

No. 1035357

SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent,
v.
Raymond J Femling, Petitioner,

MOTION FOR DISCRETIONARY REVIEW -
Consider combining with 2014 case.

Treated as a Petition for Review

Raymond Femling
[Name of petitioner]

Cedar Creek Corr. Center
PO BOX 37
Little Rock WA 98556
CAS-B-09-04.
[Address]

Statement of the case

Comes now pro se Raymond Femling asking that you consider combining Discretionary review of this case with my 2014 because they are directly linked. (State v. Femling, 2025 Wash. App. LEXIS 122 (Wash. Ct. App. January 27, 2025) and appoint Sean Downs as Counsel because I still have little to know access to law library and I'm relying on briefing Sean Down's did in the Superior Court. The Appeals court has misunderstood my SAG. I was challenging the fact the Superior Court didn't believe it had the discretion to run my 2010 DOSA revoke concurrently with the 2014 case. The judge said she thought what I was asking for was a hybrid situation. (VRP 03/31/2023 pg 74 line 6-12 Exhibit A). Or in the alternative resentence me with out DOSA at the low end of the range being that is what the offer was before Mr. Femling asked for DOSA. As you can see from the notice of Appeal Sean Downs was challenging the fact the court didnt resentence me and my Appeal attorney failed to raise anything about this.

Supporting Authority.

State v. Jones, 169 Wn. App. 1034 (2012)
Jones plead guilty to Cocaine possession and the court imposed a sentence of 20 months. Jones was serving a term of community custody for (DOSA). When he committed the current offense, At sentencing, Jones asked the court to order that his sentence for the new cocaine possession be served concurrently with the 27 months he had left on the revoked DOSA sentence,

State v. Flake, 76 Wn. App. 174 App Div. I Nov 14, 1994
Where multiple current offense's are concerned in addition to lengthening of sentence, an exceptional sentence may also consists of imposition of consecutive sentence where concurrent sentence is otherwise the standard.
Smith, 123 Wn 2d at 88 (quoting Batista, 116 Wn. 2d 784) Hence, a sentence Court may impose both types of exceptional sentence simultaneously.
In re Pers. Restraint of Green, 170 Wn. App. 328.

In re Pers. Restraint of Franklin Dean, Jr.
(38934-1-111)

- B. The court Decision not to resentence the 2010 or run it concurrent with the 2014.
[Identify the decision or parts of decision which the party wants reviewed by the type of decision]

[Court entering or filing the decision]

[date entered or filed]

[Description of any order granting or denying motions made after the decision such as a motion for reconsideration].

[date of order granting or denying motions].

Am copy of the decision [and the trial court memorandum opinion] is in the appendix at pages A- through

C. ISSUES PRESENTED FOR REVIEW

[Define the issues which the court is asked to decide if review is granted].

- 1) Ineffective Appellate Counsel, for not raising this in her Brief Due process violation.
- 2) The SRA couldn't have anticipated the Blake decision and I was never afforded the opportunity to use offender score 0-5 this violating my right to Equal protection under the law.

D. STATEMENT OF THE CASE

[Write a statement of the procedure below and the facts].

See Attached.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

[Argument should be short and concise and supported by authority].

This is just one more of the collateral consequences of the Blake case. That needs to be looked at.
In re PRP of Franklin Dean, Jr (38934-1-III, State v. Jones, 2012 Wash. App. Lexis 1807, 2012 WL 3065323 (Wash. Ct. App. July 30, 2012))

Total pages: 000

Supreme
IN THE ~~THE~~ COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

VS.

RAYMOND JAY FEMLING,

Defendant.

) No. 1035357

} Motion for Discretionary
 } Review. From court of
 } Appeals Div. II

I. SUMMARY OF FACTS

1. Mr. Femling entered a plea of guilty to possession of controlled substance with intent to deliver in case 10-1-00823-3 and possession stolen property first degree in case 10-1-01376-8 at the same time. Mr. Femling was sentenced to a prison-based DOSA sentence on both matters to be served concurrently. The controlling range was from case 10-1-00823-3 wherein 90 months was imposed with 45 months to be served as prison time and 45 months to be served as community custody.
2. Mr. Femling served his initial 45 months of prison time for his prison-based DOSA sentence. He then had his prison-based DOSA sentence revoked due to a new conviction in case 14-1-02617-0. Mr. Femling's 45 months of suspended time was then imposed and

1 his sentence in case 14-1-02617-0 was run consecutively to the 10-1-00823-3 and 10-1-
2 01376-8 matters.

3 3. After sentencing, the Washington State Supreme Court filed the decision of *State v. Blake*,
4 197 Wn.2d 170, 481 P.3d 521 (2021) declaring RCW 69.50.4013(1) unconstitutional and
5 void.
6

7 4. The defendant's criminal history included prior conviction(s) pursuant to RCW
8 69.50.4013(1), which are no longer punishable crimes according to *State v. Blake, supra*,
9 and thus are void on their face. The defendant's criminal also included a felony bail
10 jumping conviction (08-1-01301-4)¹, pursuant to a PCS charge, which the defense
11 contends should not be counted in the offender score. The defense filed a separate motion
12 to vacate that conviction or in the alternative to resentence as a simple misdemeanor. That
13 motion was denied by the court. The remaining PCS convictions include the following:
14

15 • PCS-meth. 04-1-00192-7.

16 • PCS-meth. 07-1-00192-1.

17 • PCS-meth. 07-1-01628-7.
18

19 5. The defendant served a sentence based on an offender score that includes invalid
20 convictions. The prior RCW 69.50.4013(1) conviction(s) increased the defendant's
21 offender score, thereby increasing the defendant's standard sentencing range.

22 6. The defendant's corrected offender score and recalculated standard range appears in the
23 following table, if the superior court had granted the defendant's motion regarding the
24 felony bail jumping conviction (08-1-01301-4):
25
26

27 ¹ [REDACTED]

Case 10-1-00823-3

Count	Offense	Correct Offender Score	Level	Correct Standard Range (not including enhancements)	Correct Total Standard Range	Original Sentence
1	Possession with intent to deliver – meth	5	II – D	20+ to 60 months	20+ to 60 months	90 months (45 months + 45 months revoked)

Case 10-1-01376-8

Count	Offense	Correct Offender Score	Level	Correct Standard Range (not including enhancements)	Correct Total Standard Range	Original Sentence
1	Possession stolen property first degree	5	II	14 – 18 months	14 – 18 months	19.5 months (12+ months + 7.5 months revoked)

7. The above offender scores and sentencing ranges are based on if Mr. Femling was resentenced today with his additional criminal history from case 14-1-02617-0. The correct scores at the time of sentencing in case 10-1-00823-3 should have been 1 point with range of 12+ to 20 months; case 10-1-01376-8 should have been 1 point with range of 2 – 6 months. Again, this assumes the felony bail jumping conviction (08-1-01301-4) would not score.

8. Mr. Femling was arrested on the 14-1-02617-0 matter on December 29, 2014. He was not able to get credit on that case until his sentences in cases 10-1-00823-3 and 10-1-01376-8 were served because they were run consecutively. The defense is requesting that this court correct the judgment and sentence to the correct midpoint of 40 months for case 10-1-

00823-3 and midpoint of 16 months for case 10-1-01376-8. Mr. Femling already served over 40 months of time in case 10-1-00823-3 (after accounting for good time) before he was arrested in case 14-1-02617-0. Therefore, the defense is asking this court to give Mr. Femling credit for time served in case 14-1-02617-0 beginning upon his arrest on December 29, 2014. *(In re PRP of Franklin Dean, Jr.) (38934-1-111)*

9. Additionally, Mr. Femling's offender score from the 14-1-02617-0 case appears to include two offenses which constitute the same criminal conduct (counts 1 and 4), as described in the argument section below. This would result in only three points scoring from the 14-1-02617-0 case. If the bail jumping offense (08-1-01301-4) does not count in Mr. Femling's offender score then his score would be 4. If the bail jumping offense (08-1-01301-4) does count in Mr. Femling's offender score then his score would be 5.

10. If the bail jumping offense (08-1-01301-4) does count in Mr. Femling's offender score and there is no same criminal conduct in case 14-1-02617-0, then his offender scores and sentencing ranges would be the same as previously entered in 2011.

II. ARGUMENT

1. The felony bail jumping conviction (08-1-01301-4) should not count in Mr. Femling's offender score.

As argued in case 08-1-01301-4, the bail jumping statute specifies as follows:

(2) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony; or

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

1 **3. In the alternative, Mr. Femling should be resentenced with an offender score**
2 **calculated *nunc pro tunc*.**

3 Whether a defendant is being sentenced the first or fifth time, he is being sentenced
4 and the sentencing court must compute his criminal history at that moment. *State v. Amos*,
5 147 Wn. App. 217, 232, 195 P.3d 564 (2008) (abrogated on other grounds). A conviction
6 entered after the original sentencing but before resentencing on remand, was a prior
7 conviction for purposes of determining the defendant's offender score at resentencing. *State v.*
8 *Collicott*, 118 Wn.2d at 665, 827 P.2d 263 (1992). The offender score includes all prior
9 convictions existing at the time of that particular sentencing, without regard to when the
10 underlying incidents occurred, the chronological relationship among the convictions, or the
11 sentencing or resentencing chronology. *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948
12 (1995).
13

14 The defense is making a good faith argument that the caselaw cited above should not
15 be followed as it applies in this case, based on this court's equitable principles. "Superior
16 courts and district courts have concurrent jurisdiction in cases in equity." Wa. Const. Art. IV §
17 6. A court of equity is a type of court with the power to grant remedies other than monetary
18 damages. *Black's Law Dictionary*, 2nd Ed. Equity presupposes that certain applications of law
19 can frustrate the laws of nature, the administration of "justice," or the common good. *See*
20 Anton-Hermann Chroust, *The "Common Good" and the Problem of "Equity" in the*
21 *Philosophy of Law of St. Thomas Aquinas*, 18 Notre Dame L. Rev. 114, 117 (1942-1943)
22 ("Equity does not intend to set aside what is right and just, nor does it try to pass judgment on
23 a 'strict Common Law rule' by claiming that the latter was not well made. It merely states
24 that, in the interest of a truly effective and fair Administration of Justice, the 'strict Common
25 Law' is not to be observed in some particular instance."); Colin P. Campbell, *The Court of*
26
27

1 *Equity--A Theory of its Jurisdiction*, 15 Green Bag 108, 111 (1903) (Equity can “recognize
2 and enforce principles which actually govern society in general, whether embodied in the so-
3 called rules of law or not.”).

4 In the instant case, Mr. Femling was sentenced to a minimum of 70 months more time
5 than he should have been in the possession with intent to deliver (10-1-00823-3) case. The
6 *maximum* amount of time that he was looking at for that charge with the correct offender
7 score was 20 months. Instead, Mr. Femling ended up serving 90 months in prison. He then
8 was unable to receive credit on his 14-1-02617-0 matter until his sentence was served on the
9 10-1-00823-3 case, as they were run consecutively. This additional, unjustly imposed time
10 prevented Mr. Femling from receiving credit since his arrest on December 29, 2014, which
11 results in roughly an additional 40 months of imprisonment.
12

13 Now Mr. Femling is left in the inequitable position to have his prior 2010 matters
14 score as criminal history against him in the 2014 case *and* to have the offenses from the 2014
15 case score as criminal history against him in the 2010 cases. This is all done in order to
16 correct offender scores and sentencing ranges that were erroneously inflated in the original
17 sentencing in all three matters.
18

19 Given the above, this court should exercise its equitable jurisdiction and correct Mr.
20 Femling’s judgment and sentence from the 2010 cases *nunc pro tunc*. That will allow him to
21 accrue credit on the 2014 matter since his arrest on December 29, 2014.
22

23 **III. CONCLUSION**

24 Given the foregoing, Mr. Femling should be resentenced at an offender score of 4 or,
25 at most 5, as described above. In the alternative, Mr. Femling’s offender score should be
26 recalculated and judgment and sentence corrected *nunc pro tunc*.
27

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01-12-2023, 14:07
Scott G. Weber, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

and

RAYMOND JAY FEMLING,

Defendant.

Case No. 10-1-00823-3

10-1-01376-8

14-1-02617-0

**COURT'S DECISION ON CrR 7.8
MOTIONS**

These matters are pending before the court on CrR 7.8 Motions. The court has held multiple hearings and reviewed the files in all cases. The court finds as follows:

In the 2010 cause # 10-1-00823-3, Mr. Femling pleaded guilty to a single count of Possession of a Controlled Substance with Intent to Deliver – Methamphetamine on 10/15/2010. In doing so, a factual basis was set forth. His offender score was 6.

In the other 2010 cause # 10-1-01376-8, Mr. Femling entered a guilty plea to a single count of Possession of Stolen Property in the First Degree on 10/15/2010. In doing so, a factual basis was set forth. His offender score was 6.

Mr. Femling originally received a DOSA sentence of 45 months on 10-1-00823-3 and 12 months on 10-1-01376-8 to run concurrent. These were later revoked and 90 months imposed on 10-1-00823-3 and 19.5 months imposed on 10-1-01376-8 to run concurrent.

ORDER

1 In the 2014 cause # 14-1-02617-0 entered a Newton Plea to one count of Solicitation to
2 Commit Assault 1, one count of Kidnapping in the Second Degree and two counts of Tampering
3 with A Witness on 5/6/16. His offender score was 9+.

4 The Prosecutor's offer of Settlement, attached to the Statement on Plea of Guilty
5 indicates the Prosecutor will recommend, and Defendant agrees to an exceptional sentence of
6 120 months on the Solicitation to Commit Assault First to 96 months on the Kidnapping Second
7 Degree, for a total recommendation of 216 months, as the counts will run consecutive. Mr.
8 Femling signed the Statement on Plea of Guilty and the Prosector's Offer of Settlement. The
9 box on page 10, Paragraph 11 of the Statement on Plea of Guilty indicating the court may
review police reports and/or statement of probable cause was not checked.

10 The court reviewed a CD of the hearing, which was admitted as an Exhibit in this CrR 7.8
11 determination. The prosecuting attorney, Mr. James Smith, went through a lengthy recitation
12 of the facts surrounding the case for the sentencing judge, the Honorable Scott Collier. He also
13 pointed out a typographical error in the Fourth Amended Information as to the date in Count 1,
14 indicating it was 12/26/2015 not 12/26/2014. This was not objected to by defense counsel.
15 The document was corrected and initialed by Judge Collier. The DPA also indicated Mr. Femling
16 would be completing time on the 2010 revoked DOSA sentence prior to starting time on the
17 2014 matter. This is conceded in Defense Motion to Resentence.

18 At the sentencing hearing, Judge Collier indicated he had reviewed all probable cause
19 statements in the file and incorporated them by reference. Defense attorney Jeff Staples
20 indicated this was an agreed recommendation in all respects, and that it had been negotiated
at length.

21 The court went over the stipulated exceptional sentence with Mr. Femling and indicated
22 a later appellate argument against the consecutive nature of counts 1 and 2 would amount to a
23 violation of the plea agreement in its entirety. Separate Findings of Fact/Conclusions of Law as
24 to the exceptional sentence were signed by all parties. The Felony Judgment and Sentence was
25 also signed by all parties. On Page 2, the court did not check a box indicating any counts
encompass the same criminal conduct and count as one in terms of offender score.

ORDER

1 Despite the above, it was argued for purposes of this CrR 7.8 Motion that Counts 1 and 4
2 are the same criminal conduct. Count 1 in the Fourth Amended Information reads as follows:

3 Count 1 – Solicitation to Commit Assault in the First Degree. That he, Raymond Jay
4 Femling, the County of Clark, State of Washington, on or about December 26, 2015, with intent
5 to promote or facilitate the commission of Assault in the First Degree, he offered to give or
6 gave money or other thing of value to another to engage in specific conduct which would
7 constitute such crime and/or would establish complicity of such person in its commission or
8 attempted commission had such crime been attempted or committed...

9 Count 4 in the Fourth Amended Information reads as follows:

10 Count 4 – Tampering with a Witness. That he, Raymond Jay Femling, in the County of
11 Clark, State of Washington, between December 5, 2015, and December 23, 2015, did attempt
12 to induce James N. Braithwaite, a person who the defendant knew was a witness, or a person
13 whom the defendant had reason to believe may have had information relevant to a criminal
14 investigation, to testify falsely, and/or to absent himself from such proceedings...

15 Counts 1 and 4 are not part of the same criminal conduct. They do not require the same
16 criminal intent. The solicitation requires the intent to promote or facilitate the crime of assault
17 in the first degree, which requires an intent to inflict great bodily harm. Witness tampering
18 requires the intent to cause a witness to testify falsely or absent themselves from a proceeding.

19 Counts 1 and 4 do not have the same victim, nor did they occur on the same date.

20 Mr. Femling has not asked to set aside his guilty plea in the 2014 case. The parties are
21 obligated to follow the bargained for recommendations in the plea agreement
22 (notwithstanding the correction of an offender score). Anything else would violate the plea
23 agreement.

24 At an original sentencing, or at a resentencing, the court is not obligated to follow the
25 recommendation. In both circumstances the court should consider the situation that exists at
the time and all available information. That includes those things that have occurred while Mr.

1 Femling has been in prison. The court reviewed work commendations and certificates of
2 program completion, as well as letters of support.

3 Based on the above the court ORDERS as follows:

4 Mr. Femling's offender score on the 2014 case is 8 on Counts 1 and 2, and 7 on Counts 3
5 and 4. His range on Count 1 continues to be 120 to 120 months (standard range falls above
6 statutory maximum). His range on Count 2 is 62 to 82 months. The court orders 62 months on
7 count 2. To run consecutive, it totals 182 months.

8 Mr. Femling's offender score on the 2010 cases remains at a 6, meaning he is not
9 entitled to a resentencing on those cases. While his offender score was lowered by 4 points with
10 the vacation of the *State v. Blake* convictions, it was raised by four points due to the
11 subsequent convictions in the 2014 case. Case law makes it clear that the SRA contemplates
12 the inclusion of subsequent convictions in resentencing situations. Here there is no change and
13 no need for resentencing.

14 Resentencing documentation on the 2014 case should be prepared in accordance with
15 the court's decision.

16 Dated this 12th day of January, 2023.

17 Jennifer K. Snider
18 Digitally signed by Jennifer K. Snider
Date: 2023.01.12 14:05:27 -08'00'

19 Jennifer K. Snider, Judge
20
21
22
23
24
25

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03-30-2023, 12:57
Scott G. Weber, Clerk
Clark County

Total pages: 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

vs.

RAYMOND JAY FEMLING,

Defendant.

) No. 14-1-02617-0

) DEFENDANT'S RESENTENCING
) MEMORANDUM (ADDENDUM)

I. SUMMARY OF FACTS

1. Mr. Femling entered a plea of guilty to possession of controlled substance with intent to deliver in case 10-1-00823-3 and possession stolen property first degree in case 10-1-01376-8 at the same time. Mr. Femling was sentenced to a prison-based DOSA sentence on both matters to be served concurrently. The controlling range was from case 10-1-00823-3 wherein 90 months was imposed with 45 months to be served as prison time and 45 months to be served as community custody. At the time of this plea, he should have been sentenced to an offender score of 2 with range of 12+ to 20 months, due to his three prior PCS convictions and community custody point for PCS not counting, pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

DEFENDANT'S RESENTENCING
MEMORANDUM ADDENDUM

- 1 -

GRECCO DOWNS, PLLC
ATTORNEYS AT LAW
500 W 8TH STREET, SUITE 55
VANCOUVER, WASHINGTON 98660
P: 1-855-309-4529 F: 1-855-309-4530

- 1 2. Mr. Femling served his initial 45 months of prison time for his prison-based DOSA
2 sentence. He then had his prison-based DOSA sentence revoked due to a new conviction
3 in case 14-1-02617-0. Mr. Femling's 45 months of suspended time was then imposed and
4 his sentence in case 14-1-02617-0 was run consecutively to the 10-1-00823-3 and 10-1-
5 01376-8 matters.
- 6
- 7 3. This court has ruled that Mr. Femling is not entitled to a *Blake* resentencing on the 2010
8 matters because the corrected offender score would not change his range given his
9 additional subsequent points. He therefore served 90 months of prison time on the 2010
10 matters where he should have only served 20 months at a maximum with a correct
11 offender score and range at the time, which is 70 months more time that he was lawfully
12 allowed to serve.
- 13
- 14 4. The defense is therefore requesting that this court run the 14-1-02617-0 case concurrently
15 with the 2010 matters.

16 II. ARGUMENT

17 1. This court should impose an exceptional mitigated sentence given the inequity of Mr. 18 Femling's prison DOSA sentence.

19 RCW 9.94A.589(2)(a) provides that "whenever a person while under sentence for
20 conviction of a felony commits another felony and is sentenced to another term of
21 confinement, the latter term shall not begin until expiration of all prior terms." But RCW
22 9.94A.535 provides that the court may depart from the standard sentencing guidelines in
23 RCW 9.94A.589. Such a departure "from the standards in RCW 9.94A.589(1) and (2)
24 governing whether sentences are to be served consecutively or concurrently is an exceptional
25 sentence...." *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 328, 166 P.3d 677 (2007).
26 The plain language of RCW 9.94A.535 makes clear that exceptional sentences may be
27

1 imposed when sentencing takes place under RCW 9.94A.589 subsections (1) or (2). RCW
2 9.94A.535. Thus, the trial court has discretion to impose a mitigated exceptional sentence.
3 *State v. Jones*, 169 Wn. App. 1034 (2012) (unpublished decision, cited for persuasive value
4 only, pursuant to GR 14.1). The court may impose an exceptional sentence below the standard
5 range if it finds that mitigating circumstances are established by a preponderance of the
6 evidence. RCW 9.94A.535(1). One of the purposes of the criminal justice system is to ensure
7 that the punishment for a criminal offense is proportionate to the seriousness of the offense
8 and the offender's criminal history. RCW 9.94A.010(1).

10 In the instant case, the imposition of consecutive time to the 2010 cases is clearly
11 excessive in light of the sentence that should have been imposed on Mr. Femling. The
12 maximum that Mr. Femling should have received on the 2010 matters was 20 months. He
13 served an additional 70 months (not including time off for good time) before he was able to
14 start serving time in the instant case. Running the sentence in the instant case concurrently
15 with the 2010 matters will remedy the injustice of Mr. Femling serving 70 months of prison
16 time without lawful authority.

18 III. CONCLUSION

19 Given the foregoing, Mr. Femling should be resentenced in the instant case
20 concurrently with his 2010 matters, as described above.

23 Dated this 30 March 2023.

25 

26 Sean M. Downs, WSBA #39856
27 Grecco Downs, PLLC
Attorney for Defendant

ADDITIONAL GROUND 2

Ineffective Appellate Counsel;

Appellate Attorney Marie J. Trombley, WSBA# 41410, has denied my request to argue "proving my criminal history." She has filed this appellate brief without allowing her client to review or aid in his defense, let alone counseling on her decision to present the issues in this brief (see brief of appellate). The Statement of Additional Grounds issue, has the potential to grant the appellate greater relief than Trombley's presented issues. If this court agrees with the SAG, then this would show prejudice.

To show he received ineffective assistance of appellate counsel a petitioner must prove that (1) the legal issue appellate counsel failed to raise or raised improperly had merit, and (2) he suffered actual prejudice as a result. In re Pers. Restraint of Lord, 123 Wn.2d 296, 314, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994).

