

NO. 40962-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN CONTRERAS-REBOLLAR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle
and
The Honorable Ronald E. Culpepper

No. 06-1-01643-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the sentencing court err when it followed controlling Supreme Court authority in deciding defendant's community custody status by a preponderance of the evidence instead of unnecessarily convening a jury to decide it beyond a reasonable doubt?
2. Did the sentencing court err in finding defendant was on community custody at the time of his offense when its decision was based on substantial and undisputed evidence?
3. Did defendant prove his counsel was ineffective in acknowledging his community custody status at resentencing when credible evidence proved defendant was on community custody at the time of his offense?
4. Did the court err in refusing defendant's substitution of counsel at resentencing when the only issue was outstanding proof of his offender score and substitute counsel claimed he needed over a month to prepare?

B. ISSUES PERTAINING TO PETITIONER'S PERSONAL RESTRAINT PETITION.

1. Should this Court consider issues already rejected on direct review when petitioner has failed to prove that the interests of justice are served by their re-litigation?

C. STATEMENT OF THE CASE.

On February 1, 2007, a jury convicted Appellant ADRIAN CONTRERAS-REBOLLAR ("defendant") of two counts of firearm enhanced assault in the first degree. CP 63. This appeal is the second time defendant has challenged the calculation of his offender score. CP 57-75.

The first appeal was from defendant's initial sentencing, which occurred on February 16, 2007. CP 63. While defense counsel signed a stipulation on offender score that alleged defendant had two prior adult felony convictions, one prior juvenile felony conviction, and was on active community custody status at the time of his offense, defendant refused to sign the stipulation. CP 63, 99-103, 109-110. The court relied on the stipulated offender score when it imposed defendant's sentence. *Id.* On March 29, 2010, the Court of Appeals affirmed defendant's convictions, but found the unsigned stipulation was insufficient to prove the offender score. CP 59, 69-70. As a result, the case was remanded to provide the

State an opportunity to prove defendant's offender score by a preponderance of the evidence. CP 59, 69-70.

Resentencing was held on June 29, 2010. RP (Jun. 29, 2010) at 1. At the outset of the hearing defendant made a motion to substitute counsel. RP (Jun. 29, 2010) at 2-3. Although the court was initially inclined to allow the substitution, it denied defendant's motion when substitute counsel rejected the court's offer to continue the hearing for a "week or so" claiming he needed over a month to prepare. RP (Jun. 29, 2010) at 3-9.

The court then addressed the remaining issue of defendant's offender score. RP (Jun. 29, 2010) at 9. This required the court to determine the sentencing effect of defendant's three prior convictions; to include whether application of the SRA's tolling provision¹ caused defendant's community custody to extend beyond the date of his sentencing offenses. RP (Jun. 29, 2010) at 9-17. To this end the court assessed three judgment and sentence documents which evinced defendant's three prior convictions as well as his active community custody status. RP (Jun. 29, 2010) at 10-17; CP 81-84, 111; Ex. 1,² Ex.

¹ Sentencing Reform Act ("SRA") RCW 9.94A.171(3).

² Resentencing Exhibit No. 1 ("Ex. 1")

2,³ Ex. 3⁴. Finding that the information contained in the judgment and sentence documents proved defendant's originally calculated offender score by a preponderance of the evidence, the court re-imposed defendant's original sentence. RP (Jun. 29, 2010) at 10-17; CP 81-84, 95-108.

Defendant filed timely notice of his appeal. CP 86-90.

D. ARGUMENT.

1. THE SENTENCING COURT DID NOT ERR WHEN IT FOLLOWED CONTROLLING SUPREME COURT AUTHORITY IN DECIDING DEFENDANT'S COMMUNITY CUSTODY STATUS BY A PREPONDERANCE OF THE EVIDENCE INSTEAD OF UNNECESSARILY CONVENING A JURY TO DECIDE IT BEYOND A REASONABLE DOUBT.

