted when the trial court told the jury the State had alleged Mr. Mortenson had four or more prior DUI convictions.

As discussed, Mr. Mortenson waived his right to have the State present evidence to the jury on each element of the charged offense by stipulating to the prior offense element of DUI. However, his sanitization efforts were demolished at the outset of voir dire. The trial court read the charges to the venire, indicating that the four prior offenses were for the same violation as the current offense. 3/15/12 RP 24.

The defendant, Chris Robert Mortenson, in King County, Washington, on or about August 21, 2010, drove a vehicle within this State while under the influence or affected by intoxicating liquor or any drug, having at least four prior offenses as defined under RCW 46.61.5055(14)(a) within 10 years of the arrest for the current offense contrary to RCW 46.61.502 and 46.61.5055 and against the peace and dignity of the State of Washington.

3/15/12 RP 24 (emphasis added).

Defense counsel promptly objected, once out of the presence of the venire. 3/15/12 RP 46-47. Counsel noted that the court's introduction cancelled out the effect of Mr. Mortenson stipulating generically as to his prior offenses. 3/15/12 RP 46-47, 49-50 (noting jury instruction would not contain statutory section for this DUI offense, as court's reading of the charge did). Due to the prejudice, Mr. Mortenson moved to start over with a new panel of jurors. 3/15/12 RP 50. The trial court denied the motion. 3/15/12 RP 50-51.

Any doubt that the jury understood the impact of the court's introduction was dispelled early in voir dire when one of the panel members stated that hearing that Mr. Mortenson had four prior convictions prejudiced her ability to be fair. 3/15/12 RP 79-81. Juror 31 stated, "I think if people have prior convictions that they should get a designated driver if they chose to drink." 3/15/12 RP 79. In response to questioning, she continued, "I just heard prior that the defendant had four prior convictions or something such as that that someone said. I believe the

Judge stated that.” 3/15/12 RP 80. Defense counsel asked whether that information would make it hard for her to be a fair juror, to which Juror 31 responded, “With four prior convictions, yes.” 3/15/12 RP 80-81.

The prejudicial information was thereby republished to the jury pool, along with her assessment that those priors indicated Mr. Mortenson’s guilt on the instant charge. As defense counsel stated to the court outside the presence of the venire, “it’ll be our position that our point was illustrated by Juror No. 31 who was aware of four prior DUIs. This is the third jury pool we’ve had in this case and it’s never been a comment before.” 3/15/12 RP 148.⁴

- c. By denying Mr. Mortenson’s request to recommence voir dire with a new jury panel, the trial court denied his constitutional right to a fair trial and the benefit of his stipulation.

As discussed, pretrial rulings and agreements substantially limited the prejudicial effect of admission of evidence regarding Mr. Mortenson’s prior DUI offenses. In light of these pretrial determinations and the case law acknowledging the propensity effect of such evidence, Mr. Mortenson was denied a fair trial when the trial court refused to call a new jury pool to cleanse the taint of having revealed that his prior offenses were for the same offense as the instant charge, which was also repeated by a member

⁴ During Mr. Mortenson’s first trial, the initial jury pool was excused due to an insufficient number of jurors. 1/12/12 RP 4-12. Thus two jury pools were called for the first trial and one for the second trial.

of the venire. The trial court's failure to strike the jury panel violated his constitutional rights to a fair trial, an impartial jury and the presumption of innocence, as well as his rights under ER 404(b).

Under the Sixth Amendment to the United States Constitution as well as article I, section 22 of the Washington State Constitution, “a defendant is guaranteed the right to a fair and impartial jury.” *State v. Roberts*, 142 Wn.2d 471, 517, 14 P.3d 713 (2000) (quoting *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996)); *accord* Const. art. I, § 22; U.S. Const. amend. VI. The state and federal constitutions also guarantee due process and a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *see In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). The right to a presumption of innocence inheres in the constitutional right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). To further protect these rights, ER 404(b) sharply limits the extent to which the jury may learn of a defendant's prior offenses or “bad acts.”

Despite these precepts, the entire venire learned that Mr. Mortenson had been previously convicted of four or more DUI offenses. The fact of the prior convictions was then repeated in front of the panel by Juror No. 31. This early and repeated exposure of Mr. Mortenson's prior

offenses tainted the jury pool. Instead of receiving no evidence about Mr. Mortenson's history of driving while intoxicated, practically the first information the jury received was that Mr. Mortenson was on trial for the very offense for which he had been previously convicted on four or more occasions. *See, e.g., Roswell*, 165 Wn.2d at 198 (noting "highly prejudicial" danger that jury that learns of prior conviction for "the very same type of crime" will infer propensity). The benefit of stipulating, sanitizing the stipulation by not referencing the type of prior offenses, providing a thorough limiting instruction, and bifurcating the jury instructions was annihilated at the outset. At the very least, the trial court erred in failing to grant Mr. Mortenson's motion to strike the jury panel.

In *Mach v. Stewart*, the Ninth Circuit Court of Appeals reversed a trial court's denial of a motion for a new venire. 137 F.3d 630 (9th Cir. 1997). The defendant was charged with sexual conduct with a minor. *Id.* at 631. During voir dire, a prospective juror with a psychology background and employed as a social worker stated that, in her three years as a State-employed social worker, every allegation a child had made about sexual abuse was true. *Id.* at 632-33. The information was repeated upon further questioning. *Id.* at 633. The trial court struck the juror but denied a motion for a new jury panel. *Id.* Reversing, the Ninth Circuit reasoned the statements made by the prospective juror were directly

connected to guilt, and that “the court should have[, at a minimum,] conducted further voir dire to determine whether the panel had in fact been infected by [the prospective juror’s] expert-like statements.” *Id.* at 633.

Like in *Mach*, the entire venire heard the court’s recitation of Mr. Mortenson’s prior offenses as well as Juror No. 31’s repetition of the prior offenses. Juror No. 31 also informed the entire venire that the prior offenses indicated guilt as to the instant charge. Thus, like in *Mach*, the improper comments were directly connected to Mr. Mortenson’s guilt. Moreover, counsel (and the court) could not have effectively questioned the prospective jurors about the effect of prior offenses without further opening a door that Mr. Mortenson had worked diligently to keep closed. “Even if ‘only one juror is unduly biased or prejudiced,’ [by the court or the prospective juror’s comments] the defendant is denied his constitutional right to an impartial jury.” *Mach*, 137 F.3d at 633 (quoting *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)). The proper remedy was to begin anew with a fresh jury pool.

In *Mach*, the Ninth Circuit considered the error likely was structural. 137 F.3d at 633-34. However, it did not decide the issue because it found reversal required under application of the harmless-error standard in any event. *Id.* at 634. The same result is compelled here. The court’s reading of the prior offenses as DUI offenses and the prospective

juror's recitation of that allegation while connecting it to Mr. Mortenson's guilt on the instant charge cannot be said to have no effect on those jurors eventually seated. This is particularly true where much effort had been expended to shield the jurors from such prejudicial evidence during the course of the trial. This court should reverse and remand for a new trial.

2. The concluding instruction did not tell the jury it must be unanimous to reach a guilty or not guilty verdict on the DUI count or how to proceed if it could not agree on that count, requiring reversal of the conviction.

- a. The jury was not instructed it must be unanimous to reach a verdict on count two or how to proceed if it could not reach a verdict.

Mr. Mortenson's jury was provided with three verdict forms: forms A and B pertained to count one: attempting to elude and the lesser-included offense of failure to obey. Verdict form C related to count two, DUI. The court's instruction varied significantly regarding how the jury may complete verdict form C from the instructions regarding verdict forms A and B. The court's concluding instruction read in relevant part:

You will be given the exhibits admitted in evidence, these instructions, and three verdict forms, A and B and C. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Attempting to Elude a Pursuing Police Vehicle as charged. If you unanimously agree on a verdict, you

must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Attempting to Elude a Pursuing Police Vehicle, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Failure to Obey Officer. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words “not guilty” or the word “guilty”, according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You must fill in the blank provided in verdict form C with the words “not guilty” or the word “guilty”, according to the decision you reach.

[instruction regarding special verdict form, including unanimity requirement]

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision.

CP 134-35 (instruction 17).⁵

The instruction thoroughly explains the procedure for unanimity and failure to reach a verdict on count one (verdict form A) and the lesser-included offense (verdict form B), but contains a drastically truncated instruction for count two (verdict form C), the DUI charge. Although the

⁵ A complete copy of jury instruction 17 is attached as Appendix B and is available in the clerk’s papers at pages 133-35.

instruction properly allowed for either a “guilty” or “not guilty” verdict on the DUI count, it failed to instruct the jury it must be unanimous on this count. The instruction also failed to inform the jury that it may be deadlocked on that count, in which case it should leave the form blank.

- b. The truncated instruction regarding the DUI count violated Mr. Mortenson’s constitutional rights to a fair trial and unanimous jury and constituted an error of law.

A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). A jury instruction that lowers the State’s burden of proof is a manifest error affecting the constitutional right to due process. *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *State v. McCullum*, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); U.S. Const. amend. XIV. Likewise, confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

Mr. Mortenson also has a constitutional right to a unanimous verdict. The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. art. I, §§ 21, 22; *State v. Camarillo*, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). The federal constitution guarantees a right to trial by jury. U.S. Const. amend. VI; *Camarillo*, 115 Wn.2d at 63-64. Because jurors lack interpretive tools and training, jury

instructions are held to a high standard for clarity. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

The Washington Pattern Jury Instructions-Criminal (WPIC) include language informing the jury both that it must act unanimously if it completes the verdict forms and that it must leave them blank if it cannot be unanimous. Washington Pattern Jury Instructions-Criminal WPIC 155.00. To ensure unanimity, the pattern instruction includes the following language: "If you unanimously agree on a verdict, you must fill in the blank provided in verdict form [] the words 'not guilty' or the word 'guilty,' according to the decision you reach." *Id.* With regard to a deadlocked jury, the pattern instruction counsels inclusion of the following language: "If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form []." *Id.*

The WPIC-proposed language was included in the concluding instruction with regard to verdict form A (attempting to elude) and verdict form B (the lesser-included failure to obey). But as to verdict form C, regarding the DUI charge, the court's instruction simply stated, "You must fill in the blank provided in verdict form C with the words 'not guilty' or the word 'guilty', according to the decision you reach." CP 135.

The final paragraph of the lengthy concluding instruction does generally state, “because this is a criminal case, each of you must agree for you to return a verdict.” CP 135. However, the contrasting instructions between verdict forms A and B, on the one hand, and verdict form C, on the other, rendered this statement and the instruction as a whole, confusing at the very least. If none of the specific instructions pertaining to each verdict form included unanimity or hung jury language, the jury might have fairly understood the first sentence of the final paragraph to apply equally to all verdict forms. Instead, the jury was instructed to be unanimous only as to verdict forms A or B. CP 134; *see LeFaber*, 128 Wn.2d at 903 (jury instruction erroneous where jury could equally understand it to provide improper direction or legally-sound direction); *State v. Bland*, 128 Wn. App. 511, 517, 116 P.3d 428 (2005) (reversing conviction where instruction ambiguous). Moreover, the jury was not informed that it could fail to reach a unanimous verdict on the DUI count, in which case it would return an uncompleted verdict form (as it was instructed for count one, verdict forms A and B).

It is axiomatic that minority jurors can be compelled to surrender their honest beliefs by improper or suggestive jury instructions. *E.g.*, *State v. Watkins*, 99 Wn.2d 166,173-75, 660 P.2d 1117 (1983) (discussing and citing other authority); *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d

789 (1978) (“[A]n instruction which suggests that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right [to have each juror reach his verdict uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel], however subtly the suggestion may be expressed.”). Further, jurors cannot be expected to understand that a non-unanimous verdict requires leaving the form blank, and not inserting the words “guilty” or “not guilty.” See *State v. Strine*, __ Wn.2d __, 293 P.3d 1177, 1179 (2013) (jury that returned not guilty verdict was found to be split 6-6 when polled).

c. The error requires reversal of the conviction on count two.

Errors affecting jury unanimity and the right to due process are of constitutional magnitude, and as such, are reversible unless the State proves it is “harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1975); *State v. Kitchen*, 110 Wn.2d 403, 409-12, 756 P.2d 105 (1988) (State must prove beyond a reasonable doubt that jury unanimity error was harmless); *State v. Peters*, 163 Wn. App. 836, 850, 261 P.3d 199 (2011) (State must prove beyond a reasonable doubt that due process violation was harmless).

The State cannot show the instructional errors were harmless to the DUI conviction beyond a reasonable doubt. The State’s evidence was

based on lay opinion testimony. The State had no breathalyzer or blood test to show Mr. Mortenson's level of intoxication. His driving, as observed by Deputy Petrenchak, did not indicate impairment: he drove over the speed limit on an empty, relatively straight road then slowed significantly and made six or seven turns without incident. At one point, Deputy Petrenchak testified Mr. Mortenson's vehicle touched or crossed the center and fog lines. The jury returned a special verdict form finding Mr. Mortenson's driving did not endanger anyone. CP 138. Finally, the statement by Mr. Mortenson's passenger was taken when she was substantially intoxicated and was sharply discredited and contradicted by her testimony at trial.