The Appellate was never given the motion of "designation of clerks papers." The appellate couldn't possibly know what record the court has in making their decision. At minimum an attorney needs to keep a client informed. (RPC & SID's)

A defendant has a right to effective assistance to counsel. In Re Pers. Restraint of Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2004). A petitioner can show that he was actually prejudiced by demonstrating there is a

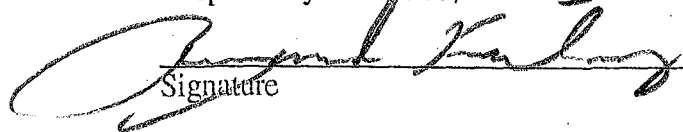
reasonable probability that but for his appellate counsel's unreasonable failure to raise the issue, he would have prevailed on his appeal. Dalluge, 152 Wn.2d at 787-88.

F. CONCLUSION

[State the relief sought if review is granted].

Mr Femling should be resentenced at an offender score of 4 or at most 5. In the alternative, Mr. Femling's offender score should be recalculated and judgment and sentence corrected nunc pro tunc. A hearing rescheduling where I could get the low end and not ask for DOSA.

Raymond J Femling
Respectfully submitted,


Signature

[Name of petitioner's attorney]

APPENDIX

Raymond Jay Femling 891005
[Name of Defendant]
Cedar Creek Corrections Center PO Box 37 Little Rock WA 98556
[Address] [City] [State] Zip Code
[Telephone Number]

EXAbit

A

FILED
Court of Appeals
Division II

WASHINGTON STATE COURT OF APPEALS, DIVISION II
State of Washington
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8/2/2023 1:44 PM
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,) CAUSE NO. 14-1-02617-0 (06)
) COA NO. 58129-9-II
)
) Hon. Jennifer Snider
Plaintiff,)
)
v.) 04/15/2022, 05/03/2022
) 06/03/2022, 07/29/2022
RAYMOND FEMLING) 11/18/2022, 12/16/2022
) 03/31/2023
Defendant.)
)

VOLUME I OF I
VERBATIM REPORT OF PROCEEDINGS
From Electronic Recording

APPEARANCES:

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EXHIBITS

<u>Exhibit No.</u>	<u>Introduced</u>	<u>Admitted</u>
1	33	42

1 04/15/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: All right. Mr. Downs --

4 UNKNOWN: Thank you.

5 THE COURT: -- can we talk about two, three, and
6 four, please?

7 MR. DOWNS: Yes, Your Honor.

8 THE COURT: Thank you. Show cause. So, you can
9 update me on what's going on with Mr. Femling's cases.

10 MR. DOWNS: Yes. So, Mr. Femling, we've submitted
11 a 6164 petition to the prosecutor's office. They're supposed
12 to staff the matter this month. However, they didn't get to
13 this case. I'm waiting for an update from the appellate unit
14 as to when they're going to be able to staff that. So,
15 depends on what happens with that staffing as to whether
16 we're moving forward with the R-7.8 motion or not, or if we
17 have an agreed felony resentencing at that point. So, at
18 this point, we ask Court to set over that hearing, probably a
19 month would be adequate.

20 THE COURT: Okay. So, when you say set over the
21 hearing, you mean, just set over for check-in status on a
22 show cause to see if we're going to set a resentencing or
23 not?

24 MR. DOWNS: That's correct.

25

1 THE COURT: Okay. And if you decide mutually that
2 that is going to happen, you can work with my department to
3 set the date and not have to do a show --

4 MR. DOWNS: Yes.

5 THE COURT: -- another show cause. Okay.

6 MR. DOWNS: Right. We'll give you a heads up.

7 THE COURT: Okay. Lori, is there a good day to do
8 that? He -- Mr. Femling won't be present for show cause. We
9 could do it on an out of custody docket.

10 MADAM JA: We're down here the week of -- your
11 criminal week of May 30th. So, we could put it on the
12 criminal docket --

13 THE COURT: Is it too far out to go to June 1st, Mr.
14 Downs?

15 MADAM JA: That's a change of plea.

16 MR. DOWNS: That'd be fine. I'm going to be in
17 trial, actually, out of county at that time.

18 THE COURT: Okay.

19 MADAM JA: How about May 2nd. Let me go May 2nd,
20 no, May 3rd. Do we have a custody problem. Is that too
21 soon?

22 THE COURT: I don't know if that's gonna be enough
23 time. That's only two weeks away. May 3rd?

24 MR. DOWNS: That would work.

25

1 THE COURT: Okay. May 3rd, that's at 1:30 on the
2 out of custody docket. Just tracking these three cases to
3 see if we're going set a resentencing on it.

4 MR. DOWNS: All right. Thank you.

5 THE COURT: Thank you for the update.

6 (CASE ADJOURNED)

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1 05/03/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 MR. DOWNS: So, for Raymond Femling, Your Honor,
4 this is a Blake review case. The -- the defendant has a 6164
5 request in with the prosecutor's office. We're still waiting
6 for that to be staffed. This was set over last time. We had
7 court for the same reason. Just asking to set it over again.
8 Would be available either Friday, June 3rd at 9:00 or June
9 10th at the 1:30 docket.

10 THE COURT: Okay, Lori, are either one of those --
11 mine? Because these are my Blake cases.

12 MADAM JA: I -- I didn't hear what he said.

13 THE COURT: June 3rd or June 10th at 1:30.

14 MADAM JA: A June 3rd show cause. I mean, June 3rd
15 you have the criminal docket at 9:00 a.m. And what was the
16 other date?

17 THE COURT: June 10th.

18 MADAM JA: You do have -- no. You're off that
19 afternoon.

20 THE COURT: Oh. Okay. So, we could do it on June
21 3rd on 9:00 a.m.

22 MR. DOWNS: Okay.

23 THE COURT: All right. So, Mr. Femling's matters
24 then, we'll set those over. And if we know something in
25 advance of June 3rd, please advise my department, because

1 this is really on for show cause to set a date for
2 resentencing, or whatever ends up happening, right? So --

3 MR. DOWNS: Yeah and it -- the 6164 request --

4 THE COURT: Yeah.

5 MR. DOWNS: -- results in a better outcome --

6 THE COURT: Yeah.

7 MR. DOWNS: -- for my client. So that's why we're

8 --

9 THE COURT: Got you.

10 MR. DOWNS: -- setting it over.

11 THE COURT: Got you. Okay. So, just let us know
12 what's going on with that, then we set those over to June 3rd
13 at 9:00 a.m. on the motions docket. Thank you.

14 (CASE ADJOURNED)

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1 06/03/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: -- require a defendant present. Mr.
4 Femling's cases, I think Mr. Downs is on those cases. Sean
5 Downs?

6 MR. DOWNS: Yes, Your Honor. Present.

7 THE COURT: All right. Thank you. We had a show
8 cause on Mr. Femling's cases. What's the status of those?

9 MR. DOWNS: Yes, sure. Yeah, I've been speaking
10 with Jessica Smith, the assigned DPA on these cases, and
11 we're still trying to come up with an agreed resolution.
12 It's a complicated fact pattern with these three different
13 cases, and how they interrelate with one another in terms of
14 credit for time served, whether matters are run consecutive
15 to one another. So parties are asking to bump this out for a
16 couple of months so we can hopefully come to an agreed
17 resolution on it.

18 THE COURT: Okay. Mr. Ikata, is that your
19 understanding as well?

20 MR. IKATA: That is my understanding, Your Honor.

21 THE COURT: Okay. August 5th at 9:00 a.m.?

22 MR. DOWNS: That works for me.

23 MR. IKATA: That works for the State, Your Honor.

24

25

1 THE COURT: Oh wait, maybe it isn't. Let's -- let
2 me ask -- let me figure out who that is first. I might have
3 to move that up one week.

4 MADAM JA: 9:00 a.m. is Department 3 that day.

5 THE COURT: Okay, so, on July 29th it's me.

6 MADAM JA: Correct.

7 THE COURT: Okay. Gentlemen, July 29th. I need to
8 --

9 MR. DOWNS: That works.

10 THE COURT: -- set this to myself, not someone
11 else. Okay? July 29th then for those three matters, we'll
12 continue over. Hopefully we can -- if you come up with
13 something before then, we'll get a special set put together,
14 okay?

15 MR. IKATA: Your Honor, at this point, that sounds
16 good, Your Honor. At this point, is Mr. Downs agreeable that
17 we no longer have -- have to have the two 2010 matters
18 tracking? It's my understanding that both sides are in
19 agreement that this actually -- not a Blake basis for the
20 2010 cases.

21 MR. DOWNS: They're all interrelated because the
22 2014 cases run consecutive to the revoked 2010 cases, and so
23 that's why we're asking to track -- if I have to, I'll end up
24 filing a motion on those, as well, but trying to come to an
25 agreed resolution.

1 MR. IKATA: Okay. Understood. Thank you for that
2 information.

3 THE COURT: All right. Thank you for that update.

4 (CASE ADJOURNED)

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1 07/29/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: -- it's Ray Femling.

4 MADAM JA: I think two and three are just tracking.

5 THE COURT: Mr. Downs -- is someone from his office
6 here today?

7 MS. SMITH: I wasn't sure it was on the docket this
8 morning. So, I didn't really email anyone on that. I can
9 send him an email.

10 THE COURT: Yeah, he's appointed on these. They're
11 Blake --

12 MS. SMITH: Okay.

13 THE COURT: -- situations and --

14 MS. SMITH: Let's see if I can (indiscernible) Mr.
15 (indiscernible) and let him know what's going on.

16 THE COURT: Okay.

17 MS. SMITH: Yeah. Hold on a minute.

18 THE COURT: Thanks.

19 (RECESS TAKEN)

20 THE COURT: Ok, Mr. Downs. Can you talk to me
21 about Mr. Fleming's matters, please?

22 MR. DOWNS: Yes, Your Honor. These are on for
23 Blake review. I've been in touch with the assigned DPA on
24 these, excuse me, on these cases. We've had continuing
25 resolution on it. It looks like it's likely we'll have to

1 litigate these issues. I was going to file some supplemental
2 briefing on these three cause numbers for the Court also was
3 going to file a 7.8 motion regarding a prior conviction for
4 bail jumping and pursue the possession of controlled
5 substance conviction. So, I was going to ask that all of
6 those be heard at the same. The prosecutor and myself are in
7 agreement to set this over for one last time. We might need
8 a special set hearing. I doubt that on one of these dockets --
9 it would be appropriate because it would probably be, at the
10 least, ten minutes to argue.

11 THE COURT: All right. Thank you. Okay, so
12 perhaps what we should do is, I can have -- who is the
13 assigned DPA on it?

14 MR. DOWNS: It's Jessica Smith.

15 THE COURT: Jessica Smith. All right. So, I think
16 what I'll do rather than wasting time now is ask Lori to
17 contact you and Ms. Smith for a special set time and we'll
18 get that set with my department special set and get these
19 matters resolved.

20 MR. DOWNS: Okay. Thank you.

21 THE COURT: Okay. So, look for an email from Lori.

22 MR. DOWNS: All right.

23 THE COURT: Thank you for the update.

24 (CASE ADJOURNED)

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1 11/18/2022 - RESENTENCING HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: Were you expecting this many people to
4 be on this particular Zoom, because I was not.

5 THE CLERK: I was wondering if we had the wrong
6 week.

7 MR. DOWNS: I know that Mr. Femling had a couple of
8 people that wanted to be present.

9 THE COURT: All right. Well, we have 20 of those
10 people.

11 MR. DOWNS: Yep. I don't think it was going to be
12 that many. I was expecting two.

13 THE COURT: Okay, ladies and gentlemen, my name is
14 Judge Snider. Please mute your device for me. Thank you.
15 We are here for a hearing with regards to Raymond Femling, so
16 if you're here for a different hearing, you're in the wrong
17 place. All right. Thank you. Okay, I have Mr. Vaughn,
18 which is prosecutor on one of these cases, and Ms. Smith is
19 present, as well. And then Mr. Downs on behalf of Mr.
20 Femling. Mr. Femling, I can see him there, thank you.

21 Okay. Where are we with this?

22 MS. SMITH: Your Honor, we were prepared to proceed
23 with sentencing today based solely on the Blake issue.
24 Defense counsel filed a brief this morning with attachments
25 -- that's 97 pages, I believe, arguing a new issue, which is

1 a same course of conduct scrivener's error issue, which has
2 not been raised up until this point. So, the State is
3 requesting a setover to look into that particular issue. If
4 the Court is not inclined to consider it, then we could
5 proceed, but if the Court is inclined to consider it, then we
6 need additional time.

7 THE COURT: Okay. So, for the record, I have not
8 reviewed the 97 pages that I received this morning, either.
9 I was on -- I've been on the bench literally since I got here
10 this morning and including a 1:00. So, if you're wanting to
11 argue items that are in that material, I think I need to read
12 it, number one, and certainly the State needs to be able to
13 respond to it. I don't like it, because we've been
14 continuing this case several times, and I would like to get
15 it completed, but --

16 MR. DOWNS: Right. We want to make sure that all
17 the issues were in the record that Mr. Femling wanted to
18 raise and want to make sure the Court understood what those
19 issues were. So, I know Mr. Femling wants to proceed with
20 resentencing, but I'll be available if the Court does set it
21 over.

22 THE COURT: Mr. Vaughn, is Ms. Smith speaking for
23 you as well?

24 MR. VAUGHN: I take the same position as Ms. Smith.
25 I haven't had time to review the entire brief that was just

1 served on me today. I'd request some additional time to file
2 responsive pleading.

3 THE COURT: All right. Well, it makes sense when
4 we do this to have all issues addressed, flushed out. I
5 don't like it, because I want to go forward, but I think we
6 need to let the State have the ability -- I'm not sure why
7 this came up at the last second, because we, again, have had
8 multiple hearings on this.

9 MR. DOWNS: It's only one issue, really. I
10 included a bail jumping issue, which the Court has already
11 ruled on. I just want to make the complete record on these
12 three cases, and then I'm just arguing that there are two
13 counts on the 2014 case that should be scored as same
14 criminal conduct.

15 MS. SMITH: The other issue we're going to need to
16 look into, Your Honor, is whether that constitutes a
17 violation of the plea agreement. When we stipulated to
18 resentencing, and to not file a breach of -- of agreement,
19 that was based solely on the Blake issue. He's now raising
20 additional issues, so we're going to need to look into that,
21 as well.

22 THE COURT: Right. Okay, so that being said, I
23 will grant the motion to continue. When can we come back.
24 Lori, you're probably going to have to help me out with that.

25 MR. FEMLING: Your Honor?

1 THE COURT: Sir.

2 MADAM JA: What's the request?

3 MR. FEMLING: Do we need to also ask that the State
4 prove my criminal history on the record? Does that need to
5 be done now --

6 THE COURT: It's part of the discussion --

7 MR. FEMLING: -- or is that something that --

8 THE COURT: That's part of the -- the whole package
9 of everything that I need to be deciding and having everyone
10 argue to me when we actually get to resentencing. Not today,
11 because new issue has been raised today. A time when we
12 could resentence Mr. Femling in the four-week timeframe?

13 MADAM JA: Okay, so mid-December, maybe? Second
14 week in December, first week in December?

15 THE COURT: I just put Ms. Smith in a trial the
16 second week of December yesterday afternoon.

17 MADAM JA: Second week -- okay. Well, let me go
18 look real quick.

19 MS. SMITH: If he is asking us to completely re-
20 prove his criminal history, that would definitely be a
21 violation of the plea agreement as well.

22 THE COURT: Yeah. He can talk to his attorney
23 about the re-proving of the criminal history.

24

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1 MR. FEMLING: In no way am I trying to unwind my
2 guilty plea. I -- I'm just asking that we get a corrected --
3 with -- with the --

4 THE COURT: Right, I think --

5 MR. FEMLING: -- with what was caused by the
6 Supreme Court. I -- I don't feel that I breached the plea
7 agreement at all. This issue is something that was done by
8 the Supreme Court, and I'm not educated in the law, and I
9 want to make sure that it is clear that I'm not trying to
10 unwind my guilty plea at all. I'm just asking for a fair and
11 just sentence with the correct offender score.

12 THE COURT: That's what started this whole
13 discussion --

14 MR. FEMLING: So --

15 THE COURT: -- a while ago. Again, I'm gonna ask,
16 if you would, if you'd direct comments and questions to your
17 attorney outside the presence of myself and counsel for the
18 State. Okay?

19 MR. FEMLING: Yes, ma'am.

20 THE COURT: Thank you. I'm just waiting for Lori --
21 to tell me what -- a date that's going to work for everybody
22 here. And your trial on Young is expected to last how long?

23 MS. SMITH: Probably at least four days.

24 THE COURT: Four days. Okay, so maybe a little bit
25 earlier than that. How about 1:30 on December 9th?

1 MS. SMITH: I'm out on December 9th.

2 THE COURT: Okay. Okay, Lori, how about the week
3 after this? The week of the 19th?

4 MR. VAUGHN: I will be out of town the week of the
5 19th. Although, I think it's probably going to be the same
6 issues for me and Ms. Smith, so I'll kind of defer on her
7 schedule, so.

8 THE COURT: Okay. Let me see what my staff has for
9 me for that next week.

10 MR. DOWNS: I'll likely be in trial that week, so
11 if it was Thursday or Friday, that would be preferable.

12 THE COURT: Okay.

13 MS. SMITH: I'll be on vacation, so --

14 MADAM JA: The week of the 19th is a trial week.
15 So, the only guaranteed time I can give is Friday at 1:30.
16 The 23rd I think is what that is.

17 MR. DOWNS: Works for me.

18 MADAM JA: You said the week of the 19th of
19 December?

20 THE COURT: Yeah. That's what I was looking at,
21 but --

22 MADAM JA: Yeah.

23 MS. SMITH: I'm scheduled to be on vacation, but I
24 can probably make it work.

25

1 THE COURT: Well, Mr. Vaughn is also scheduled to
2 be out at that time. So, --

3 MADAM JA: I mean, there's the opportunity to do a
4 Thursday. The reason I gave you the 14th is because you are
5 non-jury that week so, we would have a --

6 THE COURT: Yeah. Ms. Smith is going to be in
7 trial that day.

8 MADAM JA: Oh. What about Friday the 16th at 1:30?

9 THE COURT: That wasn't one of the options that you
10 gave me.

11 MADAM JA: Pardon? Yeah, because I just threw out
12 one each week, so.

13 THE COURT: Friday the 16th at 1:30?

14 MR. DOWNS: That works.

15 THE COURT: Sounds good.

16 MADAM JA: Okay.

17 MR. VAUGHN: I'm available then.

18 THE COURT: Thank you. Okay, so Friday December
19 16th at 1:30. We'll work with DOC to get you back in again,
20 Mr. Femling. Get that hearing set, and we'll see all of you
21 then. And please let's be prepared to go at that point. No
22 last minute surprises. I'd like to get this completed for
23 everyone's benefit, okay?

24 MR. FEMLING: Can you just -- when -- when is it
25 rescheduled for, ma'am?

1 THE COURT: Sure. It's Friday December 16th at
2 1:30 p.m. All right. Thank you.

3 MR. FEMLING: Thank you for your time.

4 MR. VAUGHN: Thank you, Your Honor.

5 MS. SMITH: Thank you.

6 THE COURT: Thank you. Okay, and I don't know if
7 all of these people were in here for this hearing, but it
8 looks like some of them were. Thank you. Our hearing is
9 concluded.

10 (CASE ADJOURNED)

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1 12/16/2022 - RESENTENCING HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: We're on State vs. Femling, multitude
4 of cause numbers. Well, three of them, at least. I've had
5 material on this for a while. I've read it a couple of
6 different times. It kind of seems like it morphs as we go.
7 But, it's defense motion, so Mr. Downs, go ahead.

8 MR. DOWNS: Your Honor, we received responsive
9 pleadings from the State early this morning. I didn't have a
10 chance to review it with Mr. Femling. However, I'm ready to
11 proceed with the motion. But, obviously, it's Mr. Femling's
12 cases, so if he is requesting more time so we can actually go
13 over it together, which won't take that long, it's just that
14 we do need time to -- to review it together. Then, you know,
15 I would ask for a setover on his behalf. So, I defer to him.

16 THE COURT: Good afternoon, Mr. Femling. Are --
17 you're able to hear us okay are -- aren't you?

18 MR. DOWNS: Looks like he's frozen.

19 THE COURT: He looks frozen. They may be calling
20 back in, so we'll just wait a moment.

21 (Pause)

22 THE COURT: Mr. Femling, are you able to turn on
23 your audio?

24 MR. FEMLING: Yes, we were offline for a second.
25 We just got back online. So I missed whatever just happened.

1 THE COURT: Nothing -- nothing happened. I knew
2 you were gone and so I was waiting for you to come back.

3 MR. FEMLING: Thank you so much.

4 THE COURT: You're welcome. Okay so, were you able
5 to hear Mr. Downs -- what Mr. Downs said before you were lost
6 there, or not?

7 MR. FEMLING: The only thing I heard is that he
8 stated that he received a briefing this morning, and that was
9 where it cut off.

10 THE COURT: Okay. So, why don't I let him complete
11 what he was saying again, and then --

12 MR. DOWNS: Sure.

13 THE COURT: -- we'll hear from you.

14 MR. DOWNS: So, we didn't have a chance, myself and
15 Mr. Femling didn't have a chance to review the State's
16 responsive briefing together. Obviously since these are his
17 cases, he has the -- the right to consult with his attorney
18 about it ahead of time. I'm ready to proceed if he is, but
19 if he's asking for a setover, I'll request one on his behalf
20 if he wants one.

21 THE COURT: Okay, Mr. Femling. Did you wish more
22 time to consult with Mr. Downs, or did you wish to go forward
23 with the motions today?

24 MR. FEMLING: Yeah, if -- if he feels that he's
25 prepared even though he just got them this morning, I was

1 wanting to put on the record that I -- I haven't even been
2 able to see what they are but, I mean, I understand your
3 frustration as well as mine, that we've been trying to deal
4 with this for a long time now, and honestly I would like to
5 see what -- what your opinion is of the case, Your Honor. I
6 -- I guess, I just trust that Mr. Downs has my best interests
7 in record -- in mind, and that you -- I don't know the law.
8 You guys do. I don't know what's required and what's not,
9 ma'am.

10 THE COURT: Okay. Appreciate that. Can everybody
11 else do me a favor? Would you all turn off your videos for
12 me? It's extremely distracting. They're still there, they
13 can still hear everything, I just can't see them. Still a
14 few of you that need to turn off your video for me, please.

15 MR. FEMLING: Would I -- could I request that my
16 sister Rosita please remain on?

17 THE COURT: That's fine. I don't mind that.

18 MR. FEMLING: All right, well, you let Rosita know
19 that she could come back, that would be appreciated.

20 THE COURT: Yeah. It's fine. Rosita, you can turn
21 your video on, if you'd like. Okay.

22 MR. FEMLING: Thank you, Your Honor.

23 THE COURT: All right. Mr. Femling has indicated
24 --

25 MS. BROWNING: Is my video on now?

1 THE COURT: I'm sorry. Please keep your device
2 muted Dustin and turn off your video. I understand that
3 people want to see --

4 MS. BROWNING: Ma'am --

5 THE COURT: You're still able to see the
6 proceedings with your own video off. Thank you. I did give
7 permission for Rosita to keep hers on if she'd like. You can
8 keep your video on, Rosita, if you'd like.

9 MS. BROWNING: It says that the host has disabled
10 my video. I cannot log on, Raymond. Sorry.

11 THE COURT: Lorinda, if you'd let her back on
12 please.

13 MR. FEMLING: I can hear you.

14 THE COURT: All right, Mr. Downs, go ahead and
15 start and we'll get her back here in a second.

16 MR. DOWNS: Thank you, Your Honor. So, I think
17 that the one thing that the parties agree on is that the
18 prior PCS meth convictions, there were three of them, no
19 longer count in the offender score for these offenses. The
20 issues are contested. One issue is in regards to the bail
21 jumping that was pursuant to PCS conviction. Your Honor has
22 already ruled on that issue. I just included it in the
23 briefing to preserve it for the record for purposes of
24 appeal. And the issues that were here before, Your Honor,
25 are in regards to whether two of these counts from the 2014

1 case are considered same criminal conduct, which would affect
2 both the 2014 scoring and also the 2010 cases -- scoring
3 them, as well. And then, also, in regards to -- at this
4 point with the previous plea agreement, how much of that is
5 still in effect and what the parties are bound by.