"[W]ashington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts intimately related to the prior conviction such as the defendant's

³ Resentencing Exhibit No. 2 ("Ex. 2")

⁴ Resentencing Exhibit No. 3 ("Ex. 3")

community custody status.”⁵ *State v. Jones*, 159 Wn.2d 231, 241, 149 P.3d 636 (2006); *see also State v. Giles*, 132 Wn. App. 738, 743, 132 P.3d 1151 (2006). The use of prior convictions and community custody status as a basis for sentence is constitutionally permissible if the State proves their existence by a preponderance of the evidence. *See State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999) (*citing* RCW 9.94A.110 *recodified as* RCW 9.94A.500); *see also State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006); *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004); *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (The United States Supreme Court rejected the defendant’s claim that his prior felony convictions were elements of his current crime which had to be proved to a jury beyond a reasonable doubt); *Blakely v. Washington*, 542 U.S. 296, 302, 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). A defendant’s claim of constitutional error is reviewed de novo. *Jones*, 159 Wn.2d at 236.

⁵ “Under this State’s determinative sentencing scheme, once a defendant has been convicted of a felony, the sentencing judge determines the defendant’s standard range sentence based on the seriousness level of the current offense and the defendant’s offender score.” *State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006) (*citing* RCW 9.94A.530(1), 510). “The defendant’s offender score is determined by his or her other convictions, with the scoring of those prior convictions dependant upon the nature of the current offense.” *Id.* at 236 (*citing* RCW 9.94A.525). Sentencing courts must also add one point to a defendant’s offender score for offenses committed while the defendant was on community custody. *See* RCW 9.94A.525(19);⁵ *Jones*, 159 Wn.2d at 233.

Defendant's sentencing court did not err when it decided whether he was on community custody at the time of his offense. Washington's sentencing courts are allowed to determine community custody status as a matter of law and the court appropriately applied the preponderance of the evidence standard when it found that defendant committed his sentencing offenses before his community custody had expired. *See Jones*, 159 Wn.2d at 241; *Ford*, 137 Wn.2d at 479-480; CP 81. Defendant's sentence should be affirmed.

2. THE SENTENCING COURT DID NOT ERR IN FINDING DEFENDANT WAS ON COMMUNITY CUSTODY AT THE TIME OF HIS OFFENSE BECAUSE ITS DECISION WAS BASED ON SUBSTANTIAL AND UNDISPUTED EVIDENCE.

“Under this State’s determinative sentencing scheme, once a defendant has been convicted of a felony, the sentencing judge determines the defendant’s standard range sentence based on the seriousness level of the current offense and the defendant’s offender score.” *State v. Jones*, 159 Wn.2d 231, 236, 149 P.3d 636 (2006) (citing RCW 9.94A.530(1), .510). “The defendant’s offender score is determined by his or her other convictions, with the scoring of those prior convictions dependant upon the nature of the current offense.” *Id.* at 236 (citing RCW 9.94A.525.) Sentencing courts must also add one point to a defendant’s offender score

for offenses committed while the defendant was on community custody.⁶ See RCW 9.94A.525(19); *Jones*, 159 Wn.2d at 233. A sentencing court's calculation of a defendant's offender score is reviewed de novo. *State v. Mendoza*, 139 Wn. App. 693, 698, 162 P.3d 439 (2007). "[T]he remedy for a miscalculated offender score is resentencing using [the] correct offender score." *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citing *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)).

The use of prior convictions or community custody status as a basis for sentence is constitutionally permissible if the State proves the existence of each by a preponderance of the evidence. See *Ford*, 137 Wn.2d at 479-480 (citing RCW 9.94A.110 recodified as RCW 9.94A.500); see also *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006); *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). "The State must introduce evidence of some kind to support the alleged criminal history...." *State v. Ford*, 137 Wn.2d at 481. "The best evidence of a prior conviction is a certified copy of the judgment." *State v. Mendoza*, 139 Wn. App. 693, 705, 162 P.3d 439 (2007). A sentencing court's findings of fact are reviewed to determine whether substantial evidence supports the court's findings of fact and whether the findings of fact

⁶ RCW 9.94A.171(3) ("Any period of community custody shall be tolled during any period of time the offender is in confinement for any reason").

support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). “Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the finding’s truth.” *Id.* at 193. “[U]nchallenged findings of fact [are considered] verities on appeal, and ... conclusions of law [are reviewed] de novo. *Id.* at 193.