The State's DUI case was based on the testimony of Deputy Petrenchak, as contradicted by Mr. Mortenson's passenger and the lack of evidence of impaired driving. The State cannot overcome its burden to show that beyond any reasonable doubt the faulty and confusing concluding instruction did not have an effect on the jury's verdict.

- 3. The admission of evidence that Mr. Mortenson changed his mind and refused to submit to potentially inculpatory testing based on advice of counsel violated his right to counsel and was substantially more prejudicial than probative.**

The State sought to admit Mr. Mortenson's initial willingness to submit to a breath test as well as his subsequent refusal. Mr. Mortenson

objected as a violation of attorney-client privilege and ER 403. 1/10/12 RP 106-08; CP 28. The court ruled that Mr. Mortenson's statements were admissible—both the initial acquiescence and the subsequent refusal. 1/10/12 RP 110-12. In an attempt to protect Mr. Mortenson's right to counsel, the court provided the State could not admit that the refusal followed an attorney-client privileged consultation. *Id.*; 3/20/12 RP 110-13; *see* 3/14/12 RP 29, 63 (adopting Judge Gain's pretrial rulings). However, the court further ruled that if Mr. Mortenson admitted testimony suggesting his refusal was based on the advice of counsel, the State would be permitted to elicit evidence surrounding the conversation with counsel, such as Mr. Mortenson's demeanor and conduct. 3/20/12 RP 113-22. In light of this ruling, defense counsel elected not to elicit the basis for Mr. Mortenson's refusal. *See* 3/20/12 RP 120-22.

The State emphasized Mr. Mortenson's refusal; in fact, it was its theme of the case. 3/20/12 RP 24, 29 (opening statement), 3/22/12 RP 86, 103 (closing argument); Exhibit 9 at slide 18.⁶ In its PowerPoint presentation to the jury during closing argument, the State literally highlighted Mr. Mortenson's "**refusal to take breath test**" as evidence of his guilt. Exhibit 9 at slide 16. In the next slide, it detailed his change of mind regarding the breath test, and then concluded with the thematic

⁶ The pagination is the same in both versions of the PowerPoint presentation submitted as part of Exhibit 9.

question, “SECRETS?” Exhibit 9 at slides 17-18. The admission of the evidence violated Mr. Mortenson’s constitutional right to counsel and was substantially more prejudicial than probative.

- a. The trial court erroneously permitted the State to admit and rely on evidence purporting to show consciousness of guilt, but the probative value was substantially outweighed by the resulting prejudice and the admission violated Mr. Mortenson’s constitutional right to counsel.

Evidence purporting to show a person’s consciousness of guilt should not be admitted where it has limited probative value but significant prejudicial effect, including evidence relating to the refusal to submit to breath tests following an allegation of drunken driving. ER 403; *State v. Cohen*, 125 Wn. App. 220, 225, 104 P.3d 70 (2005). Refusal to submit to a breath test is inadmissible if “its probative value is outweighed by the danger of unfair prejudice, confusion, or misleading the jury.” *Cohen*, 125 Wn. App. at 225.

As an example of evidence pertaining to a person’s consciousness of guilt, evidence that a person fled the police may be admitted. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). However, flight evidence is often ambiguous and thus not particularly probative. *See e.g., United States v. Foutz*, 540 F.2d 733, 739-40 (4th Cir. 1976) (“The inference that one who flees from the law is motivated by consciousness of guilt is weak at best.”).

Similarly, the refusal to cooperate with police requests to provide potentially incriminating evidence is not necessarily evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 218-19, 181 P.3d 1 (2008). Silence “is ambiguous because an innocent person may have many reasons for not speaking.” *Id.* (quoting *People v. DeGeorge*, 541 N.E.2d 11, 13 (N.Y. 1989)); *Doyle v. Ohio*, 426 U.S. 610, 617 n.8, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (noting that even aside from Miranda warnings, silence may have several explanations consistent with innocence and is of dubious probative value).

The prosecution was well aware Mr. Mortenson changed his mind about submitting to a breath test based upon a telephone conversation with counsel while he was held at the police station. Nonetheless, the State sought admission of his initial willingness as well as his subsequent refusal. The court purported to sanitize the evidence by prohibiting the State from introducing evidence that his subsequent refusal followed a conversation with counsel. Rather than cure the prejudice or constitutional violation, however, the court’s ruling required Mr. Mortenson to introduce the fact of his consultation with counsel in order to explain to the jury why he changed his mind over a short period of time and why his refusal was not indicative of guilt. The court’s ruling purported to empower Mr. Mortenson, but it in fact left him with no

choice at all. Moreover, the court further hamstrung Mr. Mortenson by ruling his introduction of the consultation with counsel would open the door to the State eliciting evidence about Mr. Mortenson's demeanor during his call to counsel and other surrounding details. 3/20/12 RP 120-22.

The right to the effective assistance of counsel is guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution. U.S. Const. amend. VI; Const. art. I, § 22. The right to counsel includes the right to confidential advice about matters material to the representation. *State v. A.N.J.*, 168 Wn.2d 91, 113, 225 P.3d 956 (2010).

Washington protects the right to private attorney-client communications by statute as well as by the explicit constitutional right to be free from governmental intrusion into one's "private affairs." Const. art. I, § 7; RCW 5.60.060(2)(a). In recognition of the importance of attorney-client communication, the statutory attorney-client privilege allows a client "to communicate freely with an attorney without fear of compulsory discovery." *Dietz v. Doe*, 131 Wn.2d 835, 842, 843, 935 P.2d 611 (1997). Information generated by a request for legal advice is protected and confidential. *State v. Perrow*, 156 Wn. App. 322, 328, 231 P.3d 853 (2010); *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 130 P.3d 840, *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2006).

Mr. Mortenson sought out and relied on advice of counsel in refusing to submit to a breath test. Nonetheless the court allowed the State to introduce not only evidence of his refusal to take a breath test but also that this refusal contradicted his prior willingness. 3/20/12 RP 79-84 (eliciting evidence of Mortenson's initial willingness to take test and then reversal of course to refuse to comply). The State capitalized on the opportunity to argue that Mr. Mortenson's about face on the matter and ultimate refusal to submit to the test demonstrated his extreme intoxication. 3/20/12 RP 24, 29 (arguing in opening that case is about "secrets"), 3/22/12 RP 86, 102-03 (arguing in summation that secret was Mortenson knew how intoxicated he was and did not want jury to know); Exhibit 9 at slides 16-18 (relying on refusal as substantive evidence of guilt and emphasizing "secrets" theme).

"[D]espite its lack of probative value" evidence regarding an accused person's pretrial silence will "undoubtedly" be considered by the jury. *DeGeorge*, 541 N.E.2d at 13. Pretrial silence "is ambiguous because an innocent person may have many reasons for not speaking" including "explicit instructions not to speak from an attorney." *Id.* The trial court ignored the likelihood that jurors "may not be sensitive to the wide variety of alternative explanations for a defendant's pretrial silence, [and] may

assign much more weight to it than is warranted and thus the evidence may create a substantial risk of prejudice.” *Id.*

The error here is like that found by this Court in *State v. Gauthier*, ___ Wn. App. ___, 298 P.3d 126 (2013). In *Gauthier*, the defendant’s constitutional right to privacy was violated when the prosecutor was allowed to use his invocation of the right to refuse consent to a warrantless DNA search as substantive evidence of his guilt. 298 P.3d at 130-32. Like here, Mr. Gauthier’s refusal was based on his consultation with counsel. *Id.* at 129. Although the trial court did not allow in evidence of Mr. Gauthier’s consultation with counsel, this Court found error based solely on the admission of the refusal to consent. *Id.* at 132. Here too, the reliance on Mr. Mortenson’s invocation of his constitutional right was erroneously introduced as substantive evidence of his guilt.

b. The error in admitting the evidence requires reversal of the DUI conviction.

The trial court’s evidentiary rulings violated Mr. Mortenson’s constitutional right to counsel and to remain silent. As discussed above, the State cannot show these constitutional violations were harmless to Mr. Mortenson’s DUI conviction. *See* Section D.2.c, *supra*; *Gauthier*, 298 P.3d at 133-34 (error not harmless where prosecutor repeatedly relied on

refusal to undermine credibility and as substantive evidence of guilt).

Consequently, the conviction should be reversed.

Furthermore, the trial court abused its discretion by admitting the evidence of Mr. Mortenson's initial agreement and subsequent refusal to submit to breath tests and by ruling that any explanation by Mr. Mortenson opened the door to further attorney-client privileged information. These rulings caused prejudice and distracted the jury from its mission—determining whether the State had proved the DUI elements beyond a reasonable doubt. The conviction should be reversed on this separately sufficient ground.

4. The State failed to prove Mr. Mortenson drove recklessly, requiring reversal of the attempting to elude conviction and dismissal of the charge.

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential

elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

To prove Mr. Mortenson attempted to elude a pursuing police vehicle in violation of RCW 46.61.024, the State is required to prove beyond a reasonable doubt that he drove in a reckless manner while attempting to elude. RCW 46.61.024(1). Though the statute has been amended from requiring “wanton or willful disregard,” driving in a reckless manner still requires the State to show the defendant was driving in a rash or heedless manner, indifferent to the consequences. *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005) (citing *State v. Bowman*, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960)); *State v. Ridgley*, 141 Wn. App. 771, 779-81, 174 P.3d 105 (2007); see Laws of 2003, ch. 101, § 1.⁷

Deputy Petrenchak first noticed Mr. Mortenson’s vehicle driving 65 miles per hour in a 45 mile per hour zone on a major road with no other vehicles present. 3/20/12 RP 40-43, 100. He had no concerns with the manner of driving other than the speed. 3/20/12 RP 96-98, 100-01. Deputy Petrenchak followed Mr. Mortenson for six to eight blocks on this mostly straight road without noting any driving concerns aside from

⁷ The jury was instructed as to this definition. CP 124 (instruction 9).

exceeding the speed limit. 3/20/12 RP 43-44, 50, 101-02, 102-03.

Speeding alone is not sufficient to constitute reckless driving. *See State v. Hanna*, 123 Wn.2d 704, 713, 871 P.2d 135 (1994) (permissive inference of recklessness permitted because State showed excessive speed of 80 to 100 miles per hour, proximity to another speeding vehicle, and steady traffic); *see also State v. Farr-Lenzini*, 93 Wn. App. 453, 469, 970 P.2d 313 (1999) (erratic driving in addition to excessive speed of as much as twice the speed limit sufficient for permissive inference).

Aside from the initial speed, the only driving concerns Deputy Petrenchak witnessed came after Mr. Mortenson slowed the vehicle substantially. Deputy Petrenchak testified that while the vehicle was driven at or below the speed limit, it touched or crossed the center line and fog line and turn signals were not utilized. 3/20/12 RP 46-47, 126-27. Deputy Petrenchak described this driving as “erratic” while acknowledging that Mr. Mortenson made six or seven turns without violating the speed limit or exhibiting any other driving concerns. 3/20/12 RP 46-47, 53, 103-04, 122-23, 124-26. Mr. Mortenson’s vehicle did not approach the curb, parked cars, or anything similar while making these turns. 3/20/12 RP 127. Deputy Petrenchak had no difficulty following the vehicle. 3/20/12 RP 130-31.

The evidence is insufficient for a rational jury to find Mr. Mortenson was driving in a rash or heedless manner, indifferent to the consequences. There were no cars or pedestrians on or near the road. The jury specifically found the driving did not threaten any person with physical injury or harm. CP 138 (special verdict form). Mr. Mortenson made competent turns at a slow speed. At one point he touched or crossed the center and fog lines, but he was proceeding at or below the speed limit and was not at risk of encountering any obstacles. Even when he was driving above the speed limit, Deputy Petrenchak noticed no rash, heedless, or indifferent driving.

Because the evidence was insufficient to prove the recklessness element beyond a reasonable doubt, Mr. Mortenson's attempting to elude conviction should be reversed and the charge dismissed with prejudice. *See, e.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

5. Cumulative trial errors denied Mr. Mortenson his constitutional right to a fair trial.

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Mortenson a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel’s errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury’s verdict. As previously discussed, the jury pool was tainted when it was informed Mr. Mortenson had been convicted of driving while intoxicated on four or more prior occasions. The confusing jury instructions further ensured an

unfair trial. And the State was allowed to introduce evidence of Mr. Mortenson's refusal to submit to a breath test although the decision was based on advice of counsel.

Moreover, the evidence against Mr. Mortenson on both charges was not airtight. The evidence showed Mr. Mortenson's driving was controlled and competent other than exceeding the speed limit, particularly in light of the lack of traffic or pedestrian presence. Further, the State had no test results—either field sobriety, breathalyzer, or blood alcohol—to prove Mr. Mortenson's impairment. Mr. Mortenson's passenger could not recall any details that would have supported the State's case. She corroborated that Mr. Mortenson was operating the vehicle at low speed when law enforcement pulled him over.

Mr. Mortenson's convictions should be reversed because in the cumulative the trial errors materially affected the outcome.

6. The sentence should be remanded because the term of confinement plus the term of community custody exceed the statutory maximum.

A trial court only possesses the power to impose sentences provided by law.” *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). This

Court reviews de novo whether a sentence is legally erroneous. *Brooks*, 166 Wn.2d at 667.