6 So, I'll start with the same criminal conduct
7 analysis. I did get a copy of the plea and sentencing
8 hearing from the State this morning. The prosecutor laid out
9 a factual basis for the plea, since they were done pursuant
10 to Newton or Alford. The prosecutor indicated that there was
11 a scrivener's error regarding the December 26th, 2014 charge
12 which was Count 1 and indicated it should have been 2015
13 instead of 2014. However, it -- it looks to be that it's
14 more than just the year that was incorrect. It was the date
15 that was incorrect as well. The -- all the different
16 charging documents and all the different probable cause
17 statements that are in the court file indicate that that date
18 from December 26th, 2015 was the -- or, 2014, excuse me. Let
19 me pull this up.

20 THE COURT: Yeah. I'm questioning how a 2014
21 filing could have a 2015, unless there's a charge added
22 later, but --

23 MS. SMITH: There was.

24 THE COURT: Okay.

25

1 MS. SMITH: There was multiple charges added later

2 --

3 THE COURT: Okay.

4 MS. SMITH: -- while he was in custody.

5 MR. DOWNS: Right. So, the kidnapping, first
6 degree, which is the original count, was from December 26th,
7 2014. So I think that's where the scrivener's error
8 generated from. And so, when the prosecutor was amending
9 this to solicitation to commit assault, first degree, he was
10 supposed to amend the or include the date range that's
11 consistent with the solicitation to commit murder, first
12 degree, that was included previously.

13 So, there was, in the previous information, the
14 Count 5, solicitation to commit murder, first degree, which
15 was between May 22nd, 2015 and June 5th, 2015. And then
16 there was Count 7, solicitation, between March 10th, 2015 and
17 October 14th, 2015. And then Count 8, between December 5th,
18 2015 and December 23rd, 2015. So, the only December
19 allegation is that December 5th to December 23rd, 2015
20 solicitation, and that's encompassed in the probable cause
21 statement.

22 In the prosecutor's recitation of the factual
23 basis, he did mention December 5th, 2015 through December
24 23rd, 2015. And so, it seems apparent from the spoken
25 record, the oral record, and also from the -- the documentary

1 record that this is really in regards to that December 5th,
2 2015 to December 23rd, 2015 incident. And when we look at
3 the charges that Mr. Femling ended up pleading to, the Count
4 4, tampering with witness --

5 MS. BROWNING: (indiscernible).

6 MR. DOWNS: -- that was also between December 5th
7 and December 23rd, 2015.

8 THE COURT: Hang on a second. Lori, can you please
9 allow Rosita to have her video on, please? Go ahead, Mr.
10 Downs, sorry.

11 MR. DOWNS: So, it seems clear that the timeframe
12 that we're dealing with is December, 2015 for the
13 solicitation to commit assault, first degree, that we're
14 dealing with in Count 1. And that's the same timeframe as
15 Count 4. December, 2015. Obviously involves the same named
16 victim, James Braithwaite and involves the same conduct.

17 So, essentially, the allegations that Mr. Femling
18 solicited an individual that -- an inmate at the jail to
19 commit harm against Mr. Braithwaite, and that that conduct
20 occurred in December, 2015, and the purpose of that
21 solicitation to commit assault, first degree, was for the
22 purpose of keeping Mr. Braithwaite from testifying at trial.
23 Mr. Femling didn't make any admissions in his guilty plea,
24 but that's what was elicited at the plea and sentencing
25 hearing, and also the -- what's indicated in the probable

1 cause statement, and it should be apparent from the multiple
2 Amended Informations, the progression of -- of what the State
3 has charged and the mistake that they ultimately made with
4 the -- the last -- the Fourth Amended Information in Count 1.
5 Just, it seems like the parties, or at least the prosecutor,
6 knows the -- the scrivener's error, but then he didn't notice
7 that it wasn't -- he didn't notice to put the date correctly
8 within that range of December 5th through December 23rd
9 because there is no factual basis for December 26th. There's
10 no allegations and the oral recitation of allegations in the
11 probable cause statement -- there's nothing that would
12 support a factual basis for December 26th, only for December
13 5th through the 23rd. So, I won't go through all the same
14 criminal conduct analysis, but I think that's the most
15 important part that the Court has to determine, is this
16 factual basis and when this Count 1 and Count 4 arose from.

17 So, if this Court does find that those counts are
18 same criminal conduct, then it obviously affects the -- the
19 sentencing range for the 2014 case and also the 2010 cases.
20 With the 2010 cases, that changes the ranges significantly,
21 such that Mr. Femling essentially had credit for time served
22 with his matters before the 2014 case came about, and he
23 would be entitled to get credit for time served on 2014
24 matters, because he had already served the 2010 cases' time.
25 The reason that he didn't get credit on the 2014 case, is

1 because it was a revoked DOSA and the sentences are required
2 to run consecutive to one another. But, if he's already
3 served that -- the time for the 2010 cases, then that extra
4 time that he was held on the 2014 case would be able to be
5 applied to his sentence for the 2014 case.

6 The last thing that I think is most contested is in
7 regards to what do we do when we have essentially an invalid
8 plea agreement. Because you all agree that the offender
9 score and sentencing ranges listed are -- are incorrect. So,
10 does that mean that the parties are bound by whatever is left
11 over in that plea agreement? Or does that mean that the
12 parties are free to argue what they want to argue upon
13 resentencing? I think that it makes the most sense that if
14 the plea agreement is invalid, that the Court is not bound by
15 it and the parties are not bound by it any longer. There's,
16 unfortunately, a lack of direct authority on point, but we
17 can look at State v. Kilgore talking about how, when we're
18 dealing with resentencing, it's a whole new sentencing
19 hearing, and the Court obviously is not bound by previous
20 imposition of sentence by the previous Court. I know the
21 State, in its responsive pleadings, mentioned Ermels, but
22 that was a totally different situation. That was a case
23 where the defendant appealed an agreed exceptional sentence,
24 and then he argued -- because this was when Blakely came out
25 -- he argued that it was a Blakely violation because it

1 wasn't a -- a jury finding. It was a stipulated agreed
2 exceptional sentence, and the Court denied him on that. It
3 -- it's a different situation than what we have here.

4 So, here we have a case where a defendant entered a
5 guilty plea to certain counts and the Court -- and the
6 parties understand now that that plea agreement is not a
7 valid one. It's something where, at this point in time, the
8 parties shouldn't be bound by it. As an example, let's
9 pretend that this was a -- a more simple case where the
10 parties agreed to the high end of the standard sentencing
11 range, but now the sentencing range is below that high end of
12 the sentencing range. Does that mean that the Court imposes
13 a high end again? Or do we have a -- a new sentencing
14 hearing like Kilgore contemplates, and the parties can argue
15 within the -- whatever standard range there is? Or, if it
16 was low end. Does that mean the Court has to impose low end?
17 Or can it -- is -- is a -- does the State have to argue low
18 end, or is the State allowed to argue the high end, which is
19 closer to the low end that was imposed previously?

20 And so, it's -- it's a question that's still open,
21 admittedly. But I think it makes the most sense that, when
22 you have an invalid plea agreement, we're not bound by it
23 anymore. And so, we just proceed with sentencing as if the
24 -- the invalid plea agreement was not effective anymore.

25

1 That's most of my argument for today, Your Honor.
2 I mean, the rest is in the briefing. If you have any
3 questions, I'll be happy to try and answer it.

4 THE COURT: All right, let me hear from Ms. Smith,
5 and then I may have questions for both. Go ahead.

6 MS. SMITH: Thank you, Your Honor. As defense
7 counsel indicated, I think really the crux of the argument
8 here is whether or not Counts 1 and Count 4 count as same
9 criminal conduct, and I would note that it is the defense's
10 burden to prove that those do count -- constitute same
11 criminal conduct. I would also note the case law indicates
12 that should be very narrowly tailored and reserved for very
13 specific instances.

14 There are three prongs that the defense would have
15 to prove in order for those two counts to be considered same
16 criminal conduct. The first is that they have the same
17 criminal intent. So, the first count is solicitation to
18 commit assault in the first degree. And I apologize, Your
19 Honor. Is it okay if I remain seated?

20 THE COURT: Yes.

21 MS. SMITH: Thank you.

22 THE COURT: That's fine. Thank you.

23 MS. SMITH: So, the first count is solicitation to
24 commit assault in the first degree and Count 4 is the witness
25 tampering. I've outlined in the briefing how, statutorily,

1 those intents are different. Obviously, the solicitation to
2 commit assault in the first degree involves the intent to
3 cause great bodily injury to the alleged victim. The
4 solicitation adds an additional layer onto that in which he
5 agrees to provide another person something of value to
6 essentially get them to commit the assault in the first
7 degree. So, essentially bringing in another person to
8 establish their complicity. As far as the witness tampering,
9 they have to have -- there has to be an attempt to induce the
10 witness to either not testify, or to not appear at the
11 proceedings, or to testify falsely. So, those are
12 objectively different criminal intents, and therefore
13 defense's argument would fail on that prong.

14 I think the clearest example of how defense's
15 argument fails is the time and place argument, which is why
16 we're arguing so much about the scrivener's error -- or this
17 alleged scrivener's error in the Amended Information.
18 Because, under the Fourth Amended Information, which is what
19 he pled to, the date range -- or the date for Count 1 is
20 December 26th, 2015. The date range for Count 4 is December
21 5th, 2015 to December 23rd, 2015. So, the counts are
22 separated by three days. There is no evidence that these
23 dates constituted a scrivener's error other than,
24 essentially, the dates don't align with defense's argument,
25 therefore they're saying it must be a scrivener's error. We

1 did go back and pull the resentencing CD. I do have a copy
2 of that, if the Court would like. We can admit it as an
3 exhibit and the Court can have an opportunity to review that.

4 Unfortunately, in the recitation of the facts, Mr.
5 Smith isn't super clear -- well, these constituted Count 1,
6 these constituted Count 2, these constituted Count 3. It is
7 very clear from the record that he intended -- there was an
8 information handed forward where Count 1 was listed as
9 December 26th, 2014. And he says, Your Honor, I see that
10 there's a scrivener's error. We need to correct that. It
11 should be December 26th, 2015. And the Court again questions
12 him about it, because there's another count, Count 2, which
13 is December 26th, 2014. And the Court says, so these
14 occurred one year apart exactly. And he's like, yes, it
15 should be December 26th, 2015. So he again reiterates that
16 that was the correct date.

17 The other prong -- and I'll get back more to the
18 factual basis for that in just a moment. But if I could just
19 quickly touch on prong three, which also needs to be proven
20 by defense, which is the same victim prong. The two counts,
21 Count 1 and Count 4, do not constitute the same victim.
22 There is an additional victim under Count 4, the witness
23 tampering charge, which is the public at large. And there is
24 case law that supports it. There are in fact two victims,
25 there are multiple victims, of witness tampering being the

1 person that they were actually intending to tamper with, and
2 also the public at large, because defense -- or defendant --
3 is attempting to interfere in the administration of justice.
4 So, because there's an additional victim under Count 4, again
5 they don't count as same criminal conduct.

6 So, the State's position is that the same criminal
7 conduct analysis fails on all three prongs. But certainly
8 the same time and place prong.

9 The factual summary -- the original offense in this
10 case occurred on December 26th of 2014. The allegation
11 during that offense is that the defendant, along with two
12 other individuals, lured another man by the name of Mr.
13 Braithwaite to a location where he was repeatedly assaulted
14 by punching and kicking. They burned his arm with a
15 methamphetamine pipe, causing second degree burns. The
16 defendant took over \$2,000 in cash from the victim. They
17 took his clothing. The defendants produced a pillow and a
18 rope. They threatened to kill the victim if he talked to the
19 police. They then followed the victim home to make sure he
20 did not go to the police. The victim ultimately did report
21 to police, and the defendant was arrested on December 29th of
22 2014. He was subsequently held in the Clark County Jail,
23 which is where the remainder of these counts took place.

24 So, while he was housed in the Clark County Jail
25 between the dates of March 10th 2015 and March 15th, 2015, he

1 approached a fellow inmate by the name of Austin Navarro and
2 offered him a motorcycle in return for killing Braithwaite.
3 He gave Navarro very specific directions to Braithwaite's
4 residence, to include what time he was likely to be home. He
5 instructed Navarro to kidnap Braithwaite, take him to the
6 mountains, and kill him. Femling told Navarro that he wanted
7 Braithwaite killed to prevent him from testifying.

8 During the dates of December 6th and December 8th,
9 2015, Femling approached a fellow inmate, Richard Shinn, and
10 asked him to make Braithwaite disappear. He told Shinn to
11 give Braithwaite a hot shot -- which, as I understand it, is
12 lingo for essentially an overdose -- of methamphetamine laced
13 with ketamine, and once Braithwaite was unconscious, he told
14 him to give him an intravenous injection of air that would
15 make his heart explode. He again provided very specific
16 instructions to the victim's residence. He offered to give
17 him a motorcycle. He again advised that he wanted this done
18 to prevent him from showing up to court.

19 It appears that he also solicited a third inmate by
20 the name of James Aillo, or Aillo -- I may be mispronouncing
21 that, A-i-l-l-o, to kill Braithwaite so that he couldn't
22 attend the trial. This may very well be the December 26th,
23 2015 incident. The factual recitation provided by the DPA at
24 sentencing didn't specify which of these allegations, again,
25 relates to which count.

1 It is also possible that this was done under In re
2 Barr. Even if their -- let's say for the sake of argument,
3 that there was no factual support for that particular date.
4 It could have been that the parties specifically contemplated
5 that these things were all going to constitute separate
6 criminal conduct and imposed the dates for that purpose under
7 In re Barr as essentially a legal fiction. So,
8 unfortunately, we're in -- in a difficult position because
9 none of us were the original sentencing parties, so we're
10 just kind of speculating as to what the contemplation of the
11 parties was five years ago at this point in time.

12 So, that's kind of the crux of the State's
13 argument, Your Honor. I -- I don't think that they meet the
14 same criminal conduct analysis on any of the three prongs,
15 but certainly the most glaring example of -- of how they
16 don't meet that is the -- the differentiation in time under
17 the Amended Information. I would also note that it's clear
18 that the sentencing court, the original sentencing court, did
19 not impose Counts 1 and Count 4 as same criminal conduct
20 because there's a box that would be checked that indicates
21 that those two counts are being considered same criminal
22 conduct. That box was not checked.

23 The only other thing I would note, Your Honor --
24 we're not going to address the bail jump argument again,
25 since the Court has already litigated that -- this -- this

1 notion that the plea agreement is now completely invalidated
2 I believe is a new argument by defense. There is no support
3 for that notion under the case law that I'm aware of, and
4 nothing cited by defense. Mr. Femling still wants the
5 benefit of the negotiated -- extensively negotiated plea
6 agreement in this particular case in which I believe it was
7 three counts of solicitation to commit murder were amended
8 out, which would have run consecutive as serious violent
9 offenses. He was looking at substantially more time had he
10 taken this case to trial. So, this notion that he wants the
11 benefit of the plea agreement that has been imposed, but none
12 of the parts that he now doesn't like anymore is absurd,
13 frankly. And, again, there is no support for it under the
14 case law.

15 THE COURT: Okay. Reply?

16 MR. DOWNS: So, in regards to the same criminal
17 conduct, regarding this being the same victim, the case that
18 the State cites Victoria that -- again that was a different
19 situation. In that case, the defendant was arguing that, in
20 a situation where he's convicted two counts of witness
21 tampering involving two different victims, he argued that it
22 was same criminal conduct because the public at large is who
23 the actual victim is. The court of appeals indicated no,
24 that's not who it is, that they specifically indicated there
25 are two different victims here, so it's not same criminal

1 conduct. So, what we're dealing with here is the same
2 identifiable victim, James Braithwaite, in Counts 1 and Count
3 4.

4 Regarding intent, seems clear that the intent was
5 all-encompassing in the same act. So, the intent was to keep
6 Braithwaite from testifying, therefore there was a
7 solicitation to keep him from testifying by means of assault.
8 So, that -- it's the same criminal intent, the same factual
9 situation.

10 The -- let's see, here. Oh, in regards to the --
11 the date. There would be no factual basis for the plea
12 regarding December 26th, 2015 in Count 1. The Court wouldn't
13 be able to accept that -- that plea. It -- it -- there's no
14 factual basis. Nothing happened on that date. It was
15 clearly a scrivener's error. I mean, it's based on the 2014
16 kidnap incident. And so, if we're dealing with a December,
17 2015 solicitation incident, the only solicitation that
18 occurred is from this previous -- previously charged
19 solicitation to commit murder, and that Mr. Femling also
20 pleaded guilty to the tampering with witness from that time
21 frame.

22 So, we're not allowed to go outside of the facts
23 that were presented. It's not under the real facts doctrine.
24 Mr. Femling pled to what he pled to, and this Court is kind
25

1 of confined to what's in the record. And what's in the
2 record from the probable cause and the statement of the --

3 THE COURT: What about the -- in the statement on
4 plea of guilty, there were a couple of Alford or Barr pleas,
5 right? On -- on these counts. Which counts?

6 MS. SMITH: It was a Newton plea to all counts.

7 THE COURT: A Newton to all counts.

8 MR. DOWNS: Right.

9 THE COURT: And so, as a part of that, was there
10 not language included indicating review the probable cause
11 statements, incorporate all -- etcetera. I haven't seen the
12 tape.

13 MS. SMITH: So --

14 THE COURT: I don't review things unless they're
15 provided to me, so --

16 MR. DOWNS: Judge Collier received the factual
17 basis from James Smith, prosecutor, and then he also
18 indicated that he reviewed the probable cause statements and
19 that he was incorporating that by reference. So that's what
20 he relied on.

21 THE COURT: Okay.

22 MR. DOWNS: And that's it.

23 THE COURT: Continue on. I interrupted.

24 MR. DOWNS: That was it, Your Honor. Those three
25 prongs are what I wanted to address.

1 THE COURT: All right. And this was Amended
2 Information No. Four?

3 MS. SMITH: Yes.

4 MR. DOWNS: Correct.

5 THE COURT: And did Amended Informations Nos. two
6 and three contain scrivener's errors?

7 MR. DOWNS: Not to my knowledge.

8 MS. SMITH: I don't know, Your Honor.

9 THE COURT: Well, that's why I made the comment I
10 did at the beginning in terms of morphing, because every time
11 we have a hearing or I receive material on this, I feel like
12 there's a new argument. And I'm not really belaboring that,
13 because this is important to get this, you know, heard and --
14 and to hear all the arguments it might -- may or may not
15 relate to the 7.8. But I haven't looked at these Amended
16 Informations that have been filed. Didn't really realize
17 until just right now that there was going to be any argument
18 about a scrivener's error. I didn't see that in any of the
19 material that I previously read.

20 MR. DOWNS: That was in the last briefing --

21 THE COURT: Okay.

22 MR. DOWNS: -- I provided. And I don't have any
23 objection to if the Court wants to review that court
24 recording.

25 THE COURT: How long is the hearing?

1 MR. DOWNS: It's 25 minutes.

2 MS. SMITH: I guess I'm a little confused as to
3 what defense counsel is arguing. If they're arguing that
4 there was no factual basis for the Court to have entered the
5 guilty plea, the guilty plea itself goes away. We go back to
6 square one where we have the Third Amended Information.

7 MR. DOWNS: That's why indicates that it's an
8 obvious scrivener's error. That he realized the mistake at
9 the hearing, that this was not 2014, and he thought, oh, it
10 must be just 2015, but he should have changed it to that date
11 range, it's the same as Count 4.

12 MS. SMITH: Well, but just a moment ago, defense
13 counsel was arguing that Count 1 came from the 2014
14 kidnapping incident, which clearly it did not because they
15 specifically amended it away from that the --

16 MR. DOWNS: No, the date -- they -- they used the
17 date from the kidnapping. That's why it's the same.
18 Initially it was the same before they indicated it was a
19 scrivener's error.

20 THE COURT: I'm logged out of this right now.
21 Sorry.

22 MR. FEMLING: Would it help if I explained a little
23 bit to them?

24 THE COURT: No, that's what I have your attorney
25 for.

1 MR. FEMLING: Okay. Sorry, that's why I asked.

2 THE COURT: No, you're fine.

3 MR. FEMLING: Okay.

4 MS. SMITH: Your Honor, if I could just say one
5 additional thing.

6 THE COURT: Yes, go ahead.

7 MS. SMITH: So, we don't even have to get to the
8 analysis as to whether or not this is a scrivener's error.
9 The defendant has to prove all three prongs: that there's
10 same criminal intent, including statutory criminal intent;
11 the same time and place; and the same victim. The case law
12 shows that these are not the same victims. There's an
13 additional victim under Count 4, so they don't meet that
14 analysis. But, also, they're different statutory criminal
15 intents. So, if the Court finds that either one of those
16 things is true, we don't even have to get to the scrivener's
17 error argument.

18 THE COURT: You're correct. The case law requires
19 that all three of the prongs be met. And so, I guess I would
20 ask Mr. Downs, then -- the idea or the case law that speaks
21 to the witness tampering and the victim of a witness
22 tampering being more than just the person who is trying to be
23 prevented from testifying or made unavailable for testifying.

24 MR. DOWNS: Well, number one, it's dicta. It's
25 just one sentence in -- in the Court's opinion that doesn't

1 have to do with the Court's ultimate conclusion. Like I was
2 saying before, the defendant in that case was arguing that
3 it's only the public at large that's the victim. And so, if
4 you have 50 counts of witness tampering with 50 different
5 victims, it's all same criminal conduct because it's the
6 public at large that's the victim. The court of appeals said
7 no, that's not how it works. We have different identifiable
8 individual victims, and therefore it's separate criminal
9 conduct. So, here we've got the same identifiable individual
10 victim in both Counts 1 and four, Mr. Braithwaite, therefor
11 it meets that prong of the same identity of the victim.

12 THE COURT: Okay. So, where I am now is, I'd like
13 you to admit that as an exhibit so that I can review it.

14 MS. SMITH: Your Honor, I assume just for the
15 record that it's being marked as P-1, so we would move to
16 admit P-1.

17 THE COURT: P-1.

18 MR. DOWNS: No objection.

19 THE COURT: It's admitted.

20 (EXHIBIT 1 ADMITTED)

21 THE COURT: Okay. The other question then I had,
22 Mr. Downs, with -- was with regards to the intent.
23 Solicitation to commit great -- or, excuse me. Intent is the
24 great bodily injury versus the witness tampering intent.

25

1 Again, as already stated, either don't appear or testify
2 falsely. How are those intents the same?

3 MR. DOWNS: Well, one, the offense is used to
4 accomplish the other offense. You don't get a witness
5 tampering without, in this case, it's what's charged in the
6 information, you don't get to that witness tampering without
7 the solicitation and attempt to keep Mr. Braithwaite from
8 testifying. So, when we look at the, again, the factual
9 basis that was indicated on the record at the plea and
10 sentencing, and we look at the probable cause statements,
11 that's the only intent regarding that date range.

12 MS. SMITH: Your -- Your Honor, defense counsel is
13 arguing that there should only be a subjective intent
14 analysis, basically. Like, what was the defendant's intent
15 in this particular case. However, under the case law, the
16 Court has to do essentially a two-step analysis, right? Yes,
17 we can look at the subjective intent, but also, and first
18 off, there has to be a statutory analysis. And that, I
19 believe, is Chenworth (sp) that talks about that. And it was
20 in the State's briefing. But -- so, the Court first has to
21 look at the statutory analysis and whether the statutory
22 intents are the same. And clearly in this particular case,
23 with solicitation to commit assault in the first degree and
24 witness tampering, the statutory intents are different.