To calculate defendant’s offender score the sentencing court determined the sentencing effect of his prior convictions; to include how the SRA’s tolling provision caused defendant’s community custody to extend beyond the date of his sentencing offenses.⁷ The court admitted the Judgment and Sentence attending defendant’s July 15, 2004, conviction for assault in the third degree, which ordered defendant to serve 9 months in the county jail with 91 days credit for time served and 12 months community custody upon his release. RP (Jun. 29, 2010) at 10-12; CP 81-84, 111; Ex. 1. The court also admitted the Judgment and Sentence attending defendant’s August 29, 2005, conviction for unlawful possession

⁷ The State’s brief relies on the Court’s oral findings to the extent the math in the court’s written findings is not supported by the evidence. The trial court’s oral findings at resentencing placed defendant’s community custody termination date at April 15, 2006, or 3 days after the 4/12/06 offense date: January 15, 2005 to January 15, 2006, plus a 3 month extension due to the 3 month statutory tolling attending defendant’s 3 month jail sentence in 2005. The trial court’s written findings of fact omit the 91 days credit for time served factored into the court’s oral finding. This omission resulted in the community custody termination date being incorrectly written as July 15, 2006, instead of April 15, 2006.

of a firearm in the second degree, which ordered defendant to serve 3 months in the county jail. RP (Jun. 29, 2010) at 10-12; CP 81-84, 111; Ex. 3.

Defendant's 2004 Judgment and Sentence provided the court substantial evidence that his original 12 month community custody term commenced on January 15, 2005, and would have terminated on January 15, 2006, absent any tolling pursuant to RCW 9.94A.171(3). Here, the court accurately adjusted the 9 month jail sentence attending defendant's July 15, 2004, conviction by the 91 days he had already served and determined defendant was released from jail 6 months later on January 15, 2005. RP (Jun. 29, 2010) at 10-12; CP 81-84, 111; Ex. 1. Once the January 15, 2005, commencement date was set, the court appropriately found defendant's original 12 month community custody would have begun on January 15, 2005, and ended on January 15, 2006. CP 111; Ex. 1; RP (Jun. 29, 2010) at 10-12.

Defendant's 2005 Judgment and Sentence provided the court equally compelling evidence that defendant's 12 month community custody tolled during his 3 month jail sentence; this extended defendant's January 15, 2006, termination date 3 months and moved it beyond his April 12, 2006, offense date to April 15, 2006. CP 111; Ex. 3; RP (Jun. 29, 2010) at 10-12. As a result, the court correctly found defendant was

on community custody when he committed the April 12, 2006, offenses. RP (Jun. 29, 2010) at 10-12, 16; CP 81-84.

This evidence was uncontroverted at defendant's resentencing; defense counsel acknowledged it as accurate, while defendant limited his objection to the legal claim that his community custody status should have been decided by a jury. RP (Jun. 29, 2010) at 13, 15. Accordingly, the State proved defendant's community custody status by a preponderance of the evidence and the sentencing court's determination should be upheld.

Defendant now claims that the sentencing court factually erred in deciding his community custody status because it did not consider whether a potential good time⁸ reduction to his jail sentences caused his community custody term to end before his April 12, 2006, offenses. APP. BR.⁹ at 2, 4, 9, 19. Defendant supports this claim by arguing that "he could have earned good time," the jail "may well have awarded good

⁸ The institution in which an offender is incarcerated retains control over the award of good time. *In re Personal Restraint of Erickson*, 146 Wn. App. 576, 191 P.3d 917 (2008) (Department of Corrections, not the superior court, has statutory authority to grant good time, or early release credit, to an offender. While good time must be earned, rather than credited automatically or in advance, it must be equally allocated and not arbitrarily deprived.); *see also In re Personal Restraint of Atwood*, 136 Wn. App. 23, 146 P.3d 1232 (2006) ("[A] jail's [good time] policy does not have to be the same as the Departmen[t] [of Corrections] ... the amount of good time, if any, ... will be determined by ... [j]ail policy."); *In re Personal Restraint of Fogle*, 128 Wn.2d 56, 60, 904 P.2d 722 (1995) (The Pierce County Jail uses a tiered credit system in which the base good time award available to all general population prisoners is 15 percent of the imposed sentence; however, the jail will deduct any misconduct from that credit.).