The controlling statutes instruct the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. RCW 9A.20.021; RCW 9.94A.701(9). RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

In *State v. Boyd*, our Supreme Court held that RCW 9.94A.701(9) requires the sentencing court to impose an aggregate term of confinement and community custody within the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012). The defendant in *Boyd* was sentenced after the 2009 amendments to the Sentencing Reform Act went into effect. *Id.* at 472-73. His sentence exceeded the 60-month statutory maximum by imposing a 54-month term of confinement and 12-month term of community custody. *Id.* at 472. The sentence included a “*Brooks* notation,” which stated “that the total term of confinement and community custody actually served could not exceed the 60-month statutory maximum. *Id.* The Court reasoned that the “‘*Brooks* notation’ procedure no longer complies with [amended] statutory requirements.” *Id.* Because

Mr. Boyd was sentenced after RCW 9.94A.701(9) became effective, “the trial court, not the Department of Corrections, was required to reduce Boyd’s term of community custody to avoid a sentence in excess of the statutory maximum.” *Id.* at 473. Accordingly, the Court “remand[ed] to the trial court to either amend the community custody term or resentence Boyd . . . consistent with RCW 9.94A.701(9).” *Id.*; accord *State v. Land*, 172 Wn. App. 593, 603, 295 P.3d 782 (2013) (applying *Boyd* to reach same result).

The same result is compelled here. Mr. Mortenson was sentenced in April 2012 on two class C felony convictions. CP 142; RCW 46.61.024(1); RCW 46.61.502(6). The statutory maximum for these crimes is 60 months. RCW 9A.20.021(1)(c); RCW 9.94A.030(49); accord CP 143. He was sentenced to 60 months confinement on one count (DUI) and 29 months on the other (attempting to elude), with the terms running concurrently. CP 145. Thus, the total confinement term imposed was 60 months. CP 145. However, the court also imposed a 12-month term of community custody for the DUI count. CP 146; RCW 9.94A.411 (classifying felony DUI as crime against a person). Though the judgment and sentence contains a *Brooks* notation asking DOC to reduce the term, the sentence is in violation of RCW 9.94A.701(9) and *Boyd*. Like in *Boyd*, the sentence should be remanded to the trial court to strike

the term of community custody or amend Mr. Mortenson's sentence to comply with RCW 9.94A.701(9).

7. Mr. Mortenson's sentence should be remanded because the trial court miscalculated the offender score and the State failed to present sufficient evidence to support the proposed criminal history.

This Court reviews the trial court's calculation of the offender score de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). The meaning of the Sentencing Reform Act statute is also a question of law reviewed de novo. *State v. Morales*, 168 Wn. App. 489, 492 & n.7, 278 P.3d 668 (2012). Mr. Mortenson objected to the existence of the State's proffered offender score, including the existence of prior offenses. 4/13/12 RP 6-7.⁸

In Washington, a sentencing court's calculation of a standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which starts with a list of his prior convictions. *See*

⁸ Even if Mr. Mortenson had not objected below, he would still be permitted to raise these legal challenges on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (defendant need not affirmatively object to offender score to preserve legal error in miscalculation upward); *State v. Wilson*, 170 Wn.2d 682, 244 P.3d 950 (2010) (erroneously scored prior conviction is a legal error resulting in miscalculated offender score) *see also State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012) (only defendant's affirmative acknowledgment of facts and information alleged at sentencing relieves State of its burden).

RCW 9.94A.030(11); RCW 9.94A.525. Which prior convictions are included depends upon the washout provisions of RCW 9.94A.525(2) and the specific provisions in RCW 9.94A.525(3) through (22) that dictate how to calculate (or count) the score from those included prior convictions. RCW 9.94A.525;⁹ *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010); *see Morales*, 168 Wn. App. at 492. When a person is sentenced for more than one current offense, the sentence range for each current offense is determined by using all other current convictions as if they were prior convictions for the purpose of the offender score, unless the court finds they encompass the same criminal conduct. RCW 9.94A.525(1), RCW 9.94A.589(1)(a).

a. The offender score for the DUI conviction was miscalculated.

The washout provisions of RCW 9.94A.525(2)(e) govern which prior offenses should be included in Mr. Mortenson's offender score. As stated previously, RCW 9.94A.525(2) sets forth the rules for which prior offenses are included and which washout. The subsections of RCW 9.94A.525(2) apply to different crimes or classes of crimes. For example, class A and prior felony sex convictions are governed by RCW 9.94A.525(2)(a), which states that all such prior convictions are included in the offender score. Subsections (c) through (e) apply to class C felonies

⁹ A copy of RCW 9.94A.525 is included herein as Appendix C.

and serious traffic offenses. The State did not allege Mr. Mortenson's offender score included anything other than class C felonies and serious traffic offenses. *See* CP 389-93 (presentence statement).¹⁰

- i. The statute, legislative history, case law and principles of statutory interpretation dictate that the washout provisions of RCW 9.94A.525(2)(e) alone are applicable to Mr. Mortenson's offender score for the DUI count.

Subsection (2)(e) is a specific provision directed at which offenses are to be included when sentencing an individual for felony DUI. RCW 9.94A.525(2)(e); *Morales*, 168 Wn. App. at 499, 500. A reading of subsection (2) makes clear that subsection (2)(e) is the only provision relevant to determining which prior offenses are included on a DUI sentence. Subsection (2) states in relevant part:

(2) . . .

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

¹⁰ Mr. Mortenson does not concede each of labeled "misdemeanors" on the State's presentence statement constitute misdemeanor offenses, as many appear to be traffic infractions. However, the State did not seek to include such offenses in Mr. Mortenson's offender score, and the court did not include them. CP 148. Thus, the Court need not consider them.

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

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

The provisions relating to class C felonies and serious traffic offenses, subsections (c) and (d), state at the outset that they apply “except” in those cases which subsection (e) applies. RCW 9.94A.525(2)(c), (d).

Subsection (2)(e) applies to the case at bar, a felony DUI conviction.

RCW 9.94A.525(2)(e).

This reading of the statute is confirmed by this Court’s case law.

In *Morales*, this Court held that the washout provisions of subsection (2)(d) are not applicable to a DUI sentence comprised under (2)(e). 168

Wn. App. at 499-500. “Because scoring for this case is controlled by subsection (2)(e), subsection (2)(d) is not relevant to scoring for the current crime.” *Id.* Thus, where subsection (2)(e) applies, in other words in sentences for DUI convictions, subsections (2)(c) and (d) are not relevant.

This reading of the statute also comports with the legislative intent for felony DUI sentencing. The legislature sought to elevate misdemeanor DUI offenses to a felony offense where the individual had previously been convicted of driving under the influence of alcohol or other intoxicants. *See* RCW 46.61.5055(4); Senate Bill Report on H.B. 3317, at 3, 59th Leg., Reg. Sess. (Wash. 2006) (summary of testimony in favor of bill indicates, “This legislation is directed at the chronic drunk driver” and “deter[ing] a habitual drunk driver.”). The legislature sought to elevate punishment for repeat offenders within the same class of offense—driving under the influence. Senate Bill Report, at 3. It was not concerned with unrelated class C felony offenses such as theft, burglary, assault or harassment. *See* RCW 46.61.5055; Final Bill Report on H.B. 3317, at 2, 59th Leg., Reg. Sess. (Wash. 2006) (reporting that DUI offender with four prior misdemeanor DUIs would receive presumptive sentence range of 22-29 months, or an offender score of 4 as per RCW 9.94A.510, thus not including unrelated felonies); House Bill Report on H.B. 3317, at 3, 59th

Leg., Reg. Sess. (Wash. 2006) (same); Senate Bill Report, at 2-3 (same; also reporting only “prior offenses” under DUI laws are counted and washout periods are clarified as applied to DUIs); *see also* RCW 9.94A.010(3) (sentences are to “[b]e commensurate with the punishment imposed on others committing similar offenses”).

If there is any ambiguity as to whether RCW 9.94A.525(2)(c) and (d) should apply to sentences for DUI convictions, the rule of lenity requires this Court to resolve that ambiguity in favor of the defendant. *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010) (“The rule of lenity requires us to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary.”).

For all of the above reasons, only those prior convictions that are included under RCW 9.94A.525(2)(e) count towards Mr. Mortenson’s offender score for the DUI count. Thus the court improperly included four class C felony convictions for identity theft, harassment, attempt to elude police and theft in the second degree (not firearm). CP 148. The court also improperly included Mr. Mortenson’s other current offense for attempt to elude police because other current offenses must be treated the same as a prior conviction for purposes of calculating the offender score. RCW 9.94A.525(1); RCW 9.94A.589; CP 142-43, 148; *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).

- ii. The trial court miscalculated which prior offenses washout under RCW 9.94A.525(2)(e).

Subsection (2)(e) provides that where the current conviction is for DUI, certain “prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score.” RCW 9.94A.525(2)(e); *see* RCW 9.94A.030(44) (defining “serious traffic offense”). Such prior convictions may only be included in the offender score if “(i) the prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered ‘prior offenses within ten years’ as defined in RCW 46.61.5055.” RCW 9.94A.525(2)(e).

In *State v. Draxinger*, Division Two held that the offender score should be calculated using either (2)(e)(i) or (2)(e)(ii). *State v. Draxinger*, 148 Wn. App. 533, 537, 200 P.3d 251 (2008), *review denied* 166 Wn.2d 1013, 210 P.3d 1018 (2009). “Subsection (ii) applies only if the defendant has committed at least four DUI-related offenses in 10 years.” *Id.* Subsection (i) is inapplicable unless the defendant has fewer than four

prior offenses within 10 years as defined in RCW 46.61.5055. *Id.* at 537-38.

Here, the State alleged Mr. Mortenson had four prior DUI offenses for which he was arrested within 10 years before the arrest for the current offense. *Compare* CP 389-90 with RCW 46.61.5055(14)(a), (c).¹¹ Accordingly the only prior offenses that should be included in Mr. Mortenson's offender score are those which qualify as serious traffic offenses under RCW 9.94A.030(44) (as set forth in subsection (2)(e)) and RCW 46.61.5055(14)(a) (as set forth in subsection (2)(e)(ii)) and for which the arrest occurred within ten years before or after the arrest for the current offense. RCW 9.94A.525(2)(e); *Draxinger*, 148 Wn. App. at 537-38; *Morales*, 168 Wn. App. at 496-98 (applying plain language of subsection (2)(e)(ii)).

Mr. Mortenson was arrested on the current DUI charge on August 21, 2010. *See* CP 1. RCW 9.94A.030(44) and RCW 46.61.5055(14)(a) require that only his prior convictions for DUI and reckless driving for which the arrest occurred on or after August 21, 2000 should be included in his offender score.¹² As argued below, the State did not adequately prove the facts necessary to show Mr. Mortenson's prior arrest dates or

¹¹ A copy of RCW 46.61.5055 is included herein as Appendix D.

¹² A copy of RCW 9.94A.030(44) is included herein as Appendix E.

that the municipal offenses would be classified as a serious traffic offense under state law. *See* RCW 9.94A.030(44)(b) (requiring comparability of municipal convictions); RCW 46.61.5055(14) (only convictions under an “equivalent local ordinance” are included). Regardless, clearly his convictions for misdemeanor DUI from 1998 and before cannot be included in his offender score pursuant to subsection (2)(e)(ii). Thus, instead of an offender score of 16, Mr. Mortenson’s offender score as proved by the State is at most 4. *See* CP 148 (only prior offenses that count under above analysis are three prior Federal Way misdemeanor DUIs and one prior Fife misdemeanor DUI; as noted above, the other current offense of attempting to elude does not count as a prior conviction).¹³

Even if the Court determines subsection (2)(e)(i) applies here, the trial court grossly over-counted Mr. Mortenson’s prior offenses. Under subsection (e)(i) only those prior “serious traffic offenses” under RCW 9.94A.030(44)¹⁴ that “were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence” shall be included. RCW

¹³ With an offender score of 4, Mr. Mortenson’s presumptive sentencing range is 22 to 29 months, instead of the 60 months he was found to have. *Compare* CP 143 *with* RCW 9.94A.510 (sentencing grid).

¹⁴ The State’s proffered criminal history does not include any other prior convictions that qualify under RCW 9.94A.525(e).

9.94A.525(2)(e); *Morales*, 168 Wn. App. at 499 (the “prior convictions” referenced in (e)(i) refers back to the qualifications of subsection (e)). Mr. Mortenson’s last date of release or judgment and sentence relevant to subsection (e) appears to be for the September 2005 Federal Way DUI. As discussed below, the State did not prove the date of release for this offense or that the Federal Way conviction is comparable to the state DUI offense. However, assuming this DUI conviction is the last date of release, or judgment and sentence if Mr. Mortenson was not confined on that conviction, only those prior serious traffic offenses (misdemeanor DUI or reckless driving) which were committed within 5 years of that date shall be included.