25

1 MR. DOWNS: But, then when we're dealing with the
2 intent of -- the criminal intent under State v. Tillian
3 (sp), State v. Vike, who I -- which I cited in my briefing,
4 there needs to be some sort of end to the intent. So, of
5 criminal intent to -- to do this thing, and that intent ends,
6 and I start again a criminal intent to do this other thing,
7 and therefore it's separate criminal intent, separate
8 criminal conduct. When we're dealing with the same intent to
9 do the same thing, that's one intent, one criminal intent.

10 THE COURT: Did you find any specific cases that
11 addressed the witness tampering? Because with that -- in
12 your claim that it's the same criminal intent in other words.
13 Because, with that claim, it would be -- there's clearly been
14 multiple cases that have happened throughout history that
15 would involve a similar set of facts. Would you agree? So,
16 were you able to find any specific case law that addressed a
17 witness tampering count where the Court found that that was
18 the same criminal intent?

19 MR. DOWNS: Not specifically. I'm pretty sure I
20 looked with those key words, but I don't believe I found
21 anything that was on point. I think most of them involved
22 witness tampering where there were multiple counts, like the
23 State's case of Victoria.

24 THE COURT: Okay. Anything that you'd like to add
25 to your argument at all on behalf of Mr. Femling, Mr. Downs?

1 MR. DOWNS: Nothing else. I just wanted to note
2 that for the 2010 case, I included arguments in there
3 regarding the -- the bail jumping, as well. And the argument
4 about the equity of having criminal history count against you
5 twice. I -- I know that case law is against us, but just for
6 purposes of -- potentially, the court of appeals would rule
7 differently, or the Supreme Court would rule differently. I
8 want to preserve it for appeal.

9 THE COURT: Okay, so -- I mean, for the record, the
10 2008 case is up on appeal, and I think that's preserved just
11 by the very nature of the fact that it is currently at that
12 -- at that level. Anything that you'd like to add to your
13 argument, Ms. Smith?

14 MS. SMITH: I don't, Your Honor. I would just
15 defer to Mr. Vaughn as to whether he has any additional
16 arguments he'd like to make with regard to his cases.

17 THE COURT: Thank you. Mr. Vaughn, didn't forget
18 about you. Did you have anything that you wish to add?

19 MR. VAUGHN: No, I -- I don't have anything
20 additional, there, Your Honor. Thank you.

21 THE COURT: Okay. I -- as I indicated when I first
22 came out, I've -- I've looked at this material a couple of
23 different times in advance of our -- what I thought was going
24 to be hearings, and I think things continually change. I now
25 have this video that I do want to watch. And, quite

1 honestly, I want to go back and kind of pick apart some of
2 the amended information just to kind of look for myself and
3 see what the record contains. Although I agree with Ms.
4 Smith: if one of the prongs fails on the same criminal
5 intent, then that's the answer to the question. But I need
6 to do that. I need to make specific findings of fact and a
7 record with regards to this so that it can be done correctly.

8 So, I'm going to do all that, read all that, as
9 soon as I can, which won't be very long, Mr. Femling. I
10 usually -- when I take things under advisement, it's usually
11 within a couple of weeks, at the most, that I get a decision
12 out. And so, I will hold myself to that standard for your
13 situation, as well. And once I issue that decision, then,
14 depending on what it is, we'll set another date for the
15 actual entry of documentation that's related to my decision.

16 MR. DOWNS: And regardless of how the Court rules,
17 Mr. Femling still will be resentenced, because his -- his
18 offender score will be lower.

19 THE COURT: That's correct. Understood.

20 MR. DOWNS: Could we set a resentencing now?

21 THE COURT: That's fine with me if you're -- if
22 that's what you want to do. It's good to give DOC kind of
23 notice, as well. Ms. Smith, I know that you are -- I think
24 you are going to be very busy in January, unless -- no?

25

1 MS. SMITH: Well, I will be very busy, but not for
2 the reason that you think. Yeah.

3 THE COURT: Circumstances have changed. Okay.
4 Lori, would you -- I know you told me that I'm -- what you
5 told me earlier today about the week of the 16th of January,
6 but if you could come in with a couple special set times in
7 January. Like, the second, fourth, and fifth week, please --
8 excuse me, third and fourth week.

9 MADAM JA: You're ex parte the week of the 23rd, so
10 that opens up quite a bit. Just on Tuesday and Thursday you
11 have a morning docket.

12 THE COURT: Counsels, how about January 25th at
13 1:30? That's a Wednesday.

14 MR. DOWNS: I'm supposed to be in a two-week murder
15 trial starting on the 23rd of January.

16 THE COURT: Will you be going all week? In other
17 words, will it be going on Fridays, or --

18 MR. DOWNS: I guess that's up to Judge Lewis. I
19 assume not.

20 THE COURT: Yeah, okay. So, if we could put it on
21 for maybe then the 27th at 1:30?

22 MR. DOWNS: That works.

23 MS. SMITH: That would be fine.

24 THE COURT: Okay. All right, and Madam Clerk's
25 notes will suffice for that special set. Okay, everyone.

1 Thank you very much. Thank you, Mr. Femling, and also to
2 Stafford Creek.

3 MADAM JA: You have -- I'm sorry. You have
4 criminal docket that afternoon.

5 THE COURT: Oh.

6 MR. FEMLING: Thank you, Your Honor. I appreciate
7 your -- all of your due diligence in reviewing my case.

8 THE COURT: You're welcome. Hang on just one
9 second. Can we make it 3:00? That will let me get my
10 criminal docket done first, and then --

11 MR. DOWNS: Works for me.

12 THE COURT: Okay.

13 MS. SMITH: That's fine.

14 THE COURT: 3:00 p.m.

15 MR. DOWNS: Thank you.

16 MADAM JA: 3:00?

17 THE COURT: Uh-huh. (affirmative)

18 MADAM JA: Thank you.

19 THE COURT: Okay. We will see you all in a few
20 weeks and thank you.

21 MS. SMITH: Thank you, Your Honor.

22 MR. VAUGHN: Thank you, Your Honor.

23 (CASE ADJOURNED)

24

25

1 03/31/2023 - RESENTENCING HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: Thank you. Be seated, please. Okay,
4 good afternoon, everybody. Mr. Femling, are you able to hear
5 me okay?

6 MR. FEMLING: Yes, ma'am --

7 THE COURT: Okay.

8 MR. FEMLING: I can hear you.

9 THE COURT: Okay.

10 MR. FEMLING: Thank you very much.

11 THE COURT: Thank you. Okay. Mr. Downs, I guess

12 I'll let you start. I -- previously, you'd indicated there
13 need to be a resentencing, but I shouldn't do it.

14 MR. DOWNS: Right. We're waiving that issue, Your
15 Honor.

16 THE COURT: Okay, so that issue is waived, is that
17 right?

18 MR. DOWNS: Yes.

19 THE COURT: Mr. Femling? Okay.

20 MR. FEMLING: Yes. Yes, ma'am. I -- I will waive
21 that issue. I feel I can get a fair ruling from you. I just
22 wanted the chance to preside -- to present some other
23 arguments to maybe further the resentencing along as far as
24 my 2010 conviction, ma'am.

25

1 THE COURT: All right. Thank you. Okay, so, then,
2 with that, I'll let Ms. Smith go first with her position with
3 regards to resentencing.

4 MS. SMITH: Thank you, Your Honor. We are prepared
5 to proceed with resentencing today. We did receive some
6 briefing from defense counsel I believe last night with kind
7 of another new, relatively novel argument with regard to
8 sentencing in this particular case, but we do just want to
9 proceed forward at this point.

10 So, as the Court is aware, we are now at a score of
11 eight on Counts 1 and Count 2, seven on Count 3 and 4. There
12 was previously a stipulation to run Counts 1 and Count 2
13 consecutive, and then 3 and 4 concurrent. The Court is aware
14 of the resulting ranges. So we are asking for 120 months on
15 Count 1. We are asking for 82 months on Count 2. I
16 understand that the Court has previously indicated that they
17 may go at the low end of that, but we do feel that the 82
18 months is appropriate in this particular case, consecutive to
19 Count 1. So, we would request 202 months total, which would
20 be a 14 month reduction in his original sentence, and then 43
21 months on Count 3 and count for to run concurrent. We are
22 asking for 18 months of community custody on Count 2. There
23 would typically be 36 months of community custody on Count 1,
24 but because we're imposing the statutory maximum of 120,
25 there's no remaining community custody there.

1 We are asking for no alcohol or controlled
2 substances, no contact with Scott Thomas or Jason Stinson,
3 who are the co-defendants, or the victim, James Braithwaite.
4 We would ask that the previously filed no contact order
5 remain in effect there. We were -- are asking for DOC to
6 calculate credit for time served.

7 As far as restitution is concerned, it appears that
8 our -- there was a previous amount ordered of \$4,240 to James
9 Braithwaite, joint and several with Scott Thomas and Jason
10 Stinson. It appears that a portion of that has been paid.
11 So that -- it appears the remaining balance is \$3,500.

12 As far as a factual summary, Your Honor, the
13 original offenses occurred on December 26th of 2014. During
14 that offense, the defendant, along with two other
15 individuals, lured Mr. Braithwaite to a location where he was
16 repeatedly assaulted by punching and kicking him. They
17 burned his arm with a methamphetamine pipe, causing second-
18 degree burns. The defendant took over \$2,000 of cash from
19 Mr. Braithwaite, and his clothing. The defendant produced a
20 pillow and a rope and threatened to kill him if he talked to
21 the police. They then followed the victim to his home to
22 make sure he did not go to the police. The victim did
23 ultimately report to police and the defendant was arrested on
24 December 29th of 2014, and housed at the Clark County Jail
25 during the pendency of his case.

1 While he was housed in the Clark County Jail,
2 between the dates of March 10th and March 15th of 2015, he
3 approached a fellow inmate by the name of Austin Navarro and
4 offered him a motorcycle in return for killing Braithwaite.
5 He gave Navarro very specific directions to Braithwaite's
6 residence to include what time he was likely to be home. He
7 instructed Navarro to kidnap Braithwaite, take him to the
8 mountains, and kill him. Femling told Navarro that he wanted
9 Braithwaite killed to prevent him from testifying at trial.

10 During the dates of December 6th to December 8th,
11 2015, Femling approached a fellow inmate by the name of
12 Richard Shinn and, again, asked him to make Braithwaite
13 quote/unquote "disappear". He told Shinn to give Braithwaite
14 a, quote, "hot shot" of methamphetamine laced with ketamine,
15 and then once Braithwaite was unconscious, to give him an
16 intravenous injection of air that would make his heart
17 explode. He again provided very specific instructions to the
18 victim's residence and offered to give him a motorcycle in
19 exchange for killing him. He again advised that he wanted
20 this done to prevent him from showing up at court.

21 It appears he also had solicited a third inmate by
22 the name of Joseph Aillo to kill Braithwaite so he couldn't
23 attend trial. The defendant provided one of these inmates to
24 a handwritten map to the victim's residence. The defendant's
25

1 print was also found on that map, and a handwriting analyst
2 indicated that the map was in his handwriting.

3 So, obviously these are highly concerning facts
4 before the Court, very serious allegations. We do not have
5 contact for Mr. Braithwaite. Defense counsel is now
6 contending that we should impose an exceptional sentence,
7 essentially down, in this case, and run it concurrent with
8 his 2010 case in which he's already completed the sentence.
9 I would note that there is no real authority for imposing
10 this sort of, kind of -- it's a Frankenstein-type sentence.
11 In defense counsel's memorandum, it's a violation of the
12 pretrial agreement, which gave him the benefit of three
13 counts of solicitation to commit murder being amended out,
14 all of which would have run consecutive, and each had a
15 minimum of over 300 months. So, it was essentially a life
16 sentence that he was facing. Again, we only received this
17 new argument last night. There are a number of cases that
18 indicate that credit for time served can only be given on a
19 case in which the defendant is confined solely for that case,
20 and also that a sentence has to either be fully concurrent or
21 fully consecutive, there can't be a partially concurrent
22 case.

23 This is not a case in which an exceptional sentence
24 down is warranted. In fact, pursuant to the plea agreement,
25 the defendant agreed to an exceptional sentence up, running

1 Counts 1 and 2 consecutive. Had he been convicted at trial,
2 again, he was looking at well over 900 months minimum, or
3 essentially a life sentence. He's already receiving a -- a
4 significant reduction given State v. Blake and we would ask
5 that the Court impose a new sentence of the 202 months.

6 Thank you.

7 THE COURT: Thank you. Okay, Mr. Downs?

8 MR. DOWNS: Your Honor, the reason that we're
9 asking for the sentence imposed in the 2014 case to run
10 concurrent to the 2010 cases is because the 2010 cases are,
11 just on their face, unfair given what was an unlawful
12 sentence that was imposed in those matters. The sentencing
13 range that should have been imposed at that time was 12
14 months and a day up to 20 months. He ended up serving 90
15 months, minus some good time I assume. But he served at
16 least 70 months more than what he should have on those 2010
17 cases. And if a midpoint was imposed, it would be even less,
18 it'd be 16 months, and that means 74 months more than what he
19 should have served.

20 So, the plea agreement doesn't specifically
21 indicate anything about the 2010 cases, from my recollection
22 and looking through it. It's just that there is a statute
23 that indicates that, when you're serving a sentence, you're
24 required to serve that and then serve this other sentence in
25 a situation like this, unless the Court imposes an

1 exceptional sentence, which is warranted in -- in this
2 situation, because the sentence in the 2010 -- 2010 cases is
3 not in line with the -- the standards of RCW 9.94A.589. So,
4 it's an unjust sentence, essentially, because of how much
5 more time that he served that he shouldn't have served. So,
6 he essentially served 70 to 74 months of -- of time on -- on
7 nothing, that didn't get him -- didn't get him anything
8 except incarceration.

9 So, for our case, the 2014 matter, it's not a
10 hybrid. We're not asking for certain counts in the 2014 case
11 to be run concurrently or consecutively. Actually I -- I
12 don't even think it's unlawful. I'm just trying to respond
13 to what Ms. Smith indicated regarding the hybrid sentence,
14 because essentially there are counts in the 2014 case that
15 are being run concurrently and then two counts that are being
16 run consecutively, per the plea agreement. What we're asking
17 for is just running this concurrently to the 2010 matter.
18 So, I'm not aware of anything that indicates that this would
19 be unlawful. The credit for time served issue is a separate
20 matter. I mean, the DOC will calculate credit for time
21 served beginning once he started -- once he was sentenced
22 originally. That's when he can start getting credit on the
23 2014 case. So, it's not necessarily when he's arrested. It
24 would be when he starts serving that sentence, is my
25 understanding. But DOC would end up calculating that --

1 calculating that if that's what this Court ended up
2 sentencing.

3 But, since being incarcerated, as we've laid out in
4 our initial sentencing memorandum, Mr. Femling has done well
5 to rehabilitate himself. I would note that the guilty plea
6 was a -- a Newton plea, so we don't necessarily agree with
7 all the facts that were recited by the State. They weren't
8 pled to in the -- in the plea paperwork. But Mr. Femling
9 does understand what his role in this situation was, and he
10 is remorseful for -- for his behavior -- his conduct, and I
11 provided a letter from him in my previous sentencing
12 memorandum outlining that, also showed his certificates of
13 completion, and I think more to the point, a lot of the good
14 behavior logs at DOC. He has -- I believe he's in the office
15 of his counselor, and so his counselor could probably address
16 the Court in terms of how well Mr. Femling has done at DOC in
17 terms of positive behavioral observations, BOEs --
18 observations in terms of how he's helping with officers,
19 helping out with the units, trying to keep the peace at DOC,
20 trying to make sure that people treat -- treat each other
21 respectfully. So, I think he's done good work in that
22 respect.

23 He recently completed the roots of success program.
24 So, he also has some training while at DOC for -- for work.
25 Upon release, he's -- I believe he's hoping to work as a -- a

1 heavy equipment operator, working construction, that kind of
2 thing, ideally. He'll live with his sister, I believe, upon
3 release. Rosita, who lives in -- in Washington State on a
4 family farm. Has a good support system there with his -- his
5 family. So, he has a good outlook for when he's released
6 that appears to be relatively low risk, given the work that
7 he's done and the observations that DOC has made of him.

8 So, the main point, again, is the inherently unjust
9 2010 sentence. I can't stress enough how much, you know, 70
10 months of an unjust, improperly imposed, illegal sentence
11 that he can't get back, how -- how awful that is. And there
12 are other individuals who are in similar situations, but at
13 least with Mr. Femling, there's a way to remedy that, and we
14 can remedy that through this 2014 case.

15 So, that's our request, is to run it concurrently
16 with that 2010 case or cases and ask the Court to waive non-
17 mandatory fines and fees. He is indigent and has been
18 indigent for -- I think he's been in for eight years or so.
19 So, that's our request, Your Honor. Thank you.

20 THE COURT: Okay. Mr. Femling, what would you like
21 to tell me?

22 MR. FEMLING: Well, Your Honor, I want to sincerely
23 thank you for the opportunity to speak today, and I
24 appreciate the Court giving me the time and the consideration
25 to hear what I have to say.

1 My name is Raymond Femling. My date of birth is
2 February 4th, 1983. First, I should say that I was really
3 sorry to the victim and any -- and everyone that I have
4 caused harm. All my initial thoughts on talking today would
5 to excuse my actions. But, I -- I've learned in the time of
6 my incarceration to learn remorse and to take responsibility
7 for what I've done, and the fact is that, regardless of the
8 reasons and however valid I think they were, I was selfish,
9 impulsive, and reckless. I cared more about my own desires
10 and what others thought of me than I did about doing the
11 right thing for the right reasons.

12 Spending significant amounts of time in prison,
13 being confined, locked down, and isolated, has had a
14 resounding effect of bringing me to terms with myself and my
15 actions. To this day, I have a hard time looking at myself
16 in the mirror, but the growth I have achieved and the
17 progress is unvaluable [sic], not only to me, but to my
18 family and the community I hope soon to return to.

19 I have suffered great losses during my
20 incarceration, not only of time, but also loved ones and
21 opportunity. However, those losses belong more to my family
22 than myself. Working through programs such as Redemption
23 Project, self-awareness classes, Blue Mountain Humane Society
24 dog training program, also the Roots of Success program and
25 now I'm currently doing a TRAC service servicing all of the

1 ice machines and doing all the services on the
2 (indiscernible) units and the unit in the facility here. So,
3 I'm actually learning a trade possibly that I could do when I
4 get out on top of with my heavy equipment operator engineers
5 union that I used to be a part of back in 2007. It's helped
6 me understand the value of vulnerability, integrity as well
7 as a sense of respect for life.

8 Unfortunately, due to the time restraints of my --
9 of my crime, I was unable to take classes -- to take
10 opportunity for schooling such as Thinking for a Change and
11 other educational programs I was interested in for the
12 betterment of who I am now. I wasn't able to take advantage
13 of those due to the respective -- to the time restraints I
14 had in my introductory to SCC. I had too much time to be
15 able to sign up for certain educational programs, so I've
16 been able to take care of -- take advantage of the ones that
17 I was able to. The parenting classes I did, I paid for that
18 myself because I do have a daughter out there that has never
19 met me, and I -- I want more than anything in life to be able
20 to show her that she can look up to me. Kind of went off
21 script here. But, when my daughter was born, my life
22 changed. Things became more serious for me. Without it --
23 not being a part of my daughter's life eats me inside. Her
24 birth made me look at the type of man I was and the father I
25 wanted to be. Through selfish, like, reflection, I have been

1 more able to put myself in the shoes of my victim. Doing
2 this has put my actions into a light I did not like and was
3 not proud of. Even more, I was able to look at what I had
4 done as if it had happened to someone of -- happened to one
5 of my loved ones. From this, I gained true remorse. What I
6 did wasn't okay, and I wouldn't wish it on anyone, and I'm
7 sorry for the pain I've caused.

8 The man I was is not the man I am today. I have a
9 daughter that I want to be proud of me, to look up to me, and
10 need to be a father worthy of her love, a brother my sister
11 can be proud of, and a neighbor worthy of living in the
12 community.

13 I do not expect people I have harmed to forgive me.
14 I realize the person I was back then was cancerous. Looking
15 back to who I was, I feel nothing but shame in the actions I
16 took against others. I only hope one day those I have harmed
17 may forgive me.

18 Thankfully, I have worked on some of the
19 relationships I still have in my life. I feel as though I
20 have been given a second chance. I now have a right mindset,
21 as well as the people who are willing to hold me accountable
22 and continue to help me on the right path. I am certain my
23 commitment to personal growth and accountability will take a
24 lifetime. I will not forget the harm I have caused or
25 remorse I feel.

1 Upon my release, I plan on living with my sister on
2 the family farm. We have 60 acres and I have several job
3 opportunities. We're getting ready to start a community
4 garden and help her manage the family farm.

5 I've been in contact with my dad's best friend Mike
6 Clausen (sp). He's the individual that was in the courtroom
7 last time we had the hearing, standing behind Sean. He was
8 not able to make it here today because he has a doctor's
9 appointment for his kidneys. Otherwise, he would have been
10 there in person to give his support, as well.

11 My long-term goals are to receive my CDO and drive
12 a semi-truck, as it -- as long as it fits in the parameters
13 of my probation, as my father has a long work history in this
14 field. I also plan on contacting the operator engineers
15 union I was with, the local -- local 428 operator engineers
16 out of Arizona, and I want to transfer this work experience
17 to Washington State. I also have a desire to look into a
18 construction union, as I may formulate multiple opportunities
19 for myself to succeed in any and all future endeavors.

20 My short-term goals are to find a sponsor as well
21 as a home group for my AA and NA meetings and to give back to
22 troubled kids by sharing my story that I might help them
23 realize a life change is in order to avoid a mistake -- the
24 mistakes I have made.

25

1 I just wanted to touch on things. I -- I've got a
2 certificate here for the emergent success class that I just
3 completed. I also -- I have received a total of 41 positive
4 behavior logs while I'm here. The last I received was from
5 my CC3. I'd like to read it to you today. It's my no. 41:
6 "Femling has come a long way in the time that he has been at
7 Stafford Creek. He has been very helpful in the unit with
8 staff and the incarcerated. He has received many positive
9 BOEs over the past year for positive changes, changed
10 behavior. This is probably the most positive BOEs I have
11 seen. Keep up the good work and maintain a positive
12 behavior." That -- that's from the counselor.

13 It -- it's -- what I'm trying to reiterate here
14 with that, ma'am, is I was always told that actions speak
15 louder than words. Anybody can sit here -- sit here and tell
16 you until they're -- lie to your face that they're changed,
17 because they're not the same person that they were before.
18 I'm sitting here telling you that, but I'm not only just
19 telling you that, I'm trying to show you that, as well,
20 through interactions with officers and also other
21 incarcerated individuals that I have here in this unit. I
22 try to lead by example, and also try to show people that are
23 coming from closed custody or other walks of life that you
24 don't have to continue making the bad choices, that we can
25 make the choice to do right here. It's what going to cement

1 your behaviors when you get out there on the streets. And I
2 -- I'm at a loss of words now.

3 I've never met -- I've never had the opportunity to
4 meet my daughter. She'll be eight years old this year. I'm
5 just begging you for the opportunity to please let me get out
6 there and show you through my actions in the community that
7 I'm not the same man that I was eight years ago. I think my
8 sister might have something to say, as well. And that's all
9 I've got, Your Honor. I'm just asking for your mercy.
10 Please give me the low end, and consider giving my 2010 to
11 run concurrent, is what I'm asking.