⁹ Appellant's Brief ("APP. BR.").

time,” and “he likely received good time;” however, there is no evidence in the record that defendant received any good time let alone the 60 days he now claims the sentencing court failed to “presume.” APP. BR. at 2, 9, 11, Appendix C.; CP 81-84, 111; Ex. 1, Ex. 2, Ex. 3; RP (Jun. 29, 2010) at 1-23.

Challenges to a sentencing court’s findings of fact should contain “[a] fair statement of the facts ... without argument. Reference to the record must be included for each factual statement.” *See* RAP 10.3(a)(5). While a defendant may attach an appendix to his or her brief, “[a]n appendix may not include materials not contained in the record” RAP 10.3(a)(8) *see also Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 614, 160 P.3d 31 (2007) (appellate courts will not consider facts recited in briefs but not supported by the record.). “If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing ... record, the appropriate means of doing so is through a personal restraint petition....” *State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915 (1998) (*citing State v. McFarland*, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995)); *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981).

Since proof of the alleged miscalculation, if it exists, must come from outside the record, it can only be properly addressed through a personal restraint petition. Defendant raised this issue in his direct appeal

but not in the personal restraint petition that has been consolidated with his appeal. The record on review supports the ruling entered below so the judgment should be affirmed.

3. DEFENDANT FAILED TO PROVE HIS COUNSEL WAS INEFFECTIVE IN ACKNOWLEDGING HIS COMMUNITY CUSTODY STATUS AT RESENTENCING BECAUSE CREDIBLE EVIDENCE PROVED DEFENDANT WAS ON COMMUNITY CUSTODY AT THE TIME OF HIS OFFENSE.

“To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987) applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). “Courts engage in a strong presumption counsel’s representation was effective.” *Id.* at 335 (citations omitted); *see also State v. Garrett*, 124 Wn.2d 504, 520 881 P.2d 185 (1994) (defense counsel’s

legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceeding below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with a direct appeal.”

McFarland, 127 Wn.2d at 335 (citing *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981)). “The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” *McFarland*, 127 Wn.2d at 337.

The record reveals defense counsel conducted an independent review of the State’s evidence before acknowledging that it proved defendant was on community custody at the time of his offense. RP (Jun. 29, 2010) at 13. Conversely, there is no evidence that defense counsel failed to investigate the possibility that defendant’s community custody ended before his April 12, 2006, offense date due to good time reductions to his jail sentences. As a result, neither the potential existence of good time nor defense counsel’s diligence in investigating it can be assessed from the record. If defendant believes there is evidence outside the record

which proves his counsel was deficient in failing to raise the existence of good time at resentencing, he should have presented that evidence with his personal restraint petition.

The same issues arise as to defendant's proof that he was prejudiced by his counsel's acknowledgment of his community custody status. There is no evidence before this Court that defendant was not on community custody when he committed his offenses. If defendant believes that he was prejudiced because evidence outside the record establishes that he was not on community custody at the time of his offenses, he should have presented that evidence with his personal restraint petition. Defendant has failed to prove he received ineffective assistance of counsel; his sentence should be affirmed.

4. THE COURT DID NOT ERR IN REFUSING DEFENDANT'S SUBSTITUTION OF COUNSEL AT RESENTENCING BECAUSE THE ONLY ISSUE WAS OUTSTANDING PROOF OF HIS OFFENDER SCORE AND SUBSTITUTE COUNSEL CLAIMED HE NEEDED OVER A MONTH TO PREPARE.

“The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” *State v. Price*, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (citing U.S. CONST. amend. VI).