As the *Morales* court found, subsection (e)(i) contains different language than the other washout provisions of subsection (2). 168 Wn. App. at 499. The legislature’s use of different words in the same statute requires the presumption “that a different meaning was intended to attach to each word.” *Id.* (quoting *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (internal quotation omitted)). Thus, unlike subsection (2)(d)’s washout provisions, subsection (2)(e)(i)’s provisions do not mandate the counting of all convictions unless Mr. Mortenson remained “crime free” for a five year period. *Id.* at 499-500. Moreover, the differing language also compels that the prior serious traffic

offenses be measured against a single “last date of release from confinement . . . or judgment and sentence.” *See id.* at 498-99. Such a reading is also in harmony with subsection (2)(e)(ii) which fixes the arrest date for the current offense as the single date upon which the ten year prior offense bar is measured. RCW 9.94A.525(2)(e)(ii); *Morales*, 168 Wn. App. at 497 (rejecting reading of statute which “sets up a conflict between subsections (2)(e)(i) and subsection (2)(e)(ii)” because the Court “will not read a conflict into a statute where there is none”).

RCW 9.94A.525(11) provides that each of the serious traffic offenses that shall be included in the offender score under subsection (2)(e) count as one point. If the State had properly proved each of Mr. Mortenson’s prior convictions under (2)(e)(ii), the correct offender score would be four—one point each for his prior Washington state municipal DUI convictions from 2005 (two convictions), 2002 and 2001.

b. The offender score for the attempting to elude conviction was miscalculated.

Mr. Mortenson was also sentenced for attempting to elude a pursuing police vehicle, a class C felony. RCW 46.61.024; CP 142. Unlike the DUI offense, the provisions of RCW 9.94A.525(2)(c) and (d) dictate which prior offenses are included in the offender score for this count. Subsection (11) mandates how those included prior offenses

should be counted. The court therefore correctly included Mr. Mortenson's prior felony class C convictions for identity theft, harassment, attempting to elude, and second degree theft under subsection (2)(c). The five year "crime free" washout rules of subsection (2)(d)—and not the differing provisions of (2)(e)—also apply to Mr. Mortenson's prior serious traffic offenses, as defined in RCW 9.94A.030(44). Mr. Mortenson did not remain "crime free" for any five year period during the relevant prior serious traffic offenses.

However, the trial court improperly included a 2001 negligent driving conviction from Sumner municipal court. *Compare* CP 390 (showing DUI offense as "amended"; listing 1st degree negligent driving under same cause number) *with* CP 148 (improperly listing offense as "DUI"). Even if the State had properly proved this prior conviction and its comparability to a state offense, negligent driving does not qualify as a serious traffic offense under RCW 9.94A.030(44). Thus, Mr. Mortenson's offender score on the attempting to elude count should be reduced by one. Assuming the State properly demonstrated the other prior offenses, Mr. Mortenson's offender score on this charge is 15, not 16.

- c. The State failed to prove the prior offenses by a preponderance of the evidence, rendering the offender score on both counts erroneous.

Even if the court had applied properly the statute to calculate Mr. Mortenson's offender score, many of the State's proffered prior offenses should not have been included because the State did not sufficiently prove their existence. Our Supreme Court has consistently held that the State bears the constitutional burden of proving prior convictions by a preponderance of the evidence. *E.g., Graciano*, 176 Wn.2d at 538-39 (contrasting burden on prior offenses, which State bears by preponderance, with finding of same criminal conduct); *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); U.S. Const. amend. XIV; Const. art. I, § 3. The burden is on the State "because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). For this reason, the record before the sentencing court must support the criminal history determination. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). "This reflects fundamental principles of due process, which require that a sentencing court base its decision on

information bearing ‘some minimal indicium of reliability beyond mere allegation.’” *Id.* (quoting *Ford*, 137 Wn.2d at 481) (emphasis in original).

A prosecutor’s summary of criminal history is not sufficient to satisfy the State’s burden. *Hunley*, 175 Wn.2d at 915. The best evidence of a prior conviction is a certified copy of the judgment and sentence. *Id.* at 910. However, the State may also establish criminal history by presenting comparable certified documents of record or transcripts of prior proceedings. *Id.* at 910-11.

The calculation of Mr. Mortenson’s offender score depends upon several matters related to his prior convictions:

- 1) Whether the prior conviction exists;
- 2) The offense underlying the prior conviction (RCW 9.94A.525(2)(e) (listing prior convictions that count); RCW 9.94A.525(2)(e)(ii) (further defining prior convictions that count as those within the definition of RCW 46.61.5055(14));
- 3) Whether the conviction was the result of a charge that was originally filed as a qualifying prior conviction (RCW 46.61.5055(14));
- 4) Whether any relevant county or municipal offenses are the equivalent of a qualifying offense under State law (RCW 46.61.5055(14); RCW 9.94A.030(44)(b));
- 5) The date of arrest (RCW 46.61.5055(14)(c) (defining “within ten years” to mean that “the arrest” for the prior offense “occurred within ten years of the arrest for the current offense)); and

- 6) The last date of release from confinement or the date of entry of the judgment and sentence (to the extent RCW 9.94A.525(2)(e)(i) is relevant).

The State was required to prove each of these qualifying factors by a preponderance of the evidence. *See Hunley*, 175 Wn.2d at 915-16.

The State submitted a presentence statement as well as a compilation entitled “Certified Copies of Defendant’s Criminal History.” CP 156-376, 378-94. *Hunley* plainly holds that the presentence statement of the prosecutor is insufficient proof of the existence of any of Mr. Mortenson’s prior convictions or the other factors underlying them. 175 Wn.2d at 914-15. With regard to the certified copies, the State made no effort to parse out the qualifying factors or otherwise prove up each of the prior offenses. *See* CP 378-94 (listing alleged prior offenses by cause number and date of offense without providing information or citation to documents supporting above-listed factors); 4/13/12 RP 4-6 (prosecutor simply lists alleged prior offenses at sentencing hearing).

Parsing through the State’s compilation of criminal history documents reveals the following deficiencies, which Mr. Mortenson points out without agreeing that any of the below-listed prior offenses count towards his offender score.

- i. Identity Theft (Cause No. 06-1-01424-5):* The State’s compilation of records fails to include the best evidence, a judgment and

sentence. Certified copies of the information, first amended information, certification of probable cause statement and a guilty plea form are included. CP 361-76. However, these documents fail to prove the existence of a conviction for the alleged crime. *See Hunley*, 175 Wn.2d at 914-15.¹⁵

ii. Federal Way Municipal DUI (Cause No. CA0038527): The State's compilation fails to include the date of release from confinement, if any, the municipal offense underlying the conviction, or the equivalence of the municipal ordinance to a listed qualifying offense in RCW 9.94A.030(44) and 46.61.5055(14). *See* CP 180-201 (includes judgment and sentence). Mr. Mortenson also doubts in many circumstances that a copy of the docket would satisfy the State's preponderance of the evidence burden with relation to the date of arrest relevant under RCW 46.61.5055(14)(c). However, the arrest for this offense was in all likelihood within ten years of his August 2010 arrest on the current offense.

iii. Federal Way Municipal DUI (Cause No. CA0036452): The State's compilation fails to include the date of release from confinement, if any, the municipal offense underlying the conviction, or the equivalence

¹⁵ The compilation of criminal history documents includes certified judgments and sentences for the three other alleged class C felony prior offenses. CP 341-56.

of the municipal ordinance to a listed qualifying offense in RCW 9.94A.030(44) and 46.61.5055(14). *See* CP 202-38 (includes judgment and sentence).

iv. Fife Municipal DUI (Cause No. C00016089): The State's compilation includes only the docket. It fails to demonstrate the date of release from confinement, if any, and the date of arrest, to the extent it is relevant. *See* CP 239-84. The State did not include a copy of the judgment.

v. Sumner Municipal Negligent Driving (Cause No. C0013317): The State's compilation fails to demonstrate the date of arrest, to the extent it is relevant, the date of release from confinement, if any, the municipal or other offense underlying the conviction, the equivalence of the municipal ordinance to a listed qualifying offense in RCW 9.94A.030(44) and 46.61.5055(14), or that the negligent driving conviction was the result of charges originally filed as a qualifying offense. *See* CP 285-304.

vi. Federal Way Municipal DUI (Cause No. CA0019732): The State's compilation fails to demonstrate the date of arrest, to the extent it is relevant, the date of release from confinement, if any, the municipal or other offense underlying the conviction, the equivalence of the municipal

ordinance to a listed qualifying offense in RCW 9.94A.030(44) and 46.61.5055(14). *See* CP 305-13.

vii. King County District Court (Federal Way) Reckless Driving (Cause No. CA08334): The State's compilation fails to prove the date of release from confinement, if any. *See* CP 314-19.

viii. King County District Court (So. Division) DUI (Cause No. C00137343): The State's compilation fails to prove the date of release from confinement. CP 320-24.

ix. King County District Court (Aukeen Division) DUI (Cause No. C0034213): The State's presentence report lists two separate misdemeanor DUI convictions under the same cause number. CP 391. The two dockets in the compilation of records list the same cause number and date of incident and the entries appear to correlate. *Compare* CP 325 *with* CP 328. The State has failed to show that Mr. Mortenson was convicted of two separate misdemeanor offenses. *See* CP 325-29 (lacking judgment and sentence). The compilation also fails to prove the date of arrest or release from confinement, if any. *Id.*

x. SeaTac Municipal DUI (Cause No. K0072165): For this offense, the State's compilation includes a certified copy of the order of release from custody. CP 162. The other documents provided by the State are a municipal court form that lists only the names of charges and

the citation. CP 163-65. These documents fail to prove the existence of a conviction on a qualifying offense or the equivalence of the municipal ordinance to a listed qualifying offense in RCW 9.94A.030(44) and 46.61.5055(14). *See id.*

xi. King County District Court (Federal Way Division) DUI (Cause No. 5246721): The State's compilation fails to demonstrate the date of arrest, if relevant, and the date of release, if relevant. *See* CP 330-34.

In light of these failings in the State's proof, the State failed to satisfy its burden to prove prior offenses by a preponderance of the evidence.

d. The remedy is resentencing.

The remedy for a miscalculated offender score is to remand for resentencing. *Wilson*, 170 Wn.2d at 691. The court's errors in miscalculating the offender score and the State's failures in proof decrease the presumptive range sentence significantly. The prosecution's failure to meet its burden of proof requires resentencing without reliance on the unproven criminal history allegations. *Mendoza*, 165 Wn.2d at 930.

E. CONCLUSION

The DUI conviction should be reversed on several alternative grounds: a new venire should have been called when the court revealed

prejudicial information related to prior offenses; the concluding jury instruction was ambiguous; evidence regarding Mr. Mortenson's contact with an attorney was erroneously admitted; and the cumulative effect of these trial errors. The attempting to elude conviction should be reversed because the evidence was insufficient to demonstrate driving in a reckless manner beyond a reasonable doubt. The aforementioned trial errors coupled with the deficiency in the evidence produced cumulative trial error on this count as well.

In the alternative, the sentence should be reversed and remanded to correct the offender score and strike the term of community custody.

DATED this 9th day of May, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX A

DRIVE

FILED
KING COUNTY, WASHINGTON

APR 13 2012

KNT
SUPERIOR COURT CLERK

COPY TO COUNTY JAIL APR 16 2012

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 10-1-08716-4 KNT
)	
Vs.)	JUDGMENT AND SENTENCE
)	FELONY (FJS)
CHRIS ROBERT MORTENSON)	
)	
Defendant,)	

I. HEARING

I.1 The defendant, the defendant's lawyer, RON HEIMAN, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Mother of defendant

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 3/23/2012 by jury verdict of counts I and II and on 1/11/2012 count III by guilty plea of:

Count No.: <u>I</u>	Crime: <u>ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE</u>
RCW <u>46.61.024</u>	Crime Code: <u>07618</u>
Date of Crime: <u>8/21/2010</u>	Incident No. _____

Count No.: <u>II</u>	Crime: <u>FELONY DUI</u>
RCW <u>46.61.502 & 46.61.5055</u>	Crime Code: <u>07650</u>
Date of Crime: <u>8/21/2010</u>	Incident No. _____

Count No.: <u>III</u>	Crime: <u>SEE NON FELONY J AND S</u>
RCW _____	Crime Code: _____
Date of Crime: _____	Incident No. _____

Count No.: _____	Crime: _____
RCW _____	Crime Code: _____
Date of Crime: _____	Incident No. _____

[] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a **firearm** in count(s) _____ RCW 9.94A.533(3).
- (b) While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.533(4).
- (c) With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
- (e) **Vehicular homicide** Violent traffic offense DUI Reckless Disregard.
- (f) **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
- (g) **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
- (h) **Domestic violence** as defined in RCW 10.99.020 was pled and proved for count(s) _____.
- (i) Current offenses encompassing the **same criminal conduct** in this cause are count(s) _____ RCW 9.94A.589(1)(a).
- (j) **Aggravating circumstances** as to count(s) _____: _____

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

Criminal history is attached in **Appendix B**.

One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	16	I	22 TO 29 MONTHS		22 TO 29 MONTHS	5 YRS AND/OR \$10,000
Count II	16	V	60 MONTHS		60 MONTHS	5 YRS AND/OR \$10,000
Count						
Count						

Additional current offense sentencing data is attached in **Appendix C**.

2.5 EXCEPTIONAL SENTENCE

Findings of Fact and Conclusions of Law as to sentence above the standard range:

Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.

Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. The court would impose the same sentence on the basis of any one of the aggravating circumstances.

An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State did did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

The Court **DISMISSES** Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
- Date to be set.
- Defendant waives presence at future restitution hearing(s).

Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500. *CON current*
w/ Court III

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); Court costs are waived;
- (b) \$100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); Recoupment is waived;
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA \$2,000, Fine for subsequent VUCSA (RCW 69.50.430); VUCSA fine waived;
- (e) \$ _____, King County Interlocal Drug Fund (RCW 9.94A.030); Drug Fund payment is waived;
- (f) \$ _____, \$100 State Crime Laboratory Fee (RCW 43.43.690); Laboratory fee waived;
- (g) \$ _____, Incarceration costs (RCW 9.94A.760(2)); Incarceration costs waived;
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 60. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; (Date): _____ by _____m.

29 months/days on count I; _____ months/days on count _____; _____ months/day on count _____

60 months/days on count II; _____ months/days on count _____; _____ months/day on count _____

The above terms for counts 1+2 are ~~consecutive~~ / concurrent.

The above terms shall run CONSECUTIVE CONCURRENT to cause No.(s) _____

The above terms shall run CONSECUTIVE CONCURRENT to any previously imposed sentence not referred to in this order. Civ 4 III see misd 465

In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is 60 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): _____ day(s) or days determined by the King County Jail.
 For nonviolent, nonsex offense, credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number.
 For nonviolent, nonsex offense, the court authorizes earned early release credit consistent with the local correctional facility standards for days spent in the King County Supervised Community Option (Enhanced CCAP).

4.5 **NO CONTACT:** For the maximum term of _____ years, defendant shall have no contact with _____

4.6 **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, as ordered in **APPENDIX G.**
 HIV TESTING: The defendant shall submit to HIV testing as ordered in **APPENDIX G.**
RCW 70.24.340.

4.7 (a) **COMMUNITY CUSTODY** for qualifying crimes committed before 7-1-2000, is ordered for one year (for a drug offense, assault 2, assault of a child 2, or any crime against a person where there is a finding that defendant or an accomplice was armed with a deadly weapon); 18 months (for any vehicular homicide or for a vehicular assault by being under the influence or by operation of a vehicle in a reckless manner); two years (for a serious violent offense).

(b) **COMMUNITY CUSTODY** for any **SEX OFFENSE** committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months.

- (c) **COMMUNITY CUSTODY** - for qualifying crimes committed after 6-30-2000 is ordered for the following established range or term:
- Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
 - Serious Violent Offense, RCW 9.94A.030 - 36 months
 - If crime committed prior to 8-1-09, a range of 24 to 36 months.
 - Violent Offense, RCW 9.94A.030 - 18 months
 - Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
 - If crime committed prior to 8-1-09, a range of 9 to 12 months.

~~The~~ The term of community custody shall be reduced by the Department of Corrections if necessary so that the total amount of incarceration and community custody does not exceed the maximum term of sentence for any offense, as specified in this judgment.

Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or the court.

APPENDIX H for Community Custody conditions is attached and incorporated herein.

APPENDIX J for sex offender registration is attached and incorporated herein.

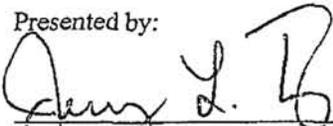
4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement, subject to the conditions set out in **Appendix H**.

4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 4/13/12


 JUDGE
 Print Name: Lori K. Smith

Presented by:

 Deputy Prosecuting Attorney, WSBA# 40739
 Print Name: Jerry Taylor

Approved as to form:

 Attorney for Defendant, WSBA # 20150
 Print Name: Ken Heiman

BEST IMAGE POSSIBLE

FINGERPRINTS



*First finger
is amputated*

RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE: _____
DEFENDANT'S ADDRESS: DAL

CHRIS ROBERT MORTENSON

DATED: 4/13/2012

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

JUDGE, KING COUNTY SUPERIOR COURT.

BY: Karla Sabidson
DEPUTY CLERK

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

S.I.D. NO. WA13650493
DOB: DECEMBER 29, 1964
SEX: M
RACE: W

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

No. 10-1-08716-4 KNT

vs.)

JUDGMENT AND SENTENCE,
(FELONY) - APPENDIX B,
CRIMINAL HISTORY

CHRIS ROBERT MORTENSON)

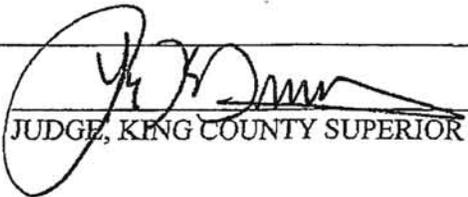
Defendant,)

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
IDENTITY THEFT	12/3/2008	ADULT	061014245	PIERCE CO
HARASSMENT	5/26/1995	ADULT	941050610	KING CO
ATTEMPT ELUDE PURSUING POLICE	3/11/1993	ADULT	921040731	KING CO
THEFT-2(NOT FIREARM)	3/11/1993	ADULT	911048823	KING CO
	Disposition Date			
DUI	✓ 9/4/2005	Adult Misd.	Ca0038527	FED WAY
DUI	✓ 2/20/2005	Adult Misd.	Ca0036452	FED WAY
DUI	✓ 10/7/2002	Adult Misd.	C00016089	FIFE
DUI	✗ 7/26/2001	Adult Misd.	C00013317	SUMNER
DUI	✓ 5/12/2001	Adult Misd.	Ca0019372	FED WAY
RECKLESS DRIVING	5/12/1998	Adult Misd.	Ca08334fw	FED WAY
DUI	4/9/1997	Adult Misd.	C0017343	FED WAY
DUI	7/5/1994	Adult Misd.	C00034213	AUKEEN
DUI	7/5/1994	Adult Misd.	C00034213	KC DISTRICT
DUI	12/23/1991	Adult Misd.	K00072165	SEATAC
DUI	3/28/1988	Adult Misd.	5246721ws	FED WAY

[] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: Lori K. Smith


JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 CHRIS ROBERT MORTENSON)
)
 Defendant,)
)

No. 10-1-08716-4 KNT
APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

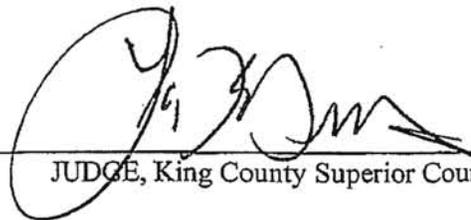
(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 4/13/2012



JUDGE, King County Superior Court

Lori K. Smith

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 10-1-08716-4 KNT
)	
vs.)	APPENDIX G
)	ORDER FOR BIOLOGICAL TESTING
CHRIS ROBERT MORTENSON)	AND COUNSELING
)	
Defendant,)	
)	

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If (2) is checked, two independent biological samples shall be taken.

Date: Lori K. Smith



JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRIS ROBERT MORTENSON

Defendant,

No. 10-1-08716-4 KNT

JUDGMENT AND SENTENCE

APPENDIX H

COMMUNITY CUSTODY

(If any)

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community restitution;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location; and
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)
- 7) Notify community corrections officer of any change in address or employment;
- 8) Upon request of the Department of Corrections, notify the Department of court-ordered treatment;
- 9) Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

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 comply with the following crime-related prohibitions: _____

Obtain Alcohol Eval + follow rec treatment within 30 days of release.

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition

Date: Lori K. Smith

[Signature]
JUDGE

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

Defendant,

Chris Robert Mortenson

No. 10-1-08716-4 KNT

APPENDIX F
ADDITIONAL CONDITIONS OF SENTENCE

No moving violations

Must not operate a motor vehicle w/o Ignition Interlock Device set at .02

Cannot enter any business where alcohol is the primary commodity for sale

No driving without valid license + insurance

No criminal law violations

4/13/2012

Date

JUDGE, King County Superior Court

Lori K. Smith

APPENDIX F

APPENDIX B

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and three verdict forms, A and B and C. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Attempting to Elude a Pursuing Police Vehicle as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Attempting to Elude a Pursuing Police Vehicle, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Failure to Obey Officer. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You must fill in the blank provided in verdict form C with the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given a special verdict form for the crime charged in Count I. If you find the defendant not guilty of the crime attempting to elude a pursuing police vehicle, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach.

In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

APPENDIX C

RCW 9.94A.525
Offender score.

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

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

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

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

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

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

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

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or

any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

(f) Prior convictions for a repetitive domestic violence offense, as defined in RCW 9.94A.030, shall not be included in the offender score if, since the last date of release from confinement or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(g) This subsection applies to both adult and juvenile prior convictions.

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses.

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

(ii) In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served

concurrently as one offense, and count all juvenile convictions entered on the same date as one offense. Use the conviction for the offense that yields the highest offender score.

(b) As used in this subsection (5), "served concurrently" means that: (i) The latter sentence was imposed with specific reference to the former; (ii) the concurrent relationship of the sentences was judicially imposed; and (iii) the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense.

(6) If the present conviction is one of the anticipatory offenses of criminal attempt, solicitation, or conspiracy, count each prior conviction as if the present conviction were for a completed offense. When these convictions are used as criminal history, score them the same as a completed crime.

(7) If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.

(8) If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

(10) If the present conviction is for Burglary 1, count prior convictions as in subsection (8) of this section; however count two points for each prior adult Burglary 2 or residential burglary conviction, and one point for each prior juvenile Burglary 2 or residential burglary conviction.

(11) If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

(12) If the present conviction is for homicide by watercraft or assault by watercraft count two points for each adult or juvenile prior conviction for homicide by watercraft or assault by watercraft; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for driving under the influence of intoxicating liquor or any drug, actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug, or operation of a vessel while under the influence of intoxicating liquor or any drug.

(13) If the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. If the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense or serious violent offense, count three points for each adult prior felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection (8) of this section if the current drug offense is violent, or as in subsection (7) of this section if the current drug offense is nonviolent.

(14) If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as 1/2 point.

(15) If the present conviction is for Escape 1, RCW 9A.76.110, or Escape 2, RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.

(16) If the present conviction is for Burglary 2 or residential burglary, count priors as in subsection (7) of this section; however, count two points for each adult and juvenile prior Burglary 1 conviction, two points for each adult prior Burglary 2 or residential burglary conviction, and one point for each juvenile prior Burglary 2 or residential burglary conviction.

(17) If the present conviction is for a sex offense, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction.

(18) If the present conviction is for failure to register as a sex offender under RCW *9A.44.130 or 9A.44.132, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, excluding prior convictions for failure to register as a sex offender under RCW *9A.44.130 or 9A.44.132, which shall count as one point.

(19) If the present conviction is for an offense committed while the offender was

under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in chapter 9.94B RCW.

(20) If the present conviction is for Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2, count priors as in subsections (7) through (18) of this section; however count one point for prior convictions of Vehicle Prowling 2, and three points for each adult and juvenile prior Theft 1 (of a motor vehicle), Theft 2 (of a motor vehicle), Possession of Stolen Property 1 (of a motor vehicle), Possession of Stolen Property 2 (of a motor vehicle), Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Taking a Motor Vehicle Without Permission 1, or Taking a Motor Vehicle Without Permission 2 conviction.

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

(a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense;

(b) Count one point for each second and subsequent juvenile conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the offenses listed in (a) of this subsection; and

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

(22) The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the

sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

[2011 c 166 § 3; 2010 c 274 § 403; 2008 c 231 § 3. Prior: 2007 c 199 § 8; 2007 c 116 § 1; prior: 2006 c 128 § 6; 2006 c 73 § 7; prior: 2002 c 290 § 3; 2002 c 107 § 3; 2001 c 264 § 5; 2000 c 28 § 15; prior: 1999 c 352 § 10; 1999 c 331 § 1; 1998 c 211 § 4; 1997 c 338 § 5; prior: 1995 c 316 § 1; 1995 c 101 § 1; prior: 1992 c 145 § 10; 1992 c 75 § 4; 1990 c 3 § 706; 1989 c 271 § 103; prior: 1988 c 157 § 3; 1988 c 153 § 12; 1987 c 456 § 4; 1986 c 257 § 25; 1984 c 209 § 19; 1983 c 115 § 7. Formerly RCW 9.94A.360.]

Notes:

***Reviser's note:** 2010 c 267 removed from RCW 9A.44.130 provisions relating to the crime of "failure to register" as a sex offender or kidnapping offender, and placed similar provisions in RCW 9A.44.132.

Intent -- 2010 c 274: See note following RCW 10.31.100.

Intent -- 2008 c 231 §§ 2-4: See note following RCW 9.94A.500.

Application -- 2008 c 231 §§ 2 and 3: See note following RCW 9.94A.500.

Severability -- 2008 c 231: See note following RCW 9.94A.500.

Findings -- Intent -- Short title -- 2007 c 199: See notes following RCW 9A.56.065.

Effective date -- 2007 c 116: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2007." [2007 c 116 § 2.]

Effective date -- 2006 c 73: See note following RCW 46.61.502.

Effective date -- 2002 c 290 §§ 2 and 3: See note following RCW 9.94A.515.

Intent -- 2002 c 290: See note following RCW 9.94A.517.

Finding -- Application -- 2002 c 107: See notes following RCW 9.94A.030.

Effective date -- 2001 c 264: See note following RCW 9A.76.110.

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

Effective date -- 1999 c 331: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public

institutions, and takes effect immediately [May 14, 1999]." [1999 c 331 § 5.]