12 Thank you for your time.

13 THE COURT: All right. Thank you. Is there any
14 objection to me hearing from his sister?

15 MS. SMITH: No.

16 THE COURT: All right. Thank you, ma'am. If you'd
17 like to say something, go ahead, please.

18 MS. BROWNING: Hi.

19 THE COURT: Hi.

20 MS. BROWNING: I'm Rosita Browning. I'm Raymond's
21 older sister. I helped raise him, so we came from a rough
22 family. We both have had a lot of struggles and,
23 unfortunately, at the time when the alleged crime had been
24 committed, we had a series of unfortunate events that kind of
25 just ran back to back, and I wasn't able to help him out as

1 much as I normally would. I was going through some of my own
2 things, and we all know that the plea bargain that he
3 accepted was on a Newton deal, it was all alleged, from my
4 understanding in his email --- always been a troubled child.
5 When he first went to prison, he struggled quite a bit to fit
6 in and make his way through, and in the last years that he's
7 been at Stafford Creek, he has improved tremendously and I
8 work with him on staying positive all the time. Focusing
9 when he gets upset, you know, to calm him down. And we talk
10 things through. He has a better understanding of how to deal
11 with his emotions and how to help people out, and the
12 importance of helping people out for our community,
13 especially the future -- our children.

14 I think that he would be a great leader and example
15 to a lot of our youth in our -- in our society today to help
16 guide them on things not to do, and the better choices that
17 they can make, and a better understanding of their feelings
18 and emotions and how to deal with them properly instead of
19 reaching out to drugs and violence and other things that the
20 streets have to offer. I think that we need more of that,
21 and I think that Raymond would be a good leader in that
22 department.

23 I also have a 60-acre farm that he has a room here
24 always, and he is at a gated community here on it, so he
25 can't get in and out. So, nobody is allowed here unless I

1 give permission, so I get to control the gate. And then,
2 also, with that being said, we are doing a community garden
3 and microgreens, so there's plenty of work here to do, and
4 that not even just the maintenance on the farm or the house
5 or the buildings. So, he has plenty to keep himself
6 occupied.

7 There are several people that have reached out to
8 Ray and let him know that when he gets out there -- there's a
9 lot of drug and alcohol programs that -- that they would like
10 to take him to and hold him accountable for his actions and
11 help him get through the, you know, the process of going from
12 incarcerated back to the civilian life.

13 THE COURT: Thank you.

14 MS. BROWNING: I -- I don't really have much more
15 to say, ma'am. I -- I appreciate you listening to me.

16 THE COURT: Thank you.

17 MR. DOWNS: I just want to note one more thing.

18 THE COURT: Go ahead.

19 MR. DOWNS: Regarding -- in response to Ms. Smith's
20 argument about a hybrid sentence, I looked it up real quick
21 and that's more in regards to, like, if there's a -- a 60-
22 month sentence, the Court can't say 40 months will run
23 concurrently or something, and then the other 20 months runs
24 consecutive. So, that's my understanding of what a hybrid
25 sentence is. So, that's not what's being requested here.

1 THE COURT: Well, okay. My understanding of what
2 was being requested was that -- and again, I mean it -- it
3 kind of moved a little bit in argument from what was actually
4 put down on paper, but -- that -- the time on the 2014 case,
5 that that start being calculated as of, basically, December
6 29th of 2014, which would be somewhere in the serving of the
7 2010 sentence, as opposed to when that 2010 sentence had
8 completed being served.

9 MR. DOWNS: I don't know the date as to when he
10 completed serving the 2010 sentence, so it's hard for me to
11 say exactly when he'd start getting credit --

12 THE COURT: He thinks he knows.

13 MR. DOWNS: Okay.

14 THE COURT: Mr. Femling, do you know?

15 MR. FEMLING: Yes, ma'am. So, I do believe that I
16 completed doing the 2010 DOSA revocation sometime in 2018,
17 ma'am.

18 THE COURT: '18.

19 MR. FEMLING: Around there. I would have to look
20 at my -- or, it might, let's see. Actually --

21 THE COURT: Yeah.

22 MR. FEMLING: I think it was '18 -- it's roughly
23 that, ma'am. It was -- it was 40 -- 40 months is what I had
24 remaining on the 2010 conviction. So, the time that I was in
25 county in 2014 till 2016, I was serving on my current

1 conviction, and then once I got to custody in DOC on five --
2 five -- month five of 2016, I started doing my DOSA revoke,
3 and then the DOSA revoke was completed in 2018, and then I
4 started my current conviction, if that makes any sense.

5 THE COURT: Yeah. It does. Thank you.

6 MR. FEMLING: Yeah. So it -- the time -- the time
7 (indiscernible). Yeah, so the time that I -- from December
8 29th, 2014 all the way till 2016, the time that I was in
9 county went towards this current conviction. And once I made
10 it to Shelton, when they revoked the DOSA, that I started the
11 remainder of the 2010. So essentially what I got was three
12 consecutive sentences. I got a consecutive 2010 DOSA revoke;
13 my current conviction, 120 months consecutive with the --
14 with the 96 months, did that too. And then everything else
15 ran from current. But what I'm asking the Court here today,
16 is to just find a line in my judgment and sentence, forgot
17 the page no., just say that the 2014 runs concurrent with the
18 2010.

19 THE COURT: Yeah, that was my understanding of what
20 Mr. Downs was asking, as well. Think it's -- there's a --
21 there's a few things that -- I mean, we've all talked and
22 gotten together multiple times, and we've heard kind of -- I
23 don't want to call it multiple arguments. I would call it
24 more advocacy as kind of the situation changes or information
25 becomes available, then I hear additional arguments, if you

1 will. And I think -- I mean, from my perspective, there's --
2 this is probably a case that falls into not being that much
3 fun as a judge, because I don't necessarily understand the
4 way that the outcome is going to happen. And what I mean by
5 that is, Mr. Downs has argued, again, I'll call it a re-
6 argument with regards to the 2010 cases, if you'd been
7 resentenced just strictly because of Blake without 2014 being
8 in play at all, you know, you would have gone -- as he
9 indicated, it was some 20-month sentence or something like
10 that on that DOSA revocation. But that's not the situation,
11 and that was part of what I had included in my last decision
12 that I made, is that, because of when it's coming in, for it
13 to be looked at, it needs to be looked at at the time. And
14 the subsequent 2014 situation goes in and has to be
15 considered as a part of the 2010 -- whether or not there be
16 resentencing on that. And so, it's a factor in terms of the
17 argument that they -- the sentence is excessive -- I can see
18 why that argument is being made, but ultimately it fails
19 because of the case law that indicates that the Court is
20 supposed to include subsequent convictions as part of the
21 offender score when doing a resentencing. You're doing it at
22 the time and considering everything that's happened up until
23 that time if -- when you do that resentencing. That's why
24 there isn't a resentencing, because the offender score didn't
25 change on the 2010 cases.

1 So, saying all that because I -- I don't think that
2 -- I'm not seeing anything in the form of case law that's
3 been provided to me that indicates that I can even do what's
4 being asked.

5 MR. FEMLING: The State v. (indiscernible) case.

6 THE COURT: I'm sorry?

7 MR. FEMLING: Did you read State v. Jones? I
8 provided Sean with that case law. It's a DOSA revocation
9 where they ran it -- his revoke -- concurrent, and that's
10 where he came up with the -- had to be an exceptional
11 sentence. Sean, do you got that case that we talked -- I
12 sent you?

13 MR. DOWNS: Yeah, it's in the briefing. So, it's
14 an unpublished case and it discusses -- there -- there are
15 multiple cases that discuss how the courts -- it remands back
16 to the superior court as the superior court indicated they
17 don't have the discretion to impose a sentence concurrently
18 to a DOSA revoke, but that's incorrect. The Court does have
19 the discretion under the exceptional sentence provision. And
20 so Jones cites In re PRP of Mulholland, and there are similar
21 cases that are similar.

22 MS. SMITH: There's a case, Your Honor, State v.
23 Grayson, it's 130 Wn.App. 782 (2005) case that talks about
24 how Washington law requires that sentences be either fully
25 consecutive or fully concurrent with one another. It talks

1 about an award of credit for time served on a 2002 conviction
2 that would credit Costello with any days that are also
3 credited to the sentence on his 2001 conviction would
4 unlawfully render the sentences partially concurrent. I
5 think that's analogous to what defense counsel is requesting
6 here. There's also -- let's see. State -- or, In re
7 Costello, it's a 2006 case where it says, "We agree with the
8 DOC and find that RCW 9.94A.505(6) is dispositive. The
9 statute plainly allows presentence credit for time served
10 solely for the offense being sentenced, not for confinement
11 time served on other matters such as Mr. Allory's (sp) DOC-
12 imposed sanction for violating community custody terms."
13 Which is essentially what defense counsel is asking for.
14 They're asking for us to go back and give credit for time
15 served on this case while he was serving the DOSA revoke.

16 MR. DOWNS: The Court doesn't determine credit for
17 time served. DOC can calculate that. So, the Court just
18 imposes a sentence, whether it's concurrent, consecutive, or
19 otherwise. State v. Grayson is the case I was citing. It
20 explained the hybrid sentence, where it talks about how he
21 can't leave --

22 THE COURT: Can you -- I mean, so in your November
23 -- let me look at my notes here. In your November 18, '22
24 memorandum regarding resentencing for Mr. Femling, you
25 conceded that the Court had to run the 2014 case consecutive

1 to the 2010 case. It was also stated at the sentencing, the
2 original sentencing -- I mean, I understand, but as we've
3 been talking about resentencing -- I mean, I was surprised
4 when I saw this argument in the new materials, because back
5 in November you indicated that I had to run it consecutive to
6 the 2010 case.

7 MR. DOWNS: Right.

8 THE COURT: So, we kind of have two different
9 arguments going on here.

10 MR. DOWNS: Well, that was my understanding based
11 on the statute. I think at the time we were still in the
12 midst of determining whether -- you know, what points count
13 as what, and then we focus what our ultimate recommendation
14 is for resentencing after we figure out what the Court rules
15 on that. And Mr. Femling is able to provide me some
16 authority, so he's helpful in that respect and I was able to
17 submit that to the Court. You know, obviously not as quickly
18 as I would prefer. I was in trial this week. But it's --
19 it's nevertheless possible and supported by case law. So,
20 the Court has the discretion. That's -- I don't think that
21 should be a question.

22 MR. FEMLING: Back in our November hearing, I
23 didn't have access to the law library like I have now, and I
24 -- I've been able to do -- do a lot of research and try to
25 assist Mr. Downs with case law. And initially, we were

1 waiting to find out whether or not you were willing to
2 resentence me under the 2010 -- once you'd made that ruling,
3 it gave us our direct argument to do what we were going to
4 ask for at this hearing, ma'am.

5 THE COURT: Yeah, that's kind of what I meant by
6 circumstances and situations can change based on the
7 decisions that the Court makes with regards to other pieces
8 of this. I still believe --

9 MR. FEMLING: (indiscernible)

10 THE COURT: Sir, I'm just going to go ahead and
11 complete this at this point. I -- I do want to say a couple
12 more things before I actually get to that. I don't think
13 there's any question that what you've done in the last eight
14 years -- I've indicated previously to you, I recognize all of
15 those things. I commend you for doing all of those things,
16 because you could have elected to not do them. You could
17 have elected to become I'll call it more hardened and more
18 bitter and upset about what's being done to you, as opposed
19 to helping yourself out. Helping your mindset out, helping
20 your family out. Being the person you are there, with all
21 the commendations. And I did read them. I saw those classes
22 that you've taken and -- and you deserve to have, you know,
23 those words of good job for doing all of that. That's a
24 piece of information that I took into consideration as I was
25 deciding what to do with regards to the Count 2. And I don't

1 agree with the State with regards to Count 2. That's the
2 main -- one of the main reasons why is what you've been able
3 to accomplish the last eight years. It doesn't wipe away
4 what happened.

5 MR. FEMLING: Yeah.

6 THE COURT: It's not -- you know, it's there, as
7 you've said, and you have to acknowledge that, and you have
8 to accept responsibility for that and move on. And you have
9 been. So, I think that doing what I'm being asked to do in
10 terms of running 2010 cases and the 2014 cases concurrent to
11 each other is a hybrid situation, and I don't think that it's
12 allowable. The court of appeals may disagree with me.

13 With that, though, on the 2014 case, we'll sentence
14 Mr. Femling -- resentence Mr. Femling 120 months on Count 1,
15 62 months on Count 2, to run consecutive to Count 1 pursuant
16 to the plea agreement. Count 3 and four, 43 months to run
17 concurrent. There's 18 months of community custody on Count
18 2. No contact orders with the individuals indicated. DOC to
19 calculate the credit for time served.

20 Is there a dispute regarding the remaining
21 restitution, Mr. Downs?

22 MR. DOWNS: I'll defer to Mr. Femling. I don't
23 know if we specifically discussed that.

24 MR. FEMLING: Oh, yeah no it -- when -- when the
25 prosecutor indicated that some money had been paid, the 42 --

1 what I signed with Mr. Staples was a restitution order of
2 \$3,500, so I don't believe that there's been any money paid
3 on that. But, I do believe that \$3,500 was to be divided
4 between the three co-defendants, me myself, Jason Stinson and
5 Scott Thomas.

6 THE COURT: Yeah, I believe that counsel indicated
7 it's joint and several, so what that means is that any
8 payment that's made by anybody counts as a payment for
9 everybody else, if that makes sense.

10 MR. FEMLING: Okay.

11 THE COURT: So, in other words, one person could
12 end up paying all \$3,500 and the other two would pay zero.
13 But that's how it's drafted.

14 MR. FEMLING: Oh, is it?

15 MR. FEMLING: The number itself, you don't disagree
16 with, correct?

17 MR. FEMLING: Oh, yeah, I would just -- it was
18 agreed on \$3,500 I think it was.

19 THE COURT: Okay. Thank you.

20 MR. DOWNS: And then there's one other thing I
21 think Mr. Femling -- Femling wanted to address was in regards
22 to the no contact with the other participants. Part of the
23 plea offer indicated that defendant may petition the court
24 for a leave from no contact from those co-defendants after
25 release from prison. The two co-defendants are now released

1 from prison. I think Mr. Femling's hope is that he's going
2 to be able to come down a large mountain to serve the tail
3 end of his time, and there might be a prohibition on where he
4 might be able to -- to go on work from there, if there's a
5 prohibition on contact with one of these co-defendants.

6 THE COURT: Okay. Is that even a known at this
7 point?

8 MR. DOWNS: I think -- I don't know. I don't
9 specifically know. I think one of the co-defendants does
10 live in Clark County. I think it was Thomas.

11 MS. SMITH: Your Honor, I believe --

12 MR. FEMLING: Yes, ma'am.

13 MS. SMITH: I believe the plea agreement indicated
14 that he could petition the court for relief of that once he
15 was released from prison. I think we're a little premature
16 at this point. I would ask that that be brought back before
17 the court after his release, if that is an issue, so we can
18 address it at that point in time. It wasn't something
19 brought to our attention before today. There hasn't been a
20 motion filed.

21 THE COURT: Okay.

22 MR. FEMLING: Your Honor --

23 THE COURT: I'm just trying to circulate through
24 the actual argument that's being made here. Is there some
25 sort of an argument being made to me that he can't go to

1 Larch because one of these other individuals is there? Is
2 that --

3 MR. DOWNS: That's what he's concerned about.

4 THE COURT: Okay. Do we even know that?

5 MR. FEMLING: No --

6 THE COURT: Have we looked that up on the --

7 MR. FEMLING: Ma'am --

8 THE COURT: -- on the website to even know that?

9 MR. FEMLING: Ma'am --

10 MR. DOWNS: He's -- he's out of custody, so he's
11 not at Larch. He's a resident. Mr. Femling can explain it.

12 MR. FEMLING: Your Honor, what I want to talk about
13 is, as far as in the computer at DOC as a -- a separatee
14 between me and Scott Thomas and -- there was -- was one also
15 between me and Jason Stenson. But for some reason, because
16 of that provision that was put into the judgment and sentence
17 to where upon my release that we can petition for the -- the
18 separatee between me and Scott Thomas at upon release, it has
19 left a separatee between me and him, even though he's already
20 in the community, versus where the one with Jason Stenson,
21 there's no longer a separatee in the computer in DOC, because
22 he's already released. So, I'm just asking that -- I'm not
23 trying to be in contact with either one of them individuals.
24 I'm just asking for the provision as far as keeping the
25 separatee once he's out in the community with Scott Thomas

1 and not my other co-defendant didn't make much sense to me --
2 sense to me. I was just trying to get to Larch Mountain and
3 didn't want to not be able to get a -- a gate card because I
4 had a separatee with someone in the community.

5 THE COURT: Yeah, that's not the intention of the
6 no contact order that was originally entered. So, I don't --
7 I don't have an objection to some sort of language that would
8 explain that, but I'm not -- I mean --

9 MR. FEMLING: That's -- that's all I'm -- just a
10 little language to explain that the -- ultimately, I'm just
11 trying to get closer to my -- my family, Your Honor, and
12 continue doing the right thing. I'm not -- I'm not trying to
13 do any nefarious activity or any of that.

14 THE COURT: Okay as -- how are you planning on
15 having Mr. Femling execute these documents? Did he -- did
16 you provide him with that in advance?

17 MR. DOWNS: We sent the appendix over there, so he
18 should have that ready to sign.

19 THE COURT: You have the appendix there, Mr.
20 Femling?

21 MR. FEMLING: Yes I do, Your Honor.

22 THE COURT: Okay does -- on the other section of
23 the judgment and sentence, does the State have any objection
24 to the language being written in by the Court, that there's
25

1 nothing preventing Mr. Femling from serving time at Larch
2 Mountain?

3 MS. SMITH: No.

4 THE COURT: Okay.

5 MS. SMITH: It's my understanding that individual
6 is not at Larch Mountain. He's just in the community here --

7 THE COURT: Correct.

8 MS. SMITH: -- so he thinks that that's going to
9 prohibit him from being --

10 THE COURT: That's why he's saying that apparently
11 there's still this flag within DOC that one of the
12 individuals he has a no contact situation with -- I --
13 there's a -- there's a name for it within DOC, Mr. Femling.

14 MR. FEMLING: Yeah, I said it's a separatee. A --

15 THE COURT: Separatee. Separate.

16 MR. FEMLING: Yeah I've got a separatee just --
17 yeah. I have a separatee at the east precinct at -- in
18 Vancouver, Washington. And my concern is -- is I did want to
19 be able to get a gate card if I go to Larch Mountain, so I
20 didn't go to do DNR, CVC. So, basically, all I'm asking for
21 is somewhere in the judgment and sentence says Mr. Femling
22 can go to Larch Mountain and get a gate card and -- and get a
23 -- and go to work. That's all I'm asking for, ma'am.

24 MS. SMITH: Oh, so he can be released into the
25 community from Larch Mountain. That's --

E-Filing

February 10, 2025 - 3:10 PM

Transmittal Information

Filed With Court: Supreme Court
Appellate Court Case Number: 1035357
Appellate Court Case Title: State of Washington v. Raymond Jay Femling
Trial Court Case Number: 10-1-00823-3

DOC filing on behalf of FEMLING - DOC Number 891005

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The E-Filer's DOC Number is 891005

The Case Number is 1035357

The entire original email subject is 03,FEMLING,891005,1035357,1OF3

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aaron.bartlett@clark.wa.gov, cntypa.generaldelivery@clark.wa.gov

03/31/2023 - RESENTENCING HEARING

80

1 MR. DOWNS: Well, they do, like, firefighting --

2 MR. FEMLING: No, I just didn't -- it's to do DNR,
3 ma'am. It's going out into the woods and plant trees, do
4 thinning, and fight fires. Just like I'd be able to do at
5 any -- any other camp. It's just that one is closer to my
6 family.

7 THE COURT: I have indicated that language on the J
8 and S. Mr. Downs can review it. Okay, so, do you have that
9 appendix there and you're signing it now for me?

10 MR. FEMLING: Yes I am, Your Honor.

11 THE COURT: Okay. With the resentencing, the
12 advice of rights of appeal of -- of -- applies again, if you
13 will. You have the right to appeal the conviction of
14 sentence outside the standard range. Unless the notice of
15 appeal is filed within 30 days after the entry of this
16 judgment, your right to appeal is irrevocably waived. The
17 superior court clerk will, if requested by you, appearing
18 without counsel, supply a notice of appeal form and file it
19 upon completion by you. You have the right, if you're unable
20 to pay the cost thereof to have counsel appointed, and
21 portions of the trial record necessary for review of assigned
22 errors transcribed at public expense for an appeal. Any
23 petition or motion for collateral attack on the judgment and
24 sentence, including but not limited to, personal restraint
25 petitions, state *habeas corpus* petitions, motion to vacate

1 judgment, motion to withdraw guilty pleas, motion for new
2 trial, or motion to arrest judgment must be filed within one
3 year of the final judgment in this matter, except for as
4 provided in RCW 10.73.100 or 10.73.090.

5 Okay, have you signed that?

6 MR. FEMLING: Yes I have, Your Honor.

7 THE COURT: Thank you --

8 MR. FEMLING: So is -- so is --

9 THE COURT: -- and is your counselor going to
10 facilitate returning it to us, or to Mr. Downs so that it can
11 get filed?

12 MR. DOWNS: Yes. They just need to know where they
13 should send it. I mean, they can send it to me or, if you
14 want, send it to the court.

15 THE COURT: Are you able to email it, counselor, to
16 my judicial assistant?

17 THE COUNSELOR: Yes. Yeah, I just need the email
18 address, then I can do that.

19 THE COURT: Thank you so much. It's Lorinda, L-o-
20 r-i-n-d-a.Roberts, R-o-b-e-r-t-s at Clark.wa.gov.

21 THE COUNSELOR: All right. Thank you.

22 THE COURT: Thank you so much for helping with
23 that. Mr. Femling --

24 THE COUNSELOR: Of course.

25

1 THE COURT: -- it goes without saying, but just for
2 your notice, you're ineligible to possess firearms, sir,
3 okay?

4 MR. FEMLING: That's -- I've -- I've never
5 possessed firearms. Never planned on it.

6 THE COURT: Okay. Pass that down, let Mr. Downs
7 review. And is that document -- is that being emailed now?

8 THE COUNSELOR: I'll have to scan it to myself, and
9 then I'll be able to email it, yes.

10 THE COURT: Okay.

11 THE COUNSELOR: Within -- within the next 10
12 minutes or so.

13 THE COURT: 10 minutes. Perfect. Thank you so
14 much.

15 THE COUNSELOR: Of course.

16 (Counsel confer)

17 MS. SMITH: Your Honor, Mr. Downs has indicated
18 he'd prefer we'd change the standard range on Count 1 to just
19 120 to 120 --

20 THE COURT: That's fine. Go ahead and make that
21 change, please.

22 MS. SMITH: White out.

23 (The Court discusses other matters with Madam JA)

24 MR. DOWNS: And there's a finding of fact,
25 conclusions of law for the -- the exceptional sentence since

1 the defense was objecting to it. I wasn't going to sign, I
2 was just going to indicate notice provided to --

3 THE COURT: That's fine. I can read it into the
4 record when we get it back up here, as well.

5 MS. SMITH: Just to be clear, defense counsel is
6 objecting to running Counts 1 and Count 2 concurrent -- or,
7 consecutive?

8 THE COURT: Well, again, I mean, I think we've been
9 over this. I put this in my original decision from a couple
10 of months ago. To do so would be a violation of the
11 agreement.

12 MR. DOWNS: Just to clarify, we have previous
13 argument that -- that previously entered finding of facts,
14 conclusions of law weren't correct. These ones would be
15 correct.