“Among the components of the constitutional right to counsel is the right to a reasonable opportunity to select and be represented by chosen counsel.” *Price*, 126 Wn. App. at 631 (citing *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995)). “But the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice.” *Price*, 126 Wn. App. at 631 (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). “The right to retained counsel of choice is not a right of the same force as other aspects of the right to counsel; a criminal defendant does not have an absolute, Sixth Amendment right to choose any particular advocate.” *Price*, 126 Wn. App. at 631-632 (citing *Roth*, 75 Wn. App. at 824); see also *State v. Roberts*, 142 Wn.2d 471, 516, 14 P.3d 713 (2000).

“[Appellate courts] grant broad discretion to trial courts on motions for continuance sought to preserve the right to counsel; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the defendant’s right.” *Price*, 126 Wn. App. at 632 (citing *Roth*, 75 Wn. App. at 824 quoting *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)). “In general, trial courts must balance the defendant’s right to counsel of his or

her choice against the public's interest in prompt and efficient administration of justice. *Price*, 126 Wn. App. at 632. "In determining whether the trial court has abused its discretion, [appellate courts] consider the following factors: (1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to [proceed]; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantive nature. *Id.* at 632.

On the day of his resentencing defendant made a motion to substitute his previously retained counsel (Mr. Berneburg) with newly retained counsel (Mr. Underwood). RP (Jun. 29, 2010) at 2-3; RP 683.¹⁰ Although the court was initially inclined to allow the substitution, Mr. Underwood informed the court that he was not ready to proceed and could not be ready to represent defendant until August 6, 2010. RP (Jun. 29, 2010) at 3-9. The court then offered to continue the hearing for a "week or so" to give Mr. Underwood adequate time to prepare. RP (Jun. 29, 2010) at 5-9. When Mr. Underwood reaffirmed his inability to proceed

¹⁰ The State has filed a motion for the report of proceedings from the direct appeal to be temporarily transferred to the file pertaining to this appeal and consolidated personal restraint petition.

before August 6, 2010, the court denied defendant's substitution of counsel. RP (Jun. 29, 2010) at 5-9.

Applying *Price*'s first factor to the facts at bar, the court had already continued defendant's resentencing one week prior to the June 29, 2010, hearing to accommodate a defense scheduling conflict and was willing postpone the hearing for an additional "week or so" to give substitute counsel adequate time to prepare. RP (Jun. 29, 2010) at 3-8.

Turning to *Price*'s second factor, defendant did not provide the sentencing court with a legitimate cause of dissatisfaction. Defendant simply reargued his previously rejected claim of ineffective assistance of counsel; there the allegation was not that Mr. Berneburg failed to represent his interests but that he was denied effective assistance of counsel when the trial court excluded his co-counsel (Mr. Berneburg) from the proceedings after lead counsel designated him as a defense witness. RP (Jun. 29, 2010) at 7-8; CP 67-68. Once more, defendant was not seeking to replace an attorney assigned to him by another with one he was able to choose for himself. Rather, on the day of resentencing defendant was seeking to replace his previously retained counsel with newly retained counsel without communicating any substantive concerns necessitating the change. RP (Jun. 29, 2010) at 7-8; RP 683.

Moving to *Price*'s third factor, defendant's substitute counsel (Mr. Underwood) was not ready to represent defendant at the scheduled resentencing and stated that he needed over a month to prepare. RP (Jun. 29, 2010) at 4-8. Meanwhile, the sentencing court was presented with resentencing on a three year old case where the only issue before it was proof of defendant's offender score. RP (Jun. 29, 2010) at 4-8. This issue was not complicated and the requested delay would have resulted in the added expense of housing defendant in the county jail for over a month instead of returning him to the Department of Corrections.¹¹ Accordingly, the court's willingness to grant defendant's substitution of counsel and give Mr. Underwood over a week to prepare accommodated the balance between defendant's right to counsel of his choice and the public's interest in efficient administration of justice.