Effective date -- 1998 c 211: See note following RCW [46.61.5055](#).

Finding -- Evaluation -- Report -- 1997 c 338: See note following RCW [13.40.0357](#).

Severability -- Effective dates -- 1997 c 338: See notes following RCW [5.60.060](#).

Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3:
See RCW [18.155.900](#) through [18.155.902](#).

Application -- 1989 c 271 §§ 101-111: See note following RCW [9.94A.510](#).

Severability -- 1989 c 271: See note following RCW [9.94A.510](#).

Application -- 1988 c 157: See note following RCW [9.94A.030](#).

Effective date -- Application of increased sanctions -- 1988 c 153: See notes following RCW [9.94A.030](#).

Severability -- 1986 c 257: See note following RCW [9A.56.010](#).

Effective date -- 1986 c 257 §§ 17-35: See note following RCW [9.94A.030](#).

Effective dates -- 1984 c 209: See note following RCW [9.94A.030](#).

APPENDIX D

RCW 46.61.5055

Alcohol and drug violators — Penalty schedule.

(1) Except as provided in RCW 46.61.502(6) or 46.61.504 (6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has no prior offense within seven years shall be punished as follows:

(a) In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than one day nor more than three hundred sixty-four days. Twenty-four consecutive hours of the imprisonment may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended or deferred, the court shall state in writing the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based. In lieu of the mandatory minimum term of imprisonment required under this subsection (1)(a)(i), the court may order not less than fifteen days of electronic home monitoring. The offender shall pay the cost of electronic home monitoring. The county or municipality in which the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device to include an alcohol detection breathalyzer, and the court may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring; and

(ii) By a fine of not less than three hundred fifty dollars nor more than five thousand dollars. Three hundred fifty dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent; or

(b) In the case of a person whose alcohol concentration was at least 0.15, or for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than two days nor more than three hundred sixty-four days. Two consecutive days of the imprisonment may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended or deferred, the court shall state in writing the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based. In lieu of the mandatory minimum term of imprisonment required under this subsection (1)(b)(i), the court may order not less than thirty days of electronic home

monitoring. The offender shall pay the cost of electronic home monitoring. The county or municipality in which the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device to include an alcohol detection breathalyzer, and the court may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring; and

(ii) By a fine of not less than five hundred dollars nor more than five thousand dollars. Five hundred dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent.

(2) Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has one prior offense within seven years shall be punished as follows:

(a) In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than thirty days nor more than three hundred sixty-four days and sixty days of electronic home monitoring. In lieu of the mandatory minimum term of sixty days electronic home monitoring, the court may order at least an additional four days in jail. The offender shall pay for the cost of the electronic monitoring. The county or municipality where the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device include an alcohol detection breathalyzer, and may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring. Thirty days of imprisonment and sixty days of electronic home monitoring may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended or deferred, the court shall state in writing the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based; and

(ii) By a fine of not less than five hundred dollars nor more than five thousand dollars. Five hundred dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent; or

(b) In the case of a person whose alcohol concentration was at least 0.15, or for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than forty-five days nor more than three hundred sixty-four days and ninety days of electronic home monitoring. In lieu of the mandatory

minimum term of ninety days electronic home monitoring, the court may order at least an additional six days in jail. The offender shall pay for the cost of the electronic monitoring. The county or municipality where the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device include an alcohol detection breathalyzer, and may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring. Forty-five days of imprisonment and ninety days of electronic home monitoring may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended or deferred, the court shall state in writing the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based; and

(ii) By a fine of not less than seven hundred fifty dollars nor more than five thousand dollars. Seven hundred fifty dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent.

(3) Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has two or three prior offenses within seven years shall be punished as follows:

(a) In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than ninety days nor more than three hundred sixty-four days and one hundred twenty days of electronic home monitoring. In lieu of the mandatory minimum term of one hundred twenty days of electronic home monitoring, the court may order at least an additional eight days in jail. The offender shall pay for the cost of the electronic monitoring. The county or municipality where the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device include an alcohol detection breathalyzer, and may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring. Ninety days of imprisonment and one hundred twenty days of electronic home monitoring may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended or deferred, the court shall state in writing the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based; and

(ii) By a fine of not less than one thousand dollars nor more than five thousand dollars. One thousand dollars of the fine may not be suspended or deferred unless the court finds

the offender to be indigent; or

(b) In the case of a person whose alcohol concentration was at least 0.15, or for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than one hundred twenty days nor more than three hundred sixty-four days and one hundred fifty days of electronic home monitoring. In lieu of the mandatory minimum term of one hundred fifty days of electronic home monitoring, the court may order at least an additional ten days in jail. The offender shall pay for the cost of the electronic monitoring. The county or municipality where the penalty is being imposed shall determine the cost. The court may also require the offender's electronic home monitoring device include an alcohol detection breathalyzer, and may restrict the amount of alcohol the offender may consume during the time the offender is on electronic home monitoring. One hundred twenty days of imprisonment and one hundred fifty days of electronic home monitoring may not be suspended or deferred unless the court finds that the imposition of this mandatory minimum sentence would impose a substantial risk to the offender's physical or mental well-being. Whenever the mandatory minimum sentence is suspended or deferred, the court shall state in writing the reason for granting the suspension or deferral and the facts upon which the suspension or deferral is based; and

(ii) By a fine of not less than one thousand five hundred dollars nor more than five thousand dollars. One thousand five hundred dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent.

(4) A person who is convicted of a violation of RCW 46.61.502 or 46.61.504 shall be punished under chapter 9.94A RCW if:

(a) The person has four or more prior offenses within ten years; or

(b) The person has ever previously been convicted of:

(i) A violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;

(ii) A violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;

(iii) An out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection; or

(iv) A violation of RCW 46.61.502(6) or 46.61.504(6).

(5)(a) The court shall require any person convicted of a violation of RCW 46.61.502 or 46.61.504 or an equivalent local ordinance to comply with the rules and requirements of the department regarding the installation and use of a functioning ignition interlock device installed on all motor vehicles operated by the person.

(b) If the court orders that a person refrain from consuming any alcohol, the court may order the person to submit to alcohol monitoring through an alcohol detection breathalyzer device, transdermal sensor device, or other technology designed to detect alcohol in a person's system. The person shall pay for the cost of the monitoring, unless the court specifies that the cost of monitoring will be paid with funds that are available from an alternative source identified by the court. The county or municipality where the penalty is being imposed shall determine the cost.

(6) If a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 committed the offense while a passenger under the age of sixteen was in the vehicle, the court shall:

(a) Order the use of an ignition interlock or other device for an additional six months;

(b) In any case in which the person has no prior offenses within seven years, and except as provided in RCW 46.61.502(6) or 46.61.504 (6), order a penalty by a fine of not less than one thousand dollars and not more than five thousand dollars. One thousand dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent;

(c) In any case in which the person has one prior offense within seven years, and except as provided in RCW 46.61.502(6) or 46.61.504 (6), order a penalty by a fine of not less than two thousand dollars and not more than five thousand dollars. One thousand dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent;

(d) In any case in which the person has two or three prior offenses within seven years, and except as provided in RCW 46.61.502(6) or 46.61.504(6), order a penalty by a fine of not less than three thousand dollars and not more than ten thousand dollars. One thousand dollars of the fine may not be suspended or deferred unless the court finds the offender to be indigent.

(7) In exercising its discretion in setting penalties within the limits allowed by this section, the court shall particularly consider the following:

(a) Whether the person's driving at the time of the offense was responsible for injury or damage to another or another's property; and

(b) Whether at the time of the offense the person was driving or in physical control of a vehicle with one or more passengers.

(8) An offender punishable under this section is subject to the alcohol assessment and treatment provisions of RCW 46.61.5056.

(9) The license, permit, or nonresident privilege of a person convicted of driving or being in physical control of a motor vehicle while under the influence of intoxicating liquor or drugs must:

(a) If the person's alcohol concentration was less than 0.15, or if for reasons other than the person's refusal to take a test offered under RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) Where there has been no prior offense within seven years, be suspended or denied by the department for ninety days;

(ii) Where there has been one prior offense within seven years, be revoked or denied by the department for two years; or

(iii) Where there have been two or more prior offenses within seven years, be revoked or denied by the department for three years;

(b) If the person's alcohol concentration was at least 0.15:

(i) Where there has been no prior offense within seven years, be revoked or denied by the department for one year;

(ii) Where there has been one prior offense within seven years, be revoked or denied by the department for nine hundred days; or

(iii) Where there have been two or more prior offenses within seven years, be revoked or denied by the department for four years; or

(c) If by reason of the person's refusal to take a test offered under RCW 46.20.308, there is no test result indicating the person's alcohol concentration:

(i) Where there have been no prior offenses within seven years, be revoked or denied by the department for two years;

(ii) Where there has been one prior offense within seven years, be revoked or denied by the department for three years; or

(iii) Where there have been two or more previous offenses within seven years, be revoked or denied by the department for four years.

The department shall grant credit on a day-for-day basis for any portion of a suspension, revocation, or denial already served under this subsection for a suspension, revocation, or denial imposed under RCW 46.20.3101 arising out of the same incident.

Upon its own motion or upon motion by a person, a court may find, on the record, that notice to the department under RCW 46.20.270 has been delayed for three years or more as a result of a clerical or court error. If so, the court may order that the person's license, permit, or nonresident privilege shall not be revoked, suspended, or denied for that offense. The court shall send notice of the finding and order to the department and to the person. Upon receipt of the notice from the court, the department shall not revoke, suspend, or deny the license, permit, or nonresident privilege of the person for that offense.

For purposes of this subsection (9), the department shall refer to the driver's record maintained under RCW 46.52.120 when determining the existence of prior offenses.

(10) After expiration of any period of suspension, revocation, or denial of the offender's license, permit, or privilege to drive required by this section, the department shall place the offender's driving privilege in probationary status pursuant to RCW 46.20.355.

(11)(a) In addition to any nonsuspendable and nondeferrable jail sentence required by this section, whenever the court imposes up to three hundred sixty-four days in jail, the court shall also suspend but shall not defer a period of confinement for a period not exceeding five years. The court shall impose conditions of probation that include: (i) Not driving a motor vehicle within this state without a valid license to drive and proof of financial responsibility for the future; (ii) not driving a motor vehicle within this state while having an alcohol concentration of 0.08 or more within two hours after driving; and (iii) not refusing to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor. The court may impose conditions of probation that include nonrepetition, installation of an ignition interlock device on the probationer's motor vehicle, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The sentence may be imposed in whole or in part upon violation of a condition of probation during the suspension period.

(b) For each violation of mandatory conditions of probation under (a)(i), (ii), or (iii) of this subsection, the court shall order the convicted person to be confined for thirty days,

which shall not be suspended or deferred.

(c) For each incident involving a violation of a mandatory condition of probation imposed under this subsection, the license, permit, or privilege to drive of the person shall be suspended by the court for thirty days or, if such license, permit, or privilege to drive already is suspended, revoked, or denied at the time the finding of probation violation is made, the suspension, revocation, or denial then in effect shall be extended by thirty days. The court shall notify the department of any suspension, revocation, or denial or any extension of a suspension, revocation, or denial imposed under this subsection.

(12) A court may waive the electronic home monitoring requirements of this chapter when:

(a) The offender does not have a dwelling, telephone service, or any other necessity to operate an electronic home monitoring system;

(b) The offender does not reside in the state of Washington; or

(c) The court determines that there is reason to believe that the offender would violate the conditions of the electronic home monitoring penalty.

Whenever the mandatory minimum term of electronic home monitoring is waived, the court shall state in writing the reason for granting the waiver and the facts upon which the waiver is based, and shall impose an alternative sentence with similar punitive consequences. The alternative sentence may include, but is not limited to, additional jail time, work crew, or work camp.

Whenever the combination of jail time and electronic home monitoring or alternative sentence would exceed three hundred sixty-four days, the offender shall serve the jail portion of the sentence first, and the electronic home monitoring or alternative portion of the sentence shall be reduced so that the combination does not exceed three hundred sixty-four days.

(13) An offender serving a sentence under this section, whether or not a mandatory minimum term has expired, may be granted an extraordinary medical placement by the jail administrator subject to the standards and limitations set forth in RCW 9.94A.728(3).

(14) For purposes of this section and RCW 46.61.502 and 46.61.504:

(a) A "prior offense" means any of the following:

(i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;

(ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;

(iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug, or a conviction for a violation of RCW 46.61.520 committed in a reckless manner or with the disregard for the safety of others if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;

(iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug, or a conviction for a violation of RCW 46.61.522 committed in a reckless manner or with the disregard for the safety of others if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;

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

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

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

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

(ix) A deferred prosecution granted in another state for a violation of driving or having physical control of a vehicle while under the influence of intoxicating liquor or any drug if the out-of-state deferred prosecution is equivalent to the deferred prosecution under chapter 10.05 RCW, including a requirement that the defendant participate in a chemical dependency treatment program;

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

(b) "Within seven years" means that the arrest for a prior offense occurred within seven years before or after the arrest for the current offense; and

(c) "Within ten years" means that the arrest for a prior offense occurred within ten years before or after the arrest for the current offense.