16 THE COURT: From 2014, you mean? Or, '16?

17 MR. DOWNS: Right.

18 THE COURT: Yeah. Can I see that for a second,
19 ma'am, or -- please?

20 MADAM JA: Yeah.

21 THE COURT: Okay. So, the findings of fact,
22 conclusions of law for the exceptional sentence appendix 2.4,
23 and exceptional sentence within standard range should be
24 imposed based upon the following findings of fact and
25 conclusions of law, Counts 1 and two run consecutive.

1 Defendant and State agree that it's in the interest of
2 justice to sentence the defendant to an exceptional sentence
3 above the standard range and, again, notice provided to the
4 defense on that. Court finds both are -- that, given both
5 parties are in agreement, and this is coming from the
6 original plea bargain, as to the recommended sentence above
7 the standard range, and further that it's in the interests of
8 justice to order an exceptional standard -- sentence above
9 the standard range in that the counts are running
10 consecutive. The defendant waives the right to jury to
11 determine the -- any issue related to imposition of an
12 exceptional sentence.

13 Okay, so we'll look for that appendix, then. It
14 will be coming over. We'll include it with the materials. I
15 don't think I need to make everybody stick around for that,
16 because I anticipate we'll be receiving that in just a few
17 minutes.

18 Okay, Mr. Femling. It's been a pleasure. Don't
19 let the comments in the sentence deter you from the positive
20 actions that you've been taking. Please continue that.

21 MR. FEMLING: I will. Thank you for your time, and
22 hopefully I -- I can get some action in the court of appeals
23 and we'll come back and we can hammer out the rest of the --
24 my issues.

25

1 THE COURT: All right, sir. You take care. Thank
2 you.

3 MR. FEMLING: All right. Thank you.

4 THE COURT: Okay. Thank you, counsels.

5 (COURT ADJOURNED)

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C E R T I F I C A T I O N

I, Amy M. Brittingham, certify under penalty of perjury under the laws of the State of Washington the following is true and correct:

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DATED this 2nd day of August, 2023.

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August 02, 2023 - 1:44 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 58129-9
Appellate Court Case Title: State of Washington, Respondent v Raymond J. Femling, Appellant
Superior Court Case Number: 14-1-02617-0

The following documents have been uploaded:

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EX 101+

B.

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Court of Appeals

Division II
WASHINGTON STATE COURT OF APPEALS, DIVISION II
State of Washington
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8/15/2023 8:08 AM
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,) CAUSE NO. 10-1-00823-3 (06)
) COA NO. 57959-6-II
)
) Hon. Diane Woolard
Plaintiff,) Hon. Robert Lewis
) Hon. Rich Melnick
v.) Hon. Jennifer Snider
)
RAYMOND FEMLING) 10/15/2010, 12/13/2010
) 12/21/2010, 01/06/2011
Defendant.) 02/18/2022, 04/15/2022
) 05/03/2022, 06/03/2022
) 07/29/2022, 09/23/2022

VOLUME I OF I
VERBATIM REPORT OF PROCEEDINGS
From Electronic Recording

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1 10/15/2010 - PLEA HEARING

2 *Before the Honorable Robert Lewis:*

3 MR. MAYERS: Raymond Femling.

4 MR. BUCKLEY: This matter is ready, Your Honor.

5 MR. MAYERS: Two items on the docket. Five and
6 seven.

7 MR. BUCKLEY: That is correct. He's going to be
8 pleading to two incidents. First in time is possession of
9 controlled substance, methamphetamine and the second is
10 possession of stolen property in the first degree. Handing
11 up to the Court proposed statement on plea of guilty.

12 THE COURT: Okay. You're Raymond J. Femling?

13 MR. FEMLING: Yes, Your Honor.

14 THE COURT: Says here you're 27. What's your date
15 of birth?

16 MR. FEMLING: 02/04/1983.

17 THE COURT: And you went through the 10th grade. Can
18 you read and write the English language?

19 MR. FEMLING: Yes, sir.

20 THE COURT: I've been handed two statements of
21 defendant on plea of guilty. Did you read both those forms?

22 MR. FEMLING: Yes, I did, sir.

23 THE COURT: Did you understand everything that was
24 in them?

25 MR. FEMLING: I did, Your Honor.

1 THE COURT: Have you had enough time to talk to
2 your attorney about how you want to proceed?

3 MR. FEMLING: Yes, I have, Your Honor.

4 THE COURT: Do you have any questions about what
5 you're doing here today?

6 MR. FEMLING: No, Your Honor.

7 THE COURT: Thank you. Is this your signature in
8 Case No. 823-3 on the plea form?

9 MR. FEMLING: Yes, it is, Your Honor.

10 THE COURT: And in Case No. 1376-8, is that your
11 signature on the plea form?

12 MR. FEMLING: Yes, it is, Your Honor.

13 THE COURT: Let's go back to 823-3. That charges
14 you with possession of a controlled substance with intent to
15 deliver methamphetamine. To convict you of that crime, the
16 State would have to prove that on April 23, 2010 in the State
17 of Washington, you did knowingly and unlawfully possess
18 methamphetamine, a controlled substance with the intent to
19 deliver to someone else. That's a Class B felony with a
20 maximum penalty of 10 years in prison with \$20,000 fine. I'm
21 advised that your offender score is six. If that's true,
22 you're standard range of sentencing is 60 plus to 120 months
23 of actual confinement, followed by 12 months of community
24 custody.

25

1 In Case No. 1376-8, your pleading guilty to
2 possession of stolen property in the first degree. To
3 convict you of that crime, the State would have to prove that
4 on August 23, 2010 in the State of Washington, you did
5 knowingly possess stolen property, a Harley Davidson
6 motorcycle with a value of -- in excess of \$5,000 belonging
7 to Robert Smarguard (sp), knowing it had been stolen and
8 withheld or appropriated the same to the use of a person
9 other than the true owner. That is a Class B felony as well.
10 So, it's maximum penalty is also 20 years in prison and a
11 \$20,000 fine. Do you understand that?

12 MR. FEMLING: Yes, Your Honor.

13 THE COURT: All right --

14 MR. MEYERS: I have an amended Information, Your
15 Honor on the 823 cause. The effect of that is to delete, I
16 think, a school zone enhancement. So, that's what
17 (indsicernbile).

18 MR. BUCKLEY: That is correct. That is part of the
19 plea agreement.

20 THE COURT: Okay. Going back then to the
21 possession of stolen property in the first degree, I have
22 corrected the plea form to indicate your maximum penalty is
23 10 years in prison, \$20,000 fine. With an offender score of
24 six, your standard range of sentencing is 17 to 22 months of
25

1 actual confinement. And, is there's community custody
2 following that.

3 MR. MEYERS: On the stolen property charge there
4 would not be.

5 THE COURT: Okay. I have deleted that as not
6 applicable.

7 Now, do you understand the crimes charged, the
8 maximum penalty and the standard sentence range in each case?

9 MR. FEMLING: Yes, I do, Your Honor.

10 THE COURT: All right. Each form tells you that
11 you give up certain important rights by pleading guilty. You
12 have a right to a speedy and public trial by an impartial
13 jury. You have a right to remain silent, both before and
14 during the trial. You can testify at trial or choose not to
15 testify. That's up to you.

16 At a trial, you have a right to hear and question
17 and witness who testifies against you. And, if you have your
18 own witnesses, they could be allowed to testify and they
19 could be made to appear in court at no expense to you if they
20 wouldn't come in voluntarily. You are presumed at trial to
21 be innocent, unless the charge is proven beyond a reasonable
22 doubt. And if you lose at a trial, you have the right to
23 appeal. Do you understand these trial rights?

24 MR. FEMLING: Yes, I do, Your Honor.

25 THE COURT: Do you have any questions about them?

1 MR. FEMLING: No, Your Honor.

2 THE COURT: Do you understand that by pleading
3 guilty you're giving up these trial rights?

4 MR. FEMLING: Yes, I do, Your Honor.

5 THE COURT: Prosecutor is going to make a
6 recommendation in your case. Did you review that with your
7 attorney?

8 MR. FEMLING: Yes, I did, Your Honor.

9 THE COURT: And upon the plea to the charges that
10 you're doing today, they're going to dismiss another charge,
11 gonna recommend the low end of the range of the possession
12 charge, 60 plus months and various legal financial
13 obligations would be imposed and you would be on community
14 custody for 23 month and that would include evaluation and
15 treatment for substance abuse. They're agreeing to recommend
16 concurrent sentences and not to charge additional time. Do
17 you understand that's their recommendation?

18 MR. BUCKLEY: One additional one and that is that
19 they're not going to object to an evaluation for DOSA
20 sentence.

21 THE COURT: Is that correct, Mr. Meyers?

22 MR. MEYERS: That's correct, Your Honor. We're not
23 agreeing to the DOSA sentences if the evaluation is done, but
24 we're not opposing an evaluation.

25

1 THE COURT: Okay. Do you understand that's the
2 recommendation?

3 MR. FEMLING: Yes, I do, Your Honor.

4 THE COURT: Do you under -- I'm sorry, do you need
5 time to talk to your --

6 MR. BUCKLEY: I want to make sure --

7 THE COURT: Did you have enough time to talk to
8 your attorney?

9 MR. FEMLING: Yes, I'm sorry.

10 THE COURT: Okay. And do you understand the
11 prosecutor's recommendation?

12 MR. FEMLING: Yes, I do, Your Honor.

13 THE COURT: And do you understand that at
14 sentencing, a Judge is not bound by anyone's recommendation?
15 A Judge can give you any legal sentence?

16 MR. FEMLING: Absolutely, Your Honor.

17 THE COURT: If you are not a citizen of the United
18 States, you can be deported, excluded from admission to the
19 United States or denied naturalization as a result if these
20 convictions. Do you understand that?

21 MR. FEMLING: Yes, Your Honor.

22 THE COURT: After your conviction you cannot
23 possess, own or have under your control any firearm unless
24 your right to do so is restored in writing by a court of
25 record. Do you understand that?

1 MR. FEMLING: Yes, Your Honor.

2 THE COURT: You will also lose your right to vote.
3 It will be a crime for you to vote until that right is
4 restored. Do you understand that?

5 MR. FEMLING: Yes, Your Honor.

6 THE COURT: And, while you're in custody, you will
7 not be able to receive public assistance. You'll have to give
8 a biological sample and pay a DNA collection fee. And, let's
9 see, with regard to these cases, you may be qualified for the
10 prison based or prison based drug offender sentencing
11 alternative. And if you're on community custody, a chemical
12 dependency contributed to your offense, you could be ordered
13 into treatment, even if you're not on the DOSA option.

14 And, possession with intent carries a mandatory fee
15 of \$3,000, mandatory methamphetamine cleanup fine of \$3,000.
16 And, because the crime involves the violation of state drug
17 laws, your eligibility for state and federal food stamps,
18 welfare and education benefits, may be affected.

19 In addition, it says with regard to the drug
20 charge, that a motor vehicle was involved. And, if that's
21 true, your driver's license or privilege to drive, will be
22 suspended or revoked. Do you have a driver's license?

23 MR. FEMLING: I do, yes. I got it reinstated
24 finally.

25 THE COURT: Do you have it with you now?

1 MR. FEMLING: No, sir. I hadn't -- I hadn't gone
2 and actually got another photocopy of it yet. I just got
3 through paying off all the tickets and everything.

4 THE COURT: Okay. Well, you'll need to surrender it
5 if -- if found that the -- that either offense involved a
6 motor vehicle.

7 Now, do you understand everything I've told you so
8 far?

9 MR. FEMLING: Yes, I do, Your Honor.

10 THE COURT: Okay. In Case No. 823-3. What is your
11 plea to Count 1 of the Amended Information charging with
12 possession of a controlled substance with intent to deliver
13 methamphetamine? Guilty or not guilty?

14 MR. FEMLING: Guilty.

15 THE COURT: And, Count 2 or Count 1 of 1376-8
16 charging with possession of stolen property in the first
17 degree. Guilty or not guilty?

18 MR. FEMLING: Guilty, Your Honor.

19 THE COURT: Are you making these pleas freely and
20 voluntarily?

21 MR. FEMLING: Absolutely, Your Honor.

22 THE COURT: Anybody threaten to harm you or any
23 other person to cause you to plea?

24 MR. FEMLING: No, Your Honor.

25

1 THE COURT: Did anybody promise anything to get you
2 to plea other than the promises that were written in this
3 statement?

4 MR. FEMLING: No, Your Honor.

5 THE COURT: Case No. 823-3, paragraph 11 of your
6 form says this is my statements. I knowingly and unlawfully
7 possessed methamphetamine with the intent to deliver in the
8 County of Clark, State of Washington, on or about April 23,
9 2010. Is that your statement?

10 MR. FEMLING: Yes, Your Honor.

11 THE COURT: In the Case No. 1376-8, paragraph 11
12 says this is my statement. I knowingly and unlawfully did
13 possess a Harley Davidson belonging to Robert Smarguard
14 knowing that it had been stolen in the County of Clark on or
15 about August 23, 2010. Is that your statement?

16 MR. FEMLING: Yes, Your Honor.

17 THE COURT: And was the vehicle worth more than
18 \$5,000?

19 MR. FEMLING: Yes, Your Honor.

20 THE COURT: And did you withhold it from a person
21 other than the true owner?

22 MR. FEMLING: Yes, Your Honor.

23 THE COURT: Okay. With those additions then, I
24 find that your pleas were knowingly, intelligently, freely
25 and voluntarily made and there's a factual basis for each of

1 them. So, we can accept the plea and find you guilty of the
2 two crimes charged.

3 And you want the matter set over for sentencing,
4 correct?

5 MR. BUCKLEY: That is correct, Your Honor.

6 THE COURT: And, my recollection is that if there's
7 prison -- he's not eligible for residential based DOSA?

8 MR. BUCKLEY: No, he's not.

9 THE COURT: As for prison based, I'm supposed to
10 keep it, I guess.

11 MR. MEYERS: I believe that's correct, Your Honor.

12 THE COURT: Okay. So, how long do you need to do
13 the evaluation?

14 MR. BUCKLEY: Your Honor, historically it's between
15 six to eight weeks. But, lately it's been a little bit
16 longer.

17 MR. MEYERS: I'd go six weeks.

18 THE COURT: Six weeks. Andrea, I forgot to bring
19 the calendar out. Could you bring it out for me? Six weeks.
20 How about November 17th at 1:30. That's about four weeks.
21 But, if you want to be sure, then I can send you out into
22 December sometime.

23 MR. BUCKLEY: I would prefer December just because.
24 I have no objection.

25

1 THE COURT: Okay. And, that would be December 13th
2 at 1:30. That's more than 40 days from today. Normally, I'm
3 supposed to sentence you within 40 days of your conviction.
4 So, are you waiving your right to be sentenced within 40
5 days?

6 MR. FLEMING: Yes, sir.

7 THE COURT: Okay. December 13th at 1:30 then.

8 (COURT ADJOURNED)

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1 12/13/2010 - MOTION HEARING

2 *Before the Honorable Robert Lewis:*

3 THE COURT: All right. Good afternoon.

4 MR. FAIRGRIEVE: Good afternoon, Your Honor.

5 THE COURT: Mr. Buckley?

6 MR. BUCKLEY: Yes, Your Honor. The -- Mr. Femling
7 had already pled guilty on this and we're here for
8 sentencing.

9 THE COURT: I never got a presentence.

10 MR. BUCKLEY: Ah.

11 MR. FAIRGRIEVE: I've got a copy of it, Your Honor.

12 THE COURT: Well, it's supposed to come to me. Oh,
13 I see what happened. It's because Judge Lewis, this is his
14 docket. So, he would have assigned to himself but he is not
15 here. Let me ask a question. I'm gonna read it anyway. Is
16 there an agreed recommendation?

17 MR. FAIRGRIEVE: I don't believe so, Your Honor. I
18 think the State's position is that we don't feel that the
19 DOSA sentence is appropriate. I think we feel that he
20 qualifies if the Court is inclined to give it to him. But,
21 we have some concerns about it.

22 MR. BUCKLEY: There's an agreed sentence, Your
23 Honor. It's just a question of whether or not -- at least my
24 understanding is we agreed to a --

25 MR. FAIRGRIEVE: I believe so too.

1 MR. BUCKLEY: -- range, but it's the DOSA issue
2 that is up in the air.

3 THE COURT: It will take me 10-14 minutes probably
4 to read this. Do you want me to do that or do you want me to
5 --

6 MR. BUCKLEY: Judge Lewis wasn't involved in the
7 case anymore than you are, Your Honor. So, he did -- he did.
8 I have no druthers. I can wait 10 minutes.

9 THE COURT: Mr. Femling, go ahead and have a seat
10 back and then let me review a the report. It doesn't look
11 like anybody else is ready anyway. Mr. Buckley, it -- have
12 you read it, Mr. Fairgrieve?

13 MR. FAIRGRIEVE: Yes, Mr. David, he talked to me
14 about it this morning a little bit, but -- inf act, I'll get
15 a copy and read it as well.

16 (COURT ADJOURNED)

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1 12/21/2010 - MOTION HEARING

2 *Before the Honorable Rich Melnick:*

3 THE COURT: All right. What are we doing today?

4 MR. BUCKLEY: I think we're asking for a little bit
5 more time, because DOC won't be available from my
6 understanding in talking with Mr. David until next week.

7 THE COURT: Yeah, he sent me an email and I told
8 him I couldn't grant a motion to continue, by ex parte email.
9 So, I --

10 MR. DAVID: Judge, that wasn't intended to be ex
11 parte. I listed the --

12 THE COURT: Well, with regard to that, Mr. David,
13 that's why we have a local rule not to send motions like that
14 or emails like that directly to a Judge. It puts them me in
15 a compromising position. And, that's why we have the rule.

16 If both sides are agreeing to it, I don't have a
17 problem with it, but I'm not here next week. LeeAnn, could
18 you bring the calendar please? Are both sides willing to
19 continue it?

20 MR. DAVID: Yes.

21 MR. BUCKLEY: Yes, Your Honor.

22 MR. WEAR: My client is, Your Honor.

23 THE COURT: All right. And, I did get a letter
24 from Mr. Femling, who is --

25

1 MR. BUCKLEY: I have had an opportunity to briefly
2 review that.

3 THE COURT: Okay. Has the State also received a
4 copy of that? He's nodding his head yes. All right. So, do
5 you want to do it --

6 MR. DAVOD: Judge, here is the difficulty in
7 setting. I received emails back from the Department of
8 Corrections indicating the two best people you would want to
9 hear from to explain the programs are Jennifer Killio (sp)
10 and Corey Skileski (sp). I'm not certain who he is.

11 THE COURT: Corey is at the drug court.

12 MR. DAVID: Ah.

13 THE COURT: I know Corey very well.

14 MR. DAVID: And, I was advised that those would be
15 the two to talk to. They were not available today. I'd sent
16 emails again asking for their availability over the next week
17 to 10 days and have not gotten a response back from them
18 today and I just checked moments ago.

19 THE COURT: Well, there's a point where I just have --
20 to set it and everybody has to make themselves available. I
21 mean that's all I can do. I can't just keep continuing it.

22 MR. DAVID: Well, I understand that. But, to focus
23 in on that point, Judge, we're not asking them to be here.

24 THE COURT: I am.

25 MR. DAVID: And so, --

1 THE COURT: If you don't want him here, Mr. David,
2 that's fine. What I'm saying is I want him here to explain
3 it. If you don't want him here, don't bring him here and
4 then I'll make a decision. But again, there's only so much
5 time I can set things.

6 MR. DAVID: Sorry, Judge. You're misunderstanding
7 what I'm saying. If you want him here, I don't have authority
8 under these circumstances to issue them a subpoena absent
9 court directive if you just want him to be here in regards to
10 the date.

11 THE COURT: Well, you --

12 MR. DAVID: So, if --

13 THE COURT: You don't have authority to issue
14 something for a sentencing to an officer, to a witness, to
15 testify?

16 MR. DAVID: It depends on if you want them to be
17 here.

18 THE COURT: I don't think that's accurate. But, I
19 don't want to get into that.

20 THE CLERK: Maybe Thursday afternoon.

21 THE COURT: The 6th? Thursday, that's the custody.
22 Not this coming Thursday, the 6th?

23 THE CLERK: It's a readiness day, but --

24 THE COURT: Are Thursdays particularly bad? Is
25 that a transport date that you guys are --

1 THE CLERK: Afternoon, morning?

2 THE COURT: Afternoon probably.

3 THE CLERK: Thursday we have the readiness in the
4 afternoon and there's change of plea. So, I don't know if
5 everybody --

6 THE COURT: Change of plea is out of custody.

7 THE CLERK: Out of custody, right. But, I mean for
8 everybody else.

9 THE COURT: Do we have any trials going?

10 THE CLERK: Actually, I was just looking on that.

11 THE COURT: Let's tentatively set it for the 6th at
12 3:00. And then, if that doesn't work, we'll figure that out.

13 THE CLERK: Yeah, 3:00.

14 THE COURT: So, question. Are both clients willing
15 to waive their rights to speedy disposition or speedy
16 sentencing again?

17 MR. BUCKLEY: Speaking for Mr. Femling, Your Honor,
18 on the record, Mr. Femling has indicated a willingness to
19 waive so that we can have this matter put before the Court in
20 a proper manner.

21 THE COURT: Okay. Mr. Wear?

22 MR. WEAR: Yes, Your Honor.

23 THE COURT: Okay. Both clients sitting over there
24 is a microphone. Is that true? You're both willing to waive
25 speedy sentencing?

1 MR. FEMLING: Absolutely, Your Honor.

2 UNKNOWN: Yes, Your Honor.

3 THE COURT: Okay. All right. So, let's set it for
4 the 6th at 3:00. Drug court -- one of the reasons I'm doing
5 it on Thursday is I know drug court is on Thursday and that
6 means Corey is downstairs in drug court and can probably just
7 sneak up, because usually drug court is over by then. So, he
8 should be available and we'll go from there.

9 MR. BUCKLEY: Thank you, Your Honor.

10 (COURT ADJOURNED)

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1 01/06/2011 - SENTENCING HEARING

2 *Before the Honorable Rich Melnick:*

3 THE COURT: Okay. Go ahead.

4 MR. DAVID: We're on for sentencing today. But,
5 the Court asked that we invite the Department of Corrections
6 over to explain to the Court some information about drug
7 court, about the two variants on DOSA.

8 THE COURT: About what?

9 MR. DAVID: The two variants on --

10 THE COURT: No. The only thing I care about is the
11 prison based DOSA. Neither of these clients is eligible for
12 residential DOSA whatsoever.

13 MR. DAVID: Okay.

14 THE COURT: That's not even a consideration of the
15 Court.

16 MR. DAVID: I have received.

17 THE COURT: So, it's purely prison based DOSA.

18 MR. DAVID: Okay. I had received somewhat
19 misinformation from Mr. Meyers on that then. What we've got,
20 what I'd like to do then is just have a couple of people come
21 forward and explain the evaluation process and what the
22 Department looks at when they prepare the evaluation.

23 THE COURT: Mr. David, all I'm concerned about at
24 this point is what is the program of DOSA and I've done some
25 independent research. I've got some evaluations that were

1 well-done. Unless counsel wants it, the only thing I want to
2 know is about the viability of the program and prison based
3 DOSA.

4 MR. BUCKLEY: Defense is -- would stipulate to the
5 assessment that's already been provided and concur in the
6 acknowledgement that he qualifies. The question is whether
7 or not the Court's going to grant.

8 THE COURT: Right. And, one of the things I was
9 concerned about is the exercise of my discretion when I
10 didn't know anything about the DOSA program in prison and in
11 fact, have had many contrary statements from it doesn't exist
12 to it's fully funded to all kinds of others I'm not gonna get
13 into. So, I think that's all I'm concerned. If you want to
14 present the rest, obviously, you have that right. But, let
15 me get through that part first.

16 Mr. Wear, do you concur?

17 MR. WEAR: I do.

18 THE COURT: Okay. Let's just get into whether
19 there's prison based DOSA, what it involves and then again,
20 I'll supplement with what I have so that you know what's
21 going through my -- well, you don't know everything that's
22 going through my head, but at least part of what's going
23 through my thought process.