Finally, the denial of defendant's request for new counsel was not likely to result in identifiable prejudice to defendant's case. During his allocution defendant objected to the sentencing court's determination of his community custody status, claiming it should have been decided by a jury. RP (Jun. 29, 2010) at 15. Similarly, Mr. Underwood explained the

¹¹ RCW 9.94A.190(1) (A sentence that includes a term ... of confinement more than one year shall be served in a facility ... operated ... by the state...a sentence of not more than one year of confinement shall be served in a facility operated ... by the county.

one month continuance as necessary to research trial transcripts in order to determine whether the defendant's community custody status was presented to the jury. RP (Jun. 29, 2010) at 5. A review of the Court of Appeals opinion, which Mr. Underwood acknowledged reading, makes it clear that defendant's community custody status was not presented to the jury and the holding in *Jones* explains why that fact was irrelevant to the determination of defendant's offender score. CP 57-75; RP (Jun. 29, 2010) at 5-6; 159 Wn.2d 231,149 P.3d 636 (2006). Since Mr. Underwood was apparently retained to present a legal argument that the Supreme Court already rejected in *Jones*, the court's unwillingness to give him over a month to prepare was not likely to result in identifiable prejudice to defendant's case. Defendant's sentence should be affirmed.

E. STATE'S RESPONSE TO PETITIONER'S PERSONAL RESTRAINT PETITION.

1. STATUS OF PETITIONER:

Petitioner, Andrian Contreras Rebollar, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 06-1-01643-4. CP 95-108. He was sentenced on February 16, 2006, for two counts of firearm enhanced assault in the first degree and one count of unlawful possession of a firearm in the second degree. CP 95-108. Petitioner appealed from entry of this judgment and sentence. CP 57-75. His

convictions were affirmed by Division II of the Court of Appeals in an unpublished opinion filed March 29, 2010. *Id.* On appeal, petitioner alleged several errors including: 1) that he did not receive a fair trial when the trial court removed his co-counsel from the trial proceedings; and 2) that he received ineffective assistance of counsel when his lead counsel failed to propose a “defense of another” instruction. *Id.* The opinion also sets forth a summary of the evidence adduced at trial. *Id.* The mandate was issued April 22, 2010.

On June 1, 2011, petitioner filed a timely personal restraint petition alleging that his conviction should be vacated. Petitioner alleges: 1) that the trial court erred when it excluded his co-counsel from the trial proceedings; and 2) that he received ineffective assistance of counsel when his lead counsel failed to propose a “defense of another” instruction.

2. ARGUMENT.

- a. Claims That Are Merely Reformulations Of Claims Rejected In The Direct Appeal Should Be Dismissed As Petitioner Still Has Not Made Any Showing That The Interests Of Justice Require Their Re-Litigation.

Collateral attack by personal restraint petition “should not simply be a reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not

have been raised in the principal action, to the prejudice of the defendant.” *In re PRP of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999); *In re PRP of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). A petitioner is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. *In re PRP of Davis*, 152 Wn.2d 647, 670-671, 101 P.3d 1 (2004); *see also Gentry*, 137 Wn.2d at 388. An issue is considered raised and rejected on direct appeal if the same ground presented in the petition was determined adversely to the petitioner on appeal, and the prior determination was on the merits. *In re PRP of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). A petitioner can show the interests of justice are served by reexamining an issue by showing there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. *In re PRP of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001).

“Simply ‘revising’ a previously rejected legal argument . . . neither creates a ‘new’ claim nor constitutes good cause to reconsider the original claim.” *In re Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). [I]dential grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different

legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects. Thus, for example, “a claim of involuntary confession predicated on alleged psychological coercion does not raise a different ‘ground’ than does one predicated on physical coercion.”

Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. *Lord*, 123 Wn.2d at 329.

In his direct appeal, petitioner challenged 1) the fairness of his trial due to the removal of his co-counsel, and 2) the effectiveness of his lead counsel due to his failure to propose a “defense of another” instruction. The appellate court found no error. *See* CP 57-75. In his collateral attack, petitioner reiterates his claims that the trial court erred in removing his co-counsel from the trial and that his lead counsel was ineffective in not proposing a “defense of another” instruction. Although Petitioner has somewhat reworded his previously rejected legal arguments he has failed to identify why the interests of justice require re-litigation of the same underlying issues. As such, the Court should summarily dismiss petitioner’s claims.

F. CONCLUSION

The sentencing court did not error when it relied on substantial and undisputed evidence that proved defendant's offender score by a preponderance of the evidence. Defendant's sentence should be affirmed.

DATED: JULY 8, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LM delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date _____ Signature _____