[2012 c 183 § 12; 2012 c 42 § 2; 2012 c 28 § 1. Prior: 2011 c 293 § 7; 2011 c 96 § 35; 2010 c 269 § 4; 2008 c 282 § 14; 2007 c 474 § 1; 2006 c 73 § 3; 2004 c 95 § 13; 2003 c 103 § 1. Prior: 1999 c 324 § 5; 1999 c 274 § 6; 1999 c 5 § 1; prior: 1998 c 215 § 1; 1998 c 214 § 1; 1998 c 211 § 1; 1998 c 210 § 4; 1998 c 207 § 1; 1998 c 206 § 1; prior: 1997 c 229 § 11; 1997 c 66 § 14; 1996 c 307 § 3; 1995 1st sp.s. c 17 § 2; 1995 c 332 § 5.]

Notes:

Reviser's note: This section was amended by 2012 c 28 § 1, 2012 c 42 § 2, and by 2012 c 183 § 12, each without reference to the other. All amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- 2012 c 183: See note following RCW 2.28.175.

Effective date -- 2011 c 293 §§ 1-9: See note following RCW 46.20.385.

Findings -- Intent -- 2011 c 96: See note following RCW 9A.20.021.

Effective date -- 2010 c 269: See note following RCW 46.20.385.

Effective date -- 2008 c 282: See note following RCW 46.20.308.

Effective date -- 2007 c 474: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2007." [2007 c 474 § 2.]

Effective date -- 2006 c 73: See note following RCW 46.61.502.

Severability -- 1999 c 5: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 5 § 2.]

Effective date -- 1999 c 5: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 16, 1999]." [1999 c 5 § 3.]

Effective date -- 1998 c 214: "This act takes effect January 1, 1999." [1998 c 214 § 6.]

Effective date -- 1998 c 211: "This act takes effect January 1, 1999." [1998 c 211 §

7.]

Short title -- Finding -- Intent -- Effective date--1998 c 210: See notes following RCW 46.20.720.

Effective date -- 1998 c 207: "This act takes effect January 1, 1999." [1998 c 207 § 12.]

Effective date -- 1997 c 229: See note following RCW 10.05.090.

Effective date -- 1995 1st sp.s. c 17: See note following RCW 46.20.355.

Severability -- Effective dates -- 1995 c 332: See notes following RCW 46.20.308.

APPENDIX E

RCW 9.94A.030

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Board" means the indeterminate sentence review board created under chapter 9.95 RCW.

(2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

(3) "Commission" means the sentencing guidelines commission.

(4) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(5) "Community custody" means that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.

(6) "Community protection zone" means the area within eight hundred eighty feet of the facilities and grounds of a public or private school.

(7) "Community restitution" means compulsory service, without compensation, performed for the benefit of the community by the offender.

(8) "Confinement" means total or partial confinement.

(9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

(10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively

to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

(11) "Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.

(a) The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.

(b) A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon.

(c) The determination of a defendant's criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

(12) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity. This definition does not apply to employees engaged in concerted activities for their mutual aid and protection, or to the activities of labor and bona fide nonprofit organizations or their members or agents.

(13) "Criminal street gang associate or member" means any person who actively participates in any criminal street gang and who intentionally promotes, furthers, or assists in any criminal act by the criminal street gang.

(14) "Criminal street gang-related offense" means any felony or misdemeanor offense, whether in this state or elsewhere, that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons:

(a) To gain admission, prestige, or promotion within the gang;

(b) To increase or maintain the gang's size, membership, prestige, dominance, or control in any geographical area;

(c) To exact revenge or retribution for the gang or any member of the gang;

(d) To obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang;

(e) To directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage for the gang, its reputation, influence, or membership; or

(f) To provide the gang with any advantage in, or any control or dominance over any criminal market sector, including, but not limited to, manufacturing, delivering, or selling any controlled substance (chapter 69.50 RCW); arson (chapter 9A.48 RCW); trafficking in stolen property (chapter 9A.82 RCW); promoting prostitution (chapter 9A.88 RCW); human trafficking (RCW 9A.40.100); promoting commercial sexual abuse of a minor (RCW 9.68A.101); or promoting pornography (chapter 9.68 RCW).

(15) "Day fine" means a fine imposed by the sentencing court that equals the difference between the offender's net daily income and the reasonable obligations that the offender has for the support of the offender and any dependents.

(16) "Day reporting" means a program of enhanced supervision designed to monitor the offender's daily activities and compliance with sentence conditions, and in which the offender is required to report daily to a specific location designated by the department or the sentencing court.

(17) "Department" means the department of corrections.

(18) "Determinate sentence" means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

(19) "Disposable earnings" means that part of the earnings of an offender remaining after the deduction from those earnings of any amount required by law to be withheld. For the purposes of this definition, "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonuses, or otherwise, and, notwithstanding any other provision of law making the payments exempt from garnishment, attachment, or other process to satisfy a court-ordered legal financial obligation, specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments made under Title 50 RCW, except as provided in RCW 50.40.020 and 50.40.050, or Title 74 RCW.

(20) "Domestic violence" has the same meaning as defined in RCW 10.99.020 and 26.50.010.

(21) "Drug offender sentencing alternative" is a sentencing option available to persons convicted of a felony offense other than a violent offense or a sex offense and who are eligible for the option under RCW 9.94A.660.

(22) "Drug offense" means:

(a) Any felony violation of chapter 69.50 RCW except possession of a controlled substance (RCW 69.50.4013) or forged prescription for a controlled substance (RCW 69.50.403);

(b) Any offense defined as a felony under federal law that relates to the possession, manufacture, distribution, or transportation of a controlled substance; or

(c) Any out-of-state conviction for an offense that under the laws of this state would be a felony classified as a drug offense under (a) of this subsection.

(23) "Earned release" means earned release from confinement as provided in RCW 9.94A.728.

(24) "Escape" means:

(a) Sexually violent predator escape (RCW 9A.76.115), escape in the first degree (RCW 9A.76.110), escape in the second degree (RCW 9A.76.120), willful failure to return from furlough (*RCW 72.66.060), willful failure to return from work release (*RCW 72.65.070), or willful failure to be available for supervision by the department while in community custody (RCW 72.09.310); or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as an escape under (a) of this subsection.

(25) "Felony traffic offense" means:

(a) Vehicular homicide (RCW 46.61.520), vehicular assault (RCW 46.61.522), eluding a police officer (RCW 46.61.024), felony hit-and-run injury-accident (RCW 46.52.020(4)), felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)), or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)); or

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

(26) "Fine" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specific period of time.

(27) "First-time offender" means any person who has no prior convictions for a felony and is eligible for the first-time offender waiver under RCW 9.94A.650.

(28) "Home detention" means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance.

(29) "Homelessness" or "homeless" means a condition where an individual lacks a fixed, regular, and adequate nighttime residence and who has a primary nighttime residence that is:

(a) A supervised, publicly or privately operated shelter designed to provide temporary living accommodations;

(b) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings; or

(c) A private residence where the individual stays as a transient invitee.

(30) "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

(31) "Minor child" means a biological or adopted child of the offender who is under age eighteen at the time of the offender's current 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;

- (b) Assault in the second degree;
- (c) Assault of a child in the second degree;
- (d) Child molestation in the second degree;
- (e) Controlled substance homicide;
- (f) Extortion in the first degree;
- (g) Incest when committed against a child under age fourteen;
- (h) Indecent liberties;
- (i) Kidnapping in the second degree;
- (j) Leading organized crime;
- (k) Manslaughter in the first degree;
- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;
- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual exploitation;

(q) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;

(r) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

- (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;
- (u) Any felony offense in effect at any time prior to December 2, 1993, that is

comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection;

(v)(i) A prior conviction for indecent liberties under RCW 9A.44.100(1) (a), (b), and (c), chapter 260, Laws of 1975 1st ex. sess. as it existed until July 1, 1979, RCW 9A.44.100(1) (a), (b), and (c) as it existed from July 1, 1979, until June 11, 1986, and RCW 9A.44.100(1) (a), (b), and (d) as it existed from June 11, 1986, until July 1, 1988;

(ii) A prior conviction for indecent liberties under RCW 9A.44.100(1)(c) as it existed from June 11, 1986, until July 1, 1988, if: (A) The crime was committed against a child under the age of fourteen; or (B) the relationship between the victim and perpetrator is included in the definition of indecent liberties under RCW 9A.44.100(1)(c) as it existed from July 1, 1988, through July 27, 1997, or RCW 9A.44.100(1) (d) or (e) as it existed from July 25, 1993, through July 27, 1997;

(w) Any out-of-state conviction for a felony offense with a finding of sexual motivation if the minimum sentence imposed was ten years or more; provided that the out-of-state felony offense must be comparable to a felony offense under this title and Title 9A RCW and the out-of-state definition of sexual motivation must be comparable to the definition of sexual motivation contained in this section.

(33) "Nonviolent offense" means an offense which is not a violent offense.

(34) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. In addition, for the purpose of community custody requirements under this chapter, "offender" also means a misdemeanor or gross misdemeanor probationer ordered by a superior court to probation pursuant to RCW 9.92.060, 9.95.204, or 9.95.210 and supervised by the department pursuant to RCW 9.94A.501 and 9.94A.5011. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

(35) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention.

(36) "Pattern of criminal street gang activity" means:

(a) The commission, attempt, conspiracy, or solicitation of, or any prior juvenile adjudication of or adult conviction of, two or more of the following criminal street gang-related offenses:

(i) Any "serious violent" felony offense as defined in this section, excluding Homicide by Abuse (RCW 9A.32.055) and Assault of a Child 1 (RCW 9A.36.120);

(ii) Any "violent" offense as defined by this section, excluding Assault of a Child 2 (RCW 9A.36.130);

(iii) Deliver or Possession with Intent to Deliver a Controlled Substance (chapter 69.50 RCW);

(iv) Any violation of the firearms and dangerous weapon act (chapter 9.41 RCW);

(v) Theft of a Firearm (RCW 9A.56.300);

(vi) Possession of a Stolen Firearm (RCW 9A.56.310);

(vii) Malicious Harassment (RCW 9A.36.080);

(viii) Harassment where a subsequent violation or deadly threat is made (RCW 9A.46.020(2)(b));

(ix) Criminal Gang Intimidation (RCW 9A.46.120);

(x) Any felony conviction by a person eighteen years of age or older with a special finding of involving a juvenile in a felony offense under RCW 9.94A.833;

(xi) Residential Burglary (RCW 9A.52.025);

(xii) Burglary 2 (RCW 9A.52.030);

(xiii) Malicious Mischief 1 (RCW 9A.48.070);

(xiv) Malicious Mischief 2 (RCW 9A.48.080);

(xv) Theft of a Motor Vehicle (RCW 9A.56.065);

(xvi) Possession of a Stolen Motor Vehicle (RCW 9A.56.068);

(xvii) Taking a Motor Vehicle Without Permission 1 (RCW 9A.56.070);

(xviii) Taking a Motor Vehicle Without Permission 2 (RCW 9A.56.075);

(xix) Extortion 1 (RCW 9A.56.120);

(xx) Extortion 2 (RCW 9A.56.130);

(xxi) Intimidating a Witness (RCW 9A.72.110);

(xxii) Tampering with a Witness (RCW 9A.72.120);

(xxiii) Reckless Endangerment (RCW 9A.36.050);

(xxiv) Coercion (RCW 9A.36.070);

(xxv) Harassment (RCW 9A.46.020); or

(xxvi) Malicious Mischief 3 (RCW 9A.48.090);

(b) That at least one of the offenses listed in (a) of this subsection shall have occurred after July 1, 2008;

(c) That the most recent committed offense listed in (a) of this subsection occurred within three years of a prior offense listed in (a) of this subsection; and

(d) Of the offenses that were committed in (a) of this subsection, the offenses occurred on separate occasions or were committed by two or more persons.

(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; or

(b)(i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in

the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (37)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection. A conviction for rape of a child in the first degree constitutes a conviction under (b)(i) of this subsection only when the offender was sixteen years of age or older when the offender committed the offense. A conviction for rape of a child in the second degree constitutes a conviction under (b)(i) of this subsection only when the offender was eighteen years of age or older when the offender committed the offense.

(38) "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) "Home-based instruction" has the same meaning as defined in RCW 28A.225.010; and (B) "teacher, counselor, volunteer, or other person in authority" does not include the parent or legal guardian of the victim.

(39) "Private school" means a school regulated under chapter 28A.195 or 28A.205 RCW.

(40) "Public school" has the same meaning as in RCW 28A.150.010.

(41) "Repetitive domestic violence offense" means any:

(a)(i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;

(ii) Domestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense;

(iii) Domestic violence violation of a protection order under chapter 26.09, 26.10, 26.26, or 26.50 RCW that is not a felony offense;

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

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

(b) Any federal, out-of-state, tribal court, military, county, or municipal conviction for an offense that under the laws of this state would be classified as a repetitive domestic violence offense under (a) of this subsection.

(42) "Restitution" means a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

(43) "Risk assessment" means the application of the risk instrument recommended to the department by the Washington state institute for public policy as having the highest degree of predictive accuracy for assessing an offender's risk of reoffense.