24 MR. DAVID: Well, Judge, what I want to do then --
25 okay, I got the original information from Mr. Meyers. As you

1 know, I'm -- so, apparently, did not understand or exactly
2 what the Court was looking at.

3 What I'm gonna do is take is let --

4 THE COURT: So, Mr. Hall, Mr. Solinsky --

5 MR. DAVID: Yes, I know. He's gonna take off and
6 then he should be back in a little bit if --

7 THE COURT: I think he's leaving.

8 MR. DAVID: Can you ask him -- no, you stay --
9 stay. Have him --

10 THE COURT: Mr. David, let's get on with this.

11 MR. DAVID: I'm trying. I just don't want him to
12 leave, Judge.

13 THE COURT: Okay. Well, --

14 MR. DAVID: I'm gonna have Mr. -- Mr. Hall briefly
15 outline the issues related to the evaluations and what you're
16 seeing and what you don't get as far as a recommendation for
17 a --

18 THE COURT: Okay. Let me -- we can do that later.
19 First, I want to hear about the program and then I'll get
20 into whatever else you want to hear after that. I'm gonna
21 allow you to present whatever you want to. Essentially, I
22 want to hear about the DOSA program and then I'll hear about
23 the evaluation afterwards.

24 MR. DAVID: I was trying to present that in a non-
25 defendant oriented. I wanted the Court to understand that

1 the Department does not do an evaluation. It makes a
2 recommendation for --

3 THE COURT: I understand that, Mr. David. I've got
4 the evaluations. I've had many evaluations. I'll give you
5 the opportunity to do that. I want to hear about the DOSA
6 program. That was the whole point of this. And then, I will
7 give you the opportunity to tell me whatever you want to tell
8 me, you know, as far as the recommendation, what it's based
9 on, if it's based on that, again, that's fine.

10 Do you feel comfortable? Do you want to stand
11 there or do you want to stand over here?

12 MS. KALLIO: However you would like.

13 THE COURT: I don't care. However you're most
14 comfortable. Nobody -- I know counsel doesn't care. So,
15 it's however you're most comfortable. I'm not putting you
16 under oath.

17 MS. KALLIO: Okay.

18 THE COURT: I think you're DOC I assume.

19 MS. KALLIO: Right, right.

20 THE COURT: And you're name?

21 MS. KALLIO: Jennifer Kallio.

22 THE COURT: Okay. And you're gonna -- can you
23 spell that for her?

24 MS. KALLIO: It's K-a-l-l-i-o.

25

1 THE COURT: And you're gonna tell me everything you
2 know. So, --

3 MS. KALLIO: Right.

4 THE COURT: -- I'm not worried about that. Does
5 anybody want me to place her under oath? No. All right.
6 So, wherever you're most comfortable, feel free.

7 MS. KALLIO: Okay.

8 THE COURT: I have been supervising DOSAs for quite
9 some time, at least the last two years. I supervise prison
10 based DOSAs. It's my understanding that they -- they serve
11 their mid-point in prison.

12 In prison we try to get them into treatment. I
13 know one of the concerns was not everybody is getting
14 treatment while they're in prison. There's many different
15 reasons for this. The most common is sometimes they don't
16 have enough time. They may go into one prison and then have
17 to get moved to another for some reason during this interim,
18 you know, the time is running down. By the time they get
19 finally settled, they're not eligible because of the lack of
20 time that they have left.

21 Sometimes they receive infractions. That sort of
22 thing. But, I would say a good majority are getting
23 treatment while in prison.

24 THE COURT: How many are in the program? Again,
25 we're just talking prison based DOSA.

1 MS. KALLIO: How many am I supervising or how many
2 are like -- right now I have a caseload of about 30 prison
3 based DOSAs.

4 THE COURT: And, do you know how many total are in
5 the program?

6 MS. KALLIO: No, I don't.

7 THE COURT: Approximate?

8 MS. KALLIO: Do you know?

9 UNKNOWN: Statistics --

10 THE COURT: And your name please?

11 MR. HALL: Brad Hall, H-a-l-l.

12 THE COURT: You're also DOC officer?

13 MR. HALL: Yes, I am.

14 THE COURT: Okay.

15 MR. HALL: Here are the statistics from 1999 to
16 2008.

17 THE COURT: Just tell me what they are?

18 MR. HALL: 2008 had 628. There have been a totally
19 of 9,621 between 1999 and --

20 THE COURT: 9,621.

21 MR. HALL: -- 2008.

22 THE COURT: Okay. Perfect.

23 MS. KALLIO: And then, once they get out, they --
24 they release, they come and report to me. They've usually
25 had a referral from the treatment to our spectrum program

1 that's run through DOC. So, it's free to them. We usually
2 are getting them into this program within -- I'd say within
3 two weeks of their release, they're in a treatment program.

4 THE COURT: And is this -- and I hope you don't
5 mind me interrupting.

6 MS. KALLIO: Oh no, it's fine.

7 THE COURT: The reason -- again, I've talked to
8 some other people. So, that's why I'm trying to put this all
9 together. So, they're doing some treatment in prison,
10 depending on how long they're there is my understanding.

11 MS. KALLIO: Right.

12 THE COURT: Then, when they come out they may be
13 doing after care?

14 MS. KALLIO: Mm-hmm.

15 THE COURT: And, it could be IOP or just straight
16 --

17 MS. KALLIO: Yeah.

18 THE COURT: -- outpatient.

19 MS. KALLIO: It depends on what they've had in
20 prison. If they're completed a therapeutic communities
21 program, which is TC, that's the prison program. Then,
22 they're usually just doing after care in the community.

23 If they haven't completed the treatment portion,
24 they're usually coming out and doing IOP three times a week.

25

1 Now, if they've had -- I mean it varies from person
2 to person. You could have a person that's done TC and come
3 out and do IOP. A lot of that depends on what the counselor
4 feels is appropriate. But --

5 THE COURT: Counselor being DOC counselor or
6 treatment counselor?

7 MS. KALLIO: Treatment counselor.

8 THE COURT: Okay.

9 MR. HALL: DOC does provide treatment. We do have
10 treatment providers within DOC.

11 THE COURT: Right. Okay, okay.

12 MR. HALL: So, if they couldn't afford private for
13 whatever they want to do, there is that available to the
14 Department of Corrections.

15 THE COURT: And spectrum, my understanding of
16 spectrum is doing the prison based DOSA and a residential
17 based DOSA in that they are certified through chemical
18 dependency treatment providers.

19 MS. KALLIO: Right.

20 THE COURT: By the State of Washington?

21 MS. KALLIO: Yes.

22 THE COURT: Okay.

23 MS. KALLIO: And then, do you want to know how
24 they're supervised?

25 THE COURT: Sure.

1 MS. KALLIO: Okay.

2 THE COURT: My hope, just to clarify, I think Mr.
3 Wear and Mr. Buckley were here through everything. I've
4 heard stories that prison based DOSA doesn't exist anymore.

5 MS. KALLIO: Oh.

6 THE COURT: That it's not providing treatment.
7 That it's not gonna be providing treatment and all these
8 other issues. And, I'm sure I'm not the only one that's
9 heard this. So, my whole reason for asking for this is so
10 that I could educate myself.

11 MS. KALLIO: Okay.

12 THE COURT: Okay.

13 MR. HALL: (Indiscernible) had a therapeutic
14 community operating an inpatient drug court as part of his
15 confinement. When Larch went in half last spring, that
16 program was taken out of that facility.

17 THE COURT: Right.

18 MR. HALL: Now that they're expanding, I do not
19 believe they will (indiscernible) to put a therapeutic
20 community back in there.

21 THE COURT: Right. So, my whole thing is this. I
22 can't exercise my discretion if I don't know how I'm
23 exercising it.

24 MS. KALLIO: Right.

25

1 THE COURT: So, I just wanted information about the
2 program. And then again, that's why I kept telling Mr.
3 David, I'll listen to everything he says later. I'll listen
4 to you if you want to tell me more stuff. But first, I just
5 want to see, is there a program, how does it work, how are
6 they supervised? I'm concerned about safety of the
7 community.

8 MS. KALLIO: Right.

9 THE COURT: I'm concerned about, you know, is
10 (indiscernible) talked about and I'm looking at both
11 defendants? Is this just a sentencing option to get people
12 half the time off?

13 MS. KALLIO: Right.

14 THE COURT: So now, I'm hearing it's not at this
15 point?

16 MS. KALLIO: No.

17 THE COURT: All right.

18 MS. KALLIO: Sometimes there's such a gap between
19 the Courts and DOC.

20 THE COURT: That's why I'm asking.

21 MS. KALLIO: Right.

22 THE COURT: So, I'm not -- I began on my own
23 research, which I'll indicate, but I just wanted to hear what
24 the program is and how it runs.

25

1 MS. KALLIO: We do still have a program. And we do
2 still place first priority for DOSA offenders to get into
3 treatment. So, it is a mission of Department of Corrections
4 to make sure that they have the first priority among other
5 offenders. If it comes between a DOSA and somebody who is on
6 for something else, the DOSA will get priority.

7 One thing that we did do away with is we used to
8 have a sentencing structure where, you know, the first
9 violation they would get zero to 15 days jail. The second
10 violation made it get 15 to 30 days jail. And then, the
11 third violation was revocation. That was basically our
12 policy. We don't have that anymore.

13 So, we don't have -- although, it's still my
14 experience that if they violate it three times, they will get
15 revoked. But, you know, it kind of varies case by case.
16 And, the -- I guess the violation process is the only thing
17 that's changed a little bit.

18 THE COURT: How has it changed? What do you do
19 now?

20 MS. KALLIO: Well, now I guess we're just not set
21 by our policy. Usually, they will get -- I mean we can still
22 revoke at three times, but we can choose not to. If we've
23 had a person that's been in compliance for the majority of
24 their supervision and doing really well and then they have a
25 relapse. I mean we'll try to get them into treatment first.

1 We'll go -- send them back to ABHS, get them into inpatient
2 treatment.

3 THE COURT: So, once they're in the community, they
4 can go back for treatment?

5 MS. KALLIO: Right, right.

6 THE COURT: And do they sometimes?

7 MS. KALLIO: Mm-hmm. Oh, yeah. I have -- I have
8 two people there right now at ABHS that are violators.

9 THE COURT: Does spectrum run ABHS?

10 MS. KALLIO: No, spectrum is separate.

11 THE COURT: Okay.

12 MS. KALLIO: But, ABHS does have a contract with
13 DOC and that's where -- it's an inpatient facility.

14 MS. HALL: It's up in Spokane.

15 MS. KALLIO: Yeah, there's one in Spokane.

16 THE COURT: Right. I'm very familiar with them.

17 MS. KALLIO: Yeah, and then the residential go to
18 the Chehalis branch. But, so when they get out of prison,
19 they are required to report weekly for three months and
20 submit UAs every week. So, I have face to face contact with
21 them every week. They submit UAs randomly every week for the
22 first three months.

23 THE COURT: Are those -- are those observed UAs?

24 MS. KALLIO: They are observed UAs.

25 THE COURT: Okay.

1 MS. KALLIO: They're also placed on our color line
2 system. So, they're calling phone number every day. They
3 come in, if their color is up, they come in and do a UA.
4 That's usually only a couple times a month. So, you know, on
5 the off weeks we -- we do call them in.

6 After the three months they're usually done with
7 treatment, but I do -- oh, I'm sorry, let me go back.

8 I also go out and make home visits. So, I see them
9 at their residence. Do walk throughs, make sure that they
10 don't have any alcohol or drug paraphernalia. There isn't
11 anything that's gonna place them in violation at their house.
12 I go out every month. Sometimes twice a month, depending on
13 their classification level.

14 After that, you know, it's mainly after that first
15 three months we really try to make sure that they stay clean,
16 that they get the treatment they need, that they complete
17 treatment. And then, they go down to kind of a lesser
18 supervision if they're doing well. They come in and report
19 once a month, they -- they're still giving UAs every month.
20 I still see them at their house every month. And, if there's
21 any violation behavior, we address that. If it's treatment
22 or drug related, that is considered a more serious violation
23 than if, I don't know, if there are some like if they don't
24 pain their fines. I mean we're not gonna, you know, get as
25 crazy about that than if they have a positive UA.

1 We always try to make sure treatment is -- is
2 available to them.

3 And then, if for some reason they aren't complying,
4 they aren't reporting, they're not taking advantage of the
5 treatment options, they're giving positive UAs, then we'll
6 revoke.

7 THE COURT: How about self-help classes? Are those
8 required?

9 MS. KALLIO: Yes. Two NA/AA meetings a week are
10 required while they are in treatment.

11 THE COURT: How about after the three months?

12 MS. KALLIO: Afterwards, sometimes that's a common
13 sanction. If they have a relapse, we'll make them go back to
14 NA/AA meetings. But, it's usually only required while
15 they're in treatment.

16 THE COURT: Okay. How about clean and sober
17 housing?

18 MS. KALLIO: We --

19 THE COURT: Oxford House type.

20 MS. KALLIO: We will use Oxford House a lot.

21 THE COURT: But, is that mandatory?

22 MS. KALLIO: No.

23 THE COURT: Depends on the individual?

24 MS. KALLIO: Right. A lot of people have family or
25 that are clean and sober support systems that they can stay

1 with. But, I have probably a good mix, about half are in
2 Oxford homes and half are with their families.

3 THE COURT: It's tough to determine success, but
4 how do you determine it?

5 MS. KALLIO: Well, I think that the best way to
6 determine success would be that they're not out committing
7 new crimes. That they're becoming productive members of
8 society, getting jobs, staying clean. You know, just doing
9 what everyday people do, you know.

10 I think that people have had relapses but can come
11 back from that and still do well. I think some people, I
12 think that they have to be in a frame of mind to want to
13 change and actually live the lifestyle, a non-criminal
14 lifestyle in order to succeed. And, I see a lot of people
15 that do kind of take advantage of DOSA and just want, you
16 know, to have half of prison time and get out. But, those
17 are usually the people that are revoked.

18 So, you know, I've seen a lot of successes and I've
19 seen a lot non-successes.

20 THE COURT: Sure. Well, that's part of addiction
21 and that's why I guess what I'm asking more specifically, and
22 again, I don't care about statistics. If you have them, you
23 can give them to me. How do you view the success rate of
24 people who are coming out from prison based DOSA versus
25

1 addicts who didn't use prison based DOSA come out of
2 supervision?

3 MS. KALLIO: I would say that they do have a higher
4 accountability with DOSA. And so, I think that I mean I
5 honestly don't know, because I only supervise DOSAs. I don't
6 really see the people that aren't --

7 THE COURT: That's okay.

8 MS. KALLIO: -- you know, that are non-DOSA. So, I
9 can't really make an accurate, you know, correlation.

10 THE COURT: Perfect. Anything else you want to
11 tell me about the program?

12 MS. KALLIO: I don't think so.

13 MR. DAVID: Unless you have any questions.

14 THE COURT: I don't yet. Just a second, Mr. David,
15 let me -- okay. And you also work in the prison based DOSA
16 or --

17 MR. HALL: I work at Larch where I had the therapy
18 committee and I supervised out in the -- the persons that
19 write these risk assessment reports for the Court. I
20 supervise them.

21 THE COURT: Perfect. All right. Mr. David, do you
22 have questions of either?

23 MR. DAVID: Ms. Kallio, could you explain what the
24 situation is as far as funding for available treatment for
25 people that do not get treatment in prison under DOSA?

1 MS. KALLIO: As far as right now we have funding
2 for treatment. There is still -- or, do you mean if they
3 don't complete therapeutic communities?

4 MR. DAVID: If they aren't able to complete their -
5 - their intensive treatment in prison.

6 MS. KALLIO: Right.

7 MR. DAVID: What funding is available? Is there
8 residential treatment available for them?

9 MS. KALLIO: Yes. Through ABHS.

10 MR. DAVID: How long does that last?

11 MS. KALLIO: Usually, that program is only about 30
12 days, 28 days.

13 MR. DAVID: And, have you had shortfalls in
14 funding? When we last checked with your department about
15 three months ago, they were reporting a lack of an ability to
16 provide treatment --

17 THE COURT: Who's they?

18 MR. DAVID: The DOC in Olympia.

19 THE COURT: Who -- who in Olympia?

20 MR. DAVID: I did not bring the -- the emails, but
21 the -- what is the name of the woman that is in charge of --

22 MS. KALLIO: Christine Tyrrell?

23 MR. DAVID: Tyrrell I believe was the individual.
24 Was reporting that there was not funding to provide people
25

1 treatment across the board that get out of prison. Is that
2 your experience or has there been --

3 MS. KALLIO: No.

4 MR. DAVID: -- a change in the last few months?

5 MS. KALLIO: As far as I know, we are still fully
6 funded and DOSA is still a top priority.

7 MR. HALL: Yes, as far as DOSA, yes. They would be
8 the highest priority.

9 MS. KALLIO: Right.

10 MR. HALL: There may not be enough there for
11 opportunity to serve every offender that comes up, but --

12 MS. KALLIO: I think the lack of funding is with
13 non-DOSA offenders. A lot of times, well, they're a lower
14 priority. So, they may not gain interest if they're not
15 sentenced to DOSA.

16 MR. DAVID: Are you presently able to get everybody
17 that's in the prison DOSA --

18 MS. KALLIO: Mm-hmm.

19 MR. DAVID: -- into a treatment program if they
20 haven't gotten it in prison? I mean is there enough
21 resources available so that a person gets a short sentence --

22 MS. KALLIO: Mm-hmm.

23 MR. DAVID: -- can get into treatment once they're
24 out?

25 MS. KALLIO: Yes.

1 MR. DAVID: And, has that been a problem here
2 locally?

3 MS. KALLIO: No, not that as far as I know. I have
4 all the DOSAs. So, I've never had a problem getting somebody
5 into that.

6 MR. DAVID: The other question I had is it has to
7 do with revocation of prison based DOSA.

8 MS. KALLIO: Mm-hmm.

9 MR. DAVID: And credit for time served. It's my
10 understanding that if you do revoke the prison DOSA and
11 they're returned, they're given day for day credit towards
12 the balance of the sentence for all the time that they're in
13 the community. Is that correct?

14 MS. KALLIO: That is my understanding, yes.

15 MR. DAVID: So that a person sentenced to say these
16 numbers aren't going to correspond, but a person sentenced to
17 a 60 month sentence would be sentenced to 30 months.

18 MS. KALLIO: Mm-hmm.

19 MR. DAVID: Which would be half the mid -- assume
20 the midpoint of the standard range was 60 months, he would be
21 sentenced to 30 months --

22 MS. KALLIO: Mm-hmm.

23 MR. DAVID: -- in prison. He would serve 20 months
24 with good time and then be released on community custody so
25 that he would then have the remaining 30 months to serve.

1 MS. KALLIO: Yes.

2 MR. DAVID: If that person stayed in the community
3 for 25 months before DOSA is revoked, --

4 MS. KALLIO: Right.

5 MR. DAVID: -- he would only have five months left
6 to serve.

7 MS. KALLIO: Right.

8 MR. DAVID: Minus good time.

9 MS. KALLIO: That's my understanding, yes.

10 MR. DAVID: So, there is a diminishing return --

11 THE COURT: Let's not argue. Just ask questions.

12 We've got our officer who needs to get going and --

13 MR. DAVID: I'm --

14 THE COURT: Just ask the question.

15 MR. DAVID: At some point, as they get to the end
16 of the sentence, if you're sanctions are 15 to 30 days, they
17 could actually get less time by having their DOSA revoked
18 near the end of the term than being addressed by sanction.

19 Is that correct?

20 MS. KALLIO: Well, yes, if they're within a couple
21 of weeks of their end date. I guess that would be possible.

22 MR. DAVID: I understand you do toll that time if
23 they take off?

24 MS. KALLIO: Right, yeah. It stops so they do have
25 to make that up once they're apprehended.

1 MR. DAVID: So, they -- so the Court knows, if
2 they're on abscond status --

3 MS. KALLIO: Mm-hmm.

4 THE COURT: I understanding what tolling means.

5 MR. DAVID: Not --

6 THE COURT: I understand.

7 MR. DAVID: Okay.

8 THE COURT: All right. Any other questions, Mr.
9 David?

10 MR. DAVID: No.

11 THE COURT: Mr. Buckley?

12 MR. BUCKLEY: I have no questions. I think
13 thoroughly been explained.

14 THE COURT: Mr. Wear?

15 MR. WEAR: No.

16 THE COURT: Okay. Mr. Hall, is there anything you
17 wanted to add or is there anything that you want to add?

18 Again, I kept asking questions and part of that was because I
19 do have correspondence from Ms., is it Tyrrell?

20 MS. KALLIO: Uh-huh.

21 THE COURT: I didn't know how to pronounce it.

22 But, it's Tyrrell. Ms. Tyrrell, that she gave me directly.

23 But again, I kept interrupting. So, if there's something you
24 want to add that you don't feel you had the opportunity cause
25 somebody, mostly me, was interrupting you, feel free.

1 MS. KALLIO: No, I think I said everything that
2 needed to be said.

3 THE COURT: Okay. Well, I appreciate it.

4 MR. DAVID: I did have a --

5 THE COURT: I know. I'm not to that point. I'll
6 give you the opportunity to talk with Mr. Hall. I told you
7 you would. So, if you want to go ahead and have a seat back,
8 go ahead.

9 All right. Go ahead, Mr. David.

10 MR. DAVID: Because the Court's looked at stuff
11 that I don't know about, what I am -- want -- I don't know if
12 you're aware of what the extent in the evaluation is, Judge.

13 THE COURT: Yeah, I am.

14 MR. DAVID: About how in-depth it is, that sort of
15 thing?

16 THE COURT: Yeah. I've gotten numerous of these,
17 mostly from Mr. Miller over the years. I think somebody else
18 wrote one of these. Yeah, I'm very familiar with them, I've
19 read them a lot, I've talked to other judges about them, I've
20 talked to other people.

21 MR. DAVID: Then, I just have a couple of quick
22 questions for Mr. Hall. Mr. Hall, when you guys were -- when
23 the Department is preparing the DOSA evaluations, there's two
24 parts. Part is the determination of whether or not they've
25 got drug or substance abuse problem and then the second, you

1 may or may not be asked to do a risk assessment. Is that
2 correct?

3 MR. HALL: Correct, the risk -- normally we're
4 asked to do a risk assessment report and along with that is
5 the chemical screening, chemical dependency screening.

6 MR. DAVID: Okay. In either of these forms, in
7 either of these, do you -- does your department actually make
8 a recommendation to the Court whether or not this person is
9 eligible or appropriate for DOSA?

10 MR. HALL: By department policy, we cannot make a
11 recommendation to the Court.

12 THE COURT: Wait. You do make if they're eligible.
13 Like if you said by statute, they're not eligible because
14 they have a sex offense. I have seen these.

15 MR. HALL: Yes, if we found that for some reason we
16 don't believe they're eligible based on the law, we would
17 probably let the Court know --

18 THE COURT: I've seen that because I've seen some
19 of the reports have disqualifying factors in there as a
20 matter of law. So, I want to clarify that those -- I've
21 personally seen those.

22 MR. HALL: Yeah.

23 THE COURT: Okay.

24 MR. DAVID: But you're --

25 THE COURT: Other than that, I agree.

1 MR. DAVID: -- but, you are not making a
2 recommendation other than --

3 MR. HALL: As far as whether or not they should get
4 into the residential prison DOSA, no.

5 MR. DAVID: So, if you've got a person that
6 probation officer himself does not feel is an appropriate
7 candidate, you're probation officers are directed not to
8 write that in their report?