(44) "Serious traffic offense" means:

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

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

(45) "Serious violent offense" is a subcategory of violent offense and means:

(a)(i) Murder in the first degree;

(ii) Homicide by abuse;

(iii) Murder in the second degree;

- (iv) Manslaughter in the first degree;
 - (v) Assault in the first degree;
 - (vi) Kidnapping in the first degree;
 - (vii) Rape in the first degree;
 - (viii) Assault of a child in the first degree; or
 - (ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or
- (b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.
- (46) "Sex offense" means:
- (a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;
 - (ii) A violation of RCW 9A.64.020;
 - (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;
 - (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or
 - (v) A felony violation of RCW 9A.44.132(1) (failure to register) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register) on at least one prior occasion;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;
- (c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135;
or
- (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.
- (47) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

(48) "Standard sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

(49) "Statutory maximum sentence" means the maximum length of time for which an offender may be confined as punishment for a crime as prescribed in chapter 9A.20 RCW, RCW 9.92.010, the statute defining the crime, or other statute defining the maximum penalty for a crime.

(50) "Stranger" means that the victim did not know the offender twenty-four hours before the offense.

(51) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

(52) "Transition training" means written and verbal instructions and assistance provided by the department to the offender during the two weeks prior to the offender's successful completion of the work ethic camp program. The transition training shall include instructions in the offender's requirements and obligations during the offender's period of community custody.

(53) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.

(54) "Violent offense" means:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

(v) Indecent liberties if committed by forcible compulsion;

(vi) Kidnapping in the second degree;

(vii) Arson in the second degree;

(viii) Assault in the second degree;

(ix) Assault of a child in the second degree;

(x) Extortion in the first degree;

(xi) Robbery in the second degree;

(xii) Drive-by shooting;

(xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and

(xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.

(55) "Work crew" means a program of partial confinement consisting of civic improvement tasks for the benefit of the community that complies with RCW 9.94A.725.

(56) "Work ethic camp" means an alternative incarceration program as provided in RCW 9.94A.690 designed to reduce recidivism and lower the cost of corrections by requiring offenders to complete a comprehensive array of real-world job and vocational experiences, character-building work ethics training, life management skills development, substance abuse rehabilitation, counseling, literacy training, and basic adult education.

(57) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school.

[2012 c 143 § 1. Prior: 2011 1st sp.s. c 40 § 8; 2011 c 87 § 2; prior: 2010 c 274 § 401; 2010 c 267 § 9; 2010 c 227 § 11; 2010 c 224 § 1; 2009 c 375 § 4; (2009 c 375 § 3 expired August 1, 2009); 2009 c 28 § 4; prior: 2008 c 276 § 309; 2008 c 231 § 23; 2008 c 230 § 2; 2008 c 7 § 1; prior: 2006 c 139 § 5; (2006 c 139 § 4 expired July 1, 2006); 2006 c 124 § 1; 2006 c 122 § 7; (2006 c 122 § 6 expired July 1, 2006); 2006 c 73 § 5; 2005 c 436 § 1;

2003 c 53 § 55; prior: 2002 c 175 § 5; 2002 c 107 § 2; prior: 2001 2nd sp.s. c 12 § 301; 2001 c 300 § 3; 2001 c 7 § 2; prior: 2001 c 287 § 4; 2001 c 95 § 1; 2000 c 28 § 2; 1999 c 352 § 8; 1999 c 197 § 1; 1999 c 196 § 2; 1998 c 290 § 3; prior: 1997 c 365 § 1; 1997 c 340 § 4; 1997 c 339 § 1; 1997 c 338 § 2; 1997 c 144 § 1; 1997 c 70 § 1; prior: 1996 c 289 § 1; 1996 c 275 § 5; prior: 1995 c 268 § 2; 1995 c 108 § 1; 1995 c 101 § 2; 1994 c 261 § 16; prior: 1994 c 1 § 3 (Initiative Measure No. 593, approved November 2, 1993); 1993 c 338 § 2; 1993 c 251 § 4; 1993 c 164 § 1; prior: 1992 c 145 § 6; 1992 c 75 § 1; prior: 1991 c 348 § 4; 1991 c 290 § 3; 1991 c 181 § 1; 1991 c 32 § 1; 1990 c 3 § 602; prior: 1989 c 394 § 1; 1989 c 252 § 2; prior: 1988 c 157 § 1; 1988 c 154 § 2; 1988 c 153 § 1; 1988 c 145 § 11; prior: 1987 c 458 § 1; 1987 c 456 § 1; 1987 c 187 § 3; 1986 c 257 § 17; 1985 c 346 § 5; 1984 c 209 § 3; 1983 c 164 § 9; 1983 c 163 § 1; 1982 c 192 § 1; 1981 c 137 § 3.]

Notes:

***Reviser's note:** RCW 72.66.060 and 72.65.070 were repealed by 2001 c 264 § 7. Cf. 2001 c 264 § 8.

Application -- Recalculation of community custody terms -- 2011 1st sp.s. c 40: See note following RCW 9.94A.501.

Effective date -- 2011 1st sp.s. c 40 §§ 1-9, 42: See note following RCW 9.94A.501.

Intent -- 2010 c 274: See note following RCW 10.31.100.

Application -- 2010 c 267: See note following RCW 9A.44.128.

Expiration date -- 2009 c 375 §§ 1, 3, and 13: See note following RCW 9.94A.501.

Application -- 2009 c 375: See note following RCW 9.94A.501.

Effective date -- 2009 c 28: See note following RCW 2.24.040.

Severability -- Part headings, subheadings not law -- 2008 c 276: See notes following RCW 36.28A.200.

Intent -- Application -- Application of repealers -- Effective date -- 2008 c 231: See notes following RCW 9.94A.701.

Severability -- 2008 c 231: See note following RCW 9.94A.500.

Delayed effective date -- 2008 c 230 §§ 1-3: See note following RCW 9A.44.130.

Short title -- 2008 c 7: "This act may be known and cited as the Chelsea Harrison act." [2008 c 7 § 2.]

Effective date -- 2006 c 139 § 5: "Section 5 of this act takes effect July 1, 2006." [2006 c 139 § 7.]

Expiration date -- 2006 c 139 § 4: "Section 4 of this act expires July 1, 2006." [2006 c 139 § 6.]

Effective date -- 2006 c 124: "Except for section 2 of this act, this act takes effect July 1, 2006." [2006 c 124 § 5.]

Effective date -- 2006 c 122 §§ 5 and 7: See note following RCW 9.94A.507.

Expiration date -- 2006 c 122 §§ 4 and 6: See note following RCW 9.94A.507.

Effective date -- 2006 c 122 §§ 1-4 and 6: See note following RCW 9.94A.836.

Effective date -- 2006 c 73: See note following RCW 46.61.502.

Intent -- Effective date -- 2003 c 53: See notes following RCW 2.48.180.

Effective date -- 2002 c 175: See note following RCW 7.80.130.

Finding -- 2002 c 107: "The legislature considers the majority opinions in *State v. Cruz*, 139 Wn.2d 186 (1999), and *State v. Smith*, Cause No. 70683-2 (September 6, 2001), to be wrongly decided, since neither properly interpreted legislative intent. When the legislature enacted the sentencing reform act, chapter 9.94A RCW, and each time the legislature has amended the act, the legislature intended that an offender's criminal history and offender score be determined using the statutory provisions that were in effect on the day the current offense was committed.

Although certain prior convictions previously were not counted in the offender score or included in the criminal history pursuant to former versions of RCW 9.94A.525, or RCW 9.94A.030, those prior convictions need not be "revived" because they were never vacated. As noted in the minority opinions in *Cruz* and *Smith*, such application of the law does not involve retroactive application or violate ex postfacto prohibitions. Additionally, the Washington state supreme court has repeatedly held in the past that the provisions of the sentencing reform act act upon and punish only current conduct; the sentencing reform act does not act upon or alter the punishment for prior convictions. See *In re Personal Restraint Petition of Williams*, 111 Wn.2d 353, (1988). The legislature has never intended to create in an offender a vested right with respect to whether a prior conviction is excluded when calculating an offender score or with respect to how a prior conviction is counted in the offender score for a current offense." [2002 c 107 § 1.]

Application -- 2002 c 107: "RCW 9.94A.030(13) (b) and (c) and 9.94A.525 (18)

apply only to current offenses committed on or after June 13, 2002. No offender who committed his or her current offense prior to June 13, 2002, may be subject to resentencing as a result of this act." [2002 c 107 § 4.]

Application -- 2001 2nd sp.s. c 12 §§ 301-363: "(1) Sections 301 through 363 of this act shall not affect the validity of any sentence imposed under any other law for any offense committed before, on, or after September 1, 2001.

(2) Sections 301 through 363 of this act shall apply to offenses committed on or after September 1, 2001." [2001 2nd sp.s. c 12 § 503.]

Intent -- Severability -- Effective dates--2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Effective dates -- 2001 c 287: See note following RCW 9A.76.115.

Effective date -- 2001 c 95: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2001." [2001 c 95 § 3.]

Finding -- Intent -- 2001 c 7: "The legislature finds that an ambiguity may exist regarding whether out-of-state convictions or convictions under prior Washington law, for sex offenses that are comparable to current Washington offenses, count when determining whether an offender is a persistent offender. This act is intended to clarify the legislature's intent that out-of-state convictions for comparable sex offenses and prior Washington convictions for comparable sex offenses shall be used to determine whether an offender meets the definition of a persistent offender." [2001 c 7 § 1.]

Technical correction bill -- 2000 c 28: See note following RCW 9.94A.015.

Severability -- 1999 c 197: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 197 § 14.]

Construction -- Short title -- 1999 c 196: See RCW 72.09.904 and 72.09.905.

Severability -- 1999 c 196: See note following RCW 9.94A.010.

Application -- Effective date -- Severability -- 1998 c 290: See notes following RCW 69.50.401.

Finding -- Evaluation -- Report -- 1997 c 338: See note following RCW 13.40.0357.

Severability -- Effective dates -- 1997 c 338: See notes following RCW 5.60.060.

Finding -- 1996 c 275: See note following RCW 9.94A.505.

Application -- 1996 c 275 §§ 1-5: See note following RCW 9.94A.505.

Purpose -- 1995 c 268: "In order to eliminate a potential ambiguity over the scope of the term "sex offense," this act clarifies that for general purposes the definition of "sex offense" does not include any misdemeanors or gross misdemeanors. For purposes of the registration of sex offenders pursuant to RCW 9A.44.130, however, the definition of "sex offense" is expanded to include those gross misdemeanors that constitute attempts, conspiracies, and solicitations to commit class C felonies." [1995 c 268 § 1.]

Effective date -- 1995 c 108: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [April 19, 1995]." [1995 c 108 § 6.]

Finding -- Intent -- 1994 c 261: See note following RCW 16.52.011.

Severability -- Short title -- Captions -- 1994 c 1: See notes following RCW 9.94A.555.

Severability -- Effective date--1993 c 338: See notes following RCW 72.09.400.

Finding -- Intent--1993 c 251: See note following RCW 38.52.430.

Effective date -- 1991 c 348: See note following RCW 46.61.520.

Effective date -- Application -- 1990 c 3 §§ 601-605: See note following RCW 9.94A.835.

Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3: See RCW 18.155.900 through 18.155.902.

Purpose -- 1989 c 252: "The purpose of this act is to create a system that: (1) Assists the courts in sentencing felony offenders regarding the offenders' legal financial obligations; (2) holds offenders accountable to victims, counties, cities, the state, municipalities, and society for the assessed costs associated with their crimes; and (3) provides remedies for an individual or other entities to recoup or at least defray a portion of the loss associated with the costs of felonious behavior." [1989 c 252 § 1.]

Prospective application -- 1989 c 252: "Except for sections 18, 22, 23, and 24 of this act, this act applies prospectively only and not retrospectively. It applies only to offenses

committed on or after the effective date of this act." [1989 c 252 § 27.]

Effective dates -- 1989 c 252: "(1) Sections 1 through 17, 19 through 21, 25, 26, and 28 of this act shall take effect July 1, 1990 unless otherwise directed by law.

(2) Sections 18, 22, 23, and 24 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1989." [1989 c 252 § 30.]

Severability -- 1989 c 252: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 252 § 31.]

Application -- 1988 c 157: "This act applies to crimes committed after July 1, 1988." [1988 c 157 § 7.]

Effective date -- 1988 c 153: "This act shall take effect July 1, 1988." [1988 c 153 § 16.]

Application of increased sanctions -- 1988 c 153: "Increased sanctions authorized by this act are applicable only to those persons committing offenses after July 1, 1988." [1988 c 153 § 15.]

Effective date -- Savings -- Application -- 1988 c 145: See notes following RCW 9A.44.010.

Severability -- 1987 c 458: See note following RCW 48.21.160.

Severability -- 1986 c 257: See note following RCW 9A.56.010.

Effective date -- 1986 c 257 §§ 17-35: "Sections 17 through 35 of this act shall take effect July 1, 1986." [1986 c 257 § 38.]

Effective dates -- 1984 c 209: See note following RCW 9.92.150.

Effective date -- 1983 c 163: See note following RCW 9.94A.505.

State preemption of criminal street gang definitions: Chapter 9.101 RCW.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68812-0-I
v.)	
)	
CHRIS MORTENSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2013 MAY -9 P11 4:48

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF MAY, 2013.

X _____ 

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