9 MR. HALL: They will make statements about the
10 person's history that would draw one to the conclusion that
11 they've been provided many opportunities in the past to take
12 advantage of treatment program and have failed to adequately
13 do that in the past.

14 MR. DAVID: And, we've addressed the statute
15 9.94A.660(2)(d) where your Department is required to report
16 whether both the offender and whether the community benefits.
17 Your Department has in fact, made the determination that it
18 will not comply with .660(2)(d) to report whether it believes
19 the community will benefit. Is that correct?

20 MR. HALL: We've been instructed not to make a
21 recommendation as to whether or not.

22 MR. DAVID: Whether or not the community will
23 benefit by the treatment program?

24 MR. HALL: Correct.

25 THE COURT: Why is that?

1 MR. HALL: I have no idea why that policy is
2 written. Maybe because we're not qualified, certified
3 chemical dependency counselors, so we're not qualified to
4 make that determination.

5 MR. DAVID: So, when the Court is making these --
6 is reviewing the DOSA report, the Court and the parties have
7 to carefully review the contents in order to determine --

8 MR. HALL: Correct.

9 MR. DAVID: -- whether or not it believes the
10 person is an appropriate candidate. So, that --

11 MR. HALL: Right.

12 MR. DAVID: Okay. I think that sums up all I had,
13 Judge.

14 THE COURT: Mr. Buckley, any questions of Mr. Hall?

15 MR. BUCKLEY: One quick question.

16 THE COURT: Mr. Hall, you don't know this, but you
17 just moved into a dead spot. There's no microphone. So, if
18 you want to come over here or wherever, but if you talk
19 there, I won't be able to pick you up on this mic. Go ahead,
20 Mr. Buckley.

21 MR. BUCKLEY: In regards to community safety and
22 not reporting it, is that based upon the DOSA protocol that
23 that's all part of the DOSA program that they make that
24 assessment once a person gets into DOSA?

25

1 MR. HALL: As far as community -- an evaluation on
2 a prison DOSA, a complete evaluation, would not be done on
3 the offender until they're in prison.

4 MR. BUCKLEY: Right.

5 MR. HALL: And then, as far as community safety, we
6 address all violations as they occur. Whether the failing to
7 report or using drugs or alcohol.

8 MR. BUCKLEY: The standard that you use to do your
9 evaluation is included -- inclusive of these issues. In
10 other words, a sex offender doesn't qualify.

11 MR. HALL: Correct. A certified chemical
12 dependency counselor conducts an evaluation on a form that
13 the -- the law and the Department have felt that complies
14 with the law.

15 MR. BUCKLEY: Thank you. I have nothing further.

16 MR. WEAR: No questions.

17 THE COURT: Go ahead and have a seat.

18 MR. HALL: Thank you.

19 MR. DAVID: Judge, one -- Mr. Hall, just one moment
20 and it's for a slight --

21 THE COURT: Just ask the question.

22 MR. DAVID: Mr. Hall, you had indicated earlier
23 that your Department was having some difficulty in responding
24 to the PSI requests in short frame, timeframe. What is --
25 could you explain to the Judge what your issue is there?

1 MR. HALL: Due -- due to staff reductions, a lot of
2 people gone through. We only have two people dedicated to
3 writing the PSIs and the (indiscernible) and it would be
4 helpful and beneficial if the Court could allow us a full,
5 complete four weeks to do those reports.

6 MR. DAVID: It doesn't -- obviously, we got the
7 time in this case and you guys complied --

8 THE COURT: Do me a favor, Mr. Hall. When you
9 leave, actually, if you go through that door, get my email
10 address from Leeann, who is my judicial assistant, send me an
11 email and I'll pass it to all the judges.

12 MR. HALL: Thank you very much.

13 THE COURT: That way, there's going to be no
14 misunderstanding. I can't say everybody is going to be able
15 to comply with it, frankly --

16 MR. HALL: Right, I understand. It's just a
17 request.

18 THE COURT: That's fine. But, if you do that, just
19 go ahead if you want to do that now or after the hearing.

20 MR. HALL: Thank you.

21 THE COURT: And we'll go from there. All right.
22 All right. So, no more questions for either of the DOC
23 officers.

24 MR. DAVID: No.

25

1 THE COURT: Okay. And no more witnesses for
2 purposes of this hearing. Except, I do want everybody to
3 know what I discovered on my own, because I didn't know how
4 this was gonna proceed.

5 I talked to one person by email and personally and
6 that's Judge Ken Williams from Clallam County. He is the
7 chair of the DOSA committee. And, my question to him was
8 well, I first told him I was being asked to consider a prison
9 based DOSA option, could he provide me an update on the
10 sentencing option. At which point, he recited the law to me.
11 I told him no, I was looking more practical side. Does it
12 exist? What's going on? And, Ken, Judge Williams then
13 actually had the courtesy to call me personally and talk to
14 me about it.

15 His email basically -- I'll just read the first
16 sentence. Some of it's not relevant to this. Prison based
17 DOSA sentence have not been impacted by recent changes.

18 He did indicate to me that what they do and just to
19 be very clear, Judge Williams is more involved with
20 residential DOSA than prison based DOSA, but he did make
21 inquiry for me and is familiar with both.

22 Spectrum health systems does provide both
23 residential based DOSA and prison based DOSA. They are on a
24 continual evaluation process. He said that one of the
25 problems they had many years ago was that they weren't being

1 examined when DOSA first came out. And, I'm gonna say this,
2 that it was not a very viable option because it wasn't
3 providing treatment. It was actually not doing what the
4 legislature intended it to do.

5 Judge Williams indicated that they have been under
6 great scrutiny. When they don't like the providers, they
7 change the providers and that what they do basically is look
8 at the success rate and that at this point, they're looking
9 at what they claim is about a 50% success rate as far as
10 treatment goes, which is in accord with most national,
11 successful national drug court programs. If it falls below
12 50% they do a number of things, including either working with
13 the provider or they change the providers or look at changing
14 providers.

15 I asked Judge Williams well, how about the one
16 person who has maybe 12 months left on his sentence or four
17 months because of credit for time served, versus a person who
18 has three or four years. He indicated to me that his
19 research show that if you have more than 12 months in prison
20 to actually do, you would a complete behavioral treatment
21 program in the 12 month period in the prison system.

22 If you have less than that, then you do a 28 day
23 inpatient treatment program that would be supplemented
24 depending on the level of care necessary by additional
25 treatment, either residential inpatient treatment and then

1 you go into an aftercare program he said is akin to the
2 intensive outpatient program.

3 If you have less than 28 days, they stick you
4 immediately into an inpatient program. Again, if I'm wrong,
5 just let me know, but this is what Judge Williams told me.
6 That if you have less than 28 days, which is the normal
7 length for an inpatient program, that they will stick you in
8 the inpatient program for as long as you can, whether it's
9 one day or 12 days or four days or 27 days. Then, once they
10 put you into the community that you will start doing IOP
11 there.

12 If there are violations, then the DOC officer does
13 have the option, as we've heard, of then placing the person
14 into a long-term inpatient program or IOP, depending what the
15 length is. So, that's what he told me.

16 And again, I don't want to get into too many
17 details as I'm going down the scope, but I guess part of the
18 reason I wanted to have the hearing is so that we could kind
19 of get the word out what does exist and what doesn't. So,
20 I'm gonna be a little longer than I normally would, but not
21 too long.

22 I asked about the present viability of the program.
23 Both he -- well, strike that. Judge Williams then contacted
24 DOC with my questions and actually forwarded some emails and
25

1 Ms. Tyrrell then responded pretty much the same as we've
2 heard today. So, I don't need to repeat all that.

3 I did ask questions about funding of the program.
4 Because again, I didn't want to sentence them to a program if
5 I was even considering it, if the program was gonna dry up.

6 Everybody I've talked to has answered as follows:
7 that the program is fully funded as of today. Whether or not
8 the program becomes funded in the future, based on the dire
9 economic situation of the State of Washington, is anybody's
10 guess. But, it is a priority at this point for treatment
11 because they're seeing it works and keeps the community safe.

12 Again, I can't prognosticate what's gonna happen.
13 I can't see, you know, nobody can see -- I should say, few
14 people saw the economy doing what it did. So, it may be that
15 they cut out all these programs. I don't know. But, at this
16 point, and that's what I have to worry about, it is fully
17 funded.

18 I then asked Ms. Tyrrell which DOC facilities have
19 prison based DOSA, which goes back to what you said. And,
20 I'm just gonna read this. You mean which facilities offer
21 treatment. And, this is an email from her dated January 3rd of
22 this year. You mean which facilities offer treatment. All of
23 them with the exception of McNeil Island, Clallam Bay
24 Correction Center and Larch Correction Center. The
25 therapeutic communities are specifically located at Mission

1 Creek Correction for women, Olympic Correction Center and
2 Monroe Correctional Complex.

3 I don't know whether the facilities are open now
4 and what's changed again with everything else.

5 So, that's a synopsis of what I did and again, I
6 don't want to repeat what DOC officers told us today. But,
7 it's consistent with what I'm hearing. And again, there is a
8 rumor going around that DOC prison based DOSA doesn't exist.
9 It's not a viable program. There's no money for it. Don't
10 send people to it, because it doesn't exist. It's coming
11 from a lot of sources. I'm reading your lips and I'm not
12 gonna repeat them. And, I'm not the only one here that's
13 heard them because I'm seeing other people in the courtroom
14 nodding their heads. Again, it doesn't matter. That's why I
15 wanted to take the opportunity to do this.

16 I felt I could not exercise my discretion in
17 whether to grant an individual prison based DOSA or not if I
18 didn't know what the program was. That was the whole
19 purpose. I think it's a valuable exercise and I don't mean
20 that demeaning. I've learned a lot in the last three days
21 from doing this and I -- I'm glad to hear it's there,
22 frankly. Again, I was a drug court judge for many, many
23 years and actually drug court coordinator just walked in the
24 courtroom not too long ago to hear what's going on.

25

1 So, having said that, Mr. David, your
2 recommendation?

3 MR. DAVID: Well, Judge we have the two cases.

4 THE COURT: Absolutely.

5 MR. DAVID: First, let's go with Mr. Femling. Mr.
6 Femling's case -- Mr. Femling actually has two cases.

7 THE COURT: They both have two cases.

8 MR. DAVID: Yes, I understand that, Judge. But,
9 Mr. Femling's cases is one of those where the agreement or
10 the prosecuting is requesting a sentence of 60 months. You
11 have a total of 136 days credit for time served. That's what
12 we're bound to request.

13 We indicated that the defense was free to -- free
14 to request --

15 THE COURT: Thank you.

16 MR. DAVID: -- any alternatives towards that
17 sentence.

18 To a certain extent, Judge, when you look at the
19 alternatives, the alternatives appear at first blush,
20 relatively inviting. The defendant's standard range in this
21 case is 60 to 120 months. To impose the prison based DOSA,
22 the Court would impose one half the midpoint of the standard
23 range, which is 45 months. You would then put the other half
24 of the midpoint of the standard range the additional 45
25 months hanging over his head.

1 So, we're really talking about a difference of
2 about 15 months between the two types of sentences with Mr.
3 Femling as far as the drug case is concerned.

4 The problem with Mr. Femling's case and recognizing
5 it's only 15 months is that Mr. Femling has had opportunity
6 after opportunity after opportunity to participate in
7 treatment. I would note that he was previously in the Clark
8 County drug court but failed. (Indiscernible) a few minutes
9 ago.

10 Interestingly enough, the -- when you look at the
11 Department of Correction, Mr. Miller's report, he was unaware
12 that Mr. Femling had been in drug court before and had failed
13 at drug court. That wasn't mentioned and it's not disclosed.

14 But, when I do look at the report from Officer
15 Miller, Officer Miller's report is not optimistic. He
16 indicates the defendant has got a criminal history of being
17 non-compliant. He doesn't show a desire to make any changes.
18 He does indicate that he wasn't hostile or anything, but he
19 was not compliant and doesn't comply with the terms of what
20 he's been through before.

21 Officer Miller in his report suggests what Mr. Hall
22 was talking about and that is that they have to write between
23 the lines so to speak to get across their point. And, the
24 point that seems quite evident from Mr. Miller's report is
25 that he doesn't feel Mr. Femling is an appropriate candidate

1 for the DOSA sentence. He concludes that in his, in essence,
2 in his final commentary on page seven. But, he goes
3 throughout the report talking about how Mr. Femling does not
4 comply. History of convictions for bail jumping, for -- on
5 at least three occasions. History of convictions for false
6 reporting, false statements to public servants. History,
7 basically, of non-compliant behavior. And, that's what I see
8 coming out of Mr. Femling's case.

9 Moreover, Mr. Femling's cases occur one after the
10 other. We have the traffic stop case. That's the -- the
11 drug case. The defendant was driving. He was pulled over.
12 The facts are all outlined in the evaluation report. He's
13 done a fairly good job of it.

14 But, it demonstrates that Mr. Femling isn't going
15 to comply. He's committing one offense after the other while
16 on supervision. I don't see that Mr. Femling is gonna be
17 benefiting from being in the drug court alternative. There
18 is no recommendation for drug court put forth --

19 THE COURT: We're not talking drug court.

20 MR. DAVID: Excuse me. For DOSA put forth by the
21 Department and the Department, in the evaluation itself and
22 as explained by Mr. Hall, has taken the position that they
23 will not comply with the state law regarding making a
24 determination to whether or not the community will benefit.
25 And then, in a situation like Mr. Femling, the community is

1 not gonna benefit. The community will benefit by keeping him
2 in prison longer.

3 When he does get out, he's gonna still be under
4 requirement to participate in treatment. He'll participate
5 in treatment during the year of community custody once he's
6 out. He can avail himself of treatment in prison. That's
7 till available. He can ask for that if he truly wants it.

8 But, in his particular case, even though we are
9 only talking about a difference of about 15 months and the
10 difference between a 45 month term and a 60 month term, I
11 suggest that the 60 month is appropriate, given the fact that
12 he's had all these opportunities before. He hasn't complied
13 with it. He's been terminated from past programs and I just
14 don't see a benefit of putting Mr. Femling into the DOSA
15 program.

16 I understand that the Court has made some
17 statements or at least expressed concern that our office does
18 not like DOSA. Earlier today we were recommending DOSA --

19 THE COURT: I didn't say that, Mr. David.

20 MR. DAVID: But, we do --

21 THE COURT: Mr. David, I categorically deny that
22 statement. I've had Camara Banfield come before me and
23 recommend DOSA on cases. I believe I had Ms. Riddell
24 recommend it. So, I'm going to categorically deny and just
25 ask you to move on with your recommendation.

1 MR. DAVID: I'm sorry, Judge. What I was -- what I
2 was referring to was not you specifically. I have not been in
3 front of you on a DOSA case before. I'm indicating that in
4 the general term that the Court, other judges have expressed
5 --

6 THE COURT: Okay. I don't know about that, but I
7 haven't. I'll say that. Because again, I can think of two
8 or three cases. And frankly, I'll even say this. They are
9 cases where I've said this is totally inappropriate when I've
10 got the recommendations and one of them was Mr. Wear's case
11 previously. But anyway --

12 MR. DAVID: In any case --

13 THE COURT: If there's other people, that's fine.
14 I can't speak for anybody. But, I deny that I ever said
15 that.

16 MR. DAVID: In any case, Judge, if you use the --
17 the DOSA sentence, you would be imposing 45 months on the
18 drug count. That would be the 823-3. He also has the
19 separate possession of stolen property case. That involved,
20 and again, it's outlined in the --

21 MR. BUCKLEY: Actually, Your Honor, I'm gonna object
22 right now. They run concurrent. He seems to be consecutive.
23 And, clearly, their offer, which was part of the contract, is
24 a term of 60 months.

25 THE COURT: Okay.

1 MR. DAVID: I'm sorry. I was interrupted there.
2 But, what I was trying to explain is not concurrent or
3 consecutive. I was trying to explain that the numbers that
4 you need to reach depending on which option you're gonna use.

5 THE COURT: I understand how that works. Let -- I
6 don't know what I'm gonna do yet, so let me -- let me hear
7 from that -- I mean I understand it and I'm gonna actually,
8 since you don't appear before me much, I'll let you figure
9 all that out and tell me. So, you can -- you can prepare --
10 be prepared to think of both options.

11 MR. DAVID: Yeah, the other -- what I was gonna say
12 is the other case request in that is for 22 months, which
13 would be the high end of the range. If you impose DOSA on
14 that, then you'd be looking at a 19 and a half month --

15 THE COURT: But, we agree it's academic because
16 it's concurrent.

17 MR. DAVID: Basically, yes.

18 THE COURT: Yeah, okay. Okay. So, let me do this.
19 I'm gonna have Mr. Buckley talk, then Mr. Femling, I'm gonna
20 have you come forward and talk and I'll have both --
21 actually, why don't you come forward, Mr. Femling, Mr. David,
22 Mr. Buckley come up here and then Mr. Wear and Mr. David go
23 through this with you and your client and then I'll get
24 through it that way and I think that's gonna make it more
25 orderly.

1 All right. So, go ahead, Mr. Buckley.

2 MR. BUCKLEY: Thank you. Your Honor, to start off
3 with, I concede that my client has not been a stellar
4 individual in acquiring treatment. To get beyond that
5 though, what we're saying here, and what he's saying, and
6 what we're proposing to the Court is, that he be allowed to
7 get into a prison based DOSA program. He's got sufficient
8 time, even half of the 60 months is 30 months plus he gets to
9 take away the good time. He's still in the neighborhood of
10 18 months.

11 So, he has more than enough time. As I understand
12 it, the inpatient treatment program in prison and complete
13 that before he's released.

14 The other issue, I think, that needs to be fleshed
15 out here is that --

16 THE COURT: I'm sorry. How much credit does your
17 client have?

18 MR. BUCKLEY: 136 days.

19 THE COURT: Okay, go ahead.

20 MR. BUCKLEY: I rounded it off to six months, only
21 because --

22 THE COURT: No, that's fine.

23 MR. BUCKLEY: Okay.

24 THE COURT: I just couldn't remember. I'm trying
25 to keep both -- I'm trying to exercise discretion with each

1 client separately. It may come to the same conclusion on
2 both, it may not, I don't know. But, I'm trying to keep it
3 separate.

4 MR. BUCKLEY: I understand, Your Honor. But, the
5 issue here, as I see it, is he gonna go to treatment, is he
6 gonna be given an opportunity because of priority or is he
7 going to not be given a very clear opportunity and I think
8 that from what we've heard today, if you're not in DOSA,
9 you're not a priority. And, obviously, being a priority is
10 going to be beneficial to the community, to my client, and
11 hopefully to the -- to all the powers that be.

12 The second issue is is that when he gets out, he'll
13 still have a 30 month community custody hammer over his head.
14 If he doesn't comply, if he hasn't learned his lesson and he
15 falls back --

16 THE COURT: Actually, it'd be 45 month if it's
17 DOSA.

18 MR. BUCKLEY: Right.

19 THE COURT: Not 30 month, right?

20 MR. DAVID: I picked up -- counsel may be working
21 under the wrong terms.

22 THE COURT: Let me finish what I was saying. My
23 understanding was that you go half of the midway point.

24 MR. BUCKLEY: Right.
25

1 THE COURT: And then, you divide that in half.
2 Half of which goes to community custody and half of which
3 goes to prison.

4 MR. BUCKLEY: Right.

5 THE COURT: Which would be 45 months of community
6 custody, not 30..

7 MR. BUCKLEY: Right.

8 THE COURT: Is that right?

9 MR. BUCKLEY: Right.

10 THE COURT: Okay.

11 MR. BUCKLEY: Okay. The point being --

12 THE COURT: So, frankly, he's gonna be on
13 supervision longer than if he just got straight prison, which
14 would be --

15 MR. BUCKLEY: If he goes --

16 THE COURT: -- 12 months, correct?

17 MR. BUCKLEY: Right, right.

18 THE COURT: Okay, go ahead. I just want to make
19 sure. I get confused.

20 MR. BUCKLEY: And, quite frankly, he -- if he gets
21 the standard sentence, he has less of a burden hanging over
22 his head. Part of it will be to his discretion because he'll
23 be out in the community. He still has a long period of time
24 that he could go back and get revoked and quite frankly, has
25

1 DOC had indicated, he gets, you know, a couple of sanctions
2 and then they revoke.

3 If he doesn't comply and if we look and try to use
4 his past as an indicator that he won't, he'll be back in
5 prison for longer than he would had he served a straight
6 sentence. Because, at least at this point in time.

7 So, I think the hammer over his head is -- is
8 clearly that he's going to be spending more time, potentially
9 in prison, than he would if he got a straight sentence on
10 this case.

11 The second issue is is that he's a relatively young
12 man. If he's going to change his life, get on with it, now
13 is the time to do it. We've had long detailed conversations.

14 MR. FEMLING: Yes.

15 MR. BUCKLEY: He has a family behind him that wants
16 him to get treatment. They're in court today. They believe
17 that if he gets out, they'll keep him on the straight and
18 narrow. And, they will report any issues that he has,
19 because they're more concerned about his life than he has
20 been in the past.

21 And, I've known this young man for 30 years.

22 MR. FEMLING: 27.

23 MR. BUCKLEY: 27. I've know the family since I've
24 been in practice. So, my feeling is is that while Raymond
25 has not been a stellar example of citizenship, his family

1 relatively has and I know that they will watch over him in
2 the sense that they realize this is his last opportunity. If
3 he continues on with drugs, gets out in 40 months if he does
4 straight sentence and he -- he's going to get back into drug
5 if he's not given an opportunity, if he doesn't take the
6 opportunity. We'd just have another career criminal on our
7 hands. That's what DOSA is all about. To nip that in the
8 bud. It's a potentially successful program. I would urge the
9 Court to follow our request to have a DOSA sentence.

10 THE COURT: What do you want to tell me?

11 MR. FEMLING: Well, Your Honor, I thank you for
12 your time and consideration, even to give me the opportunity
13 to take DOSA. I have put a lot of thought and effort into
14 this idea of DOSA and I have secured my family to give me
15 support and back in that decision, which is the same family
16 that I chose to neglect because I was too busy out being
17 high. And, to me, if I can get my family to stand behind me
18 and give me the support, then I can give myself the support
19 and I know I can do this and it's an opportunity that I truly
20 appreciate even being considered for. Thank you, Your Honor.

21 THE COURT: I'm gonna just be honest. These aren't
22 easy decisions.

23 MR. FEMLING: No, they're not.

24 THE COURT: I -- I -- when I was talking to another
25 Judge today, just generally about this and how every decision

1 we make, just like every decision you make, is based on
2 something. It's not just done (indiscernible) based on our
3 history.

4 A couple things strike me. One is is that if he's
5 that big of danger, there should be 120 month recommendation,
6 not 60 month recommendation. And that, I guess, was never
7 contemplated.

8 So, having said that, I'm looking at boy, frankly,
9 either I give him DOSA or I give him 120 months, because
10 frankly, all I'm hearing is that if he gets out of that
11 treatment, he's gonna reoffend and he's gonna be a huge
12 danger to the community. So, why would I give him 60 months?
13 I mean that doesn't make sense to me in the plea bargain
14 process.

15 So, from a community safety point, I mean it's
16 interesting to raise that. But, the whole other aspect is
17 that the recommendation isn't for the high end, it's for the
18 low end.

19 So, I guess then what I look at is based on all
20 that, we do have 45 months of supervision. I, again, you
21 know, have been involved in our drug courts for 13 years now.
22 I think and frankly, I know a lot of people who treatment
23 didn't take the first time, second time, third time. I even
24 talked to one person at a conference, a national conference,
25 she was a featured speaker. She was the son [sic] of a

1 federal judge and it was her 21st program before she got clean
2 and sober.

3 Yeah, I'm concerned because I think Mr. Buckley has
4 been really kind as he generally is when he says you've been
5 less than stellar. I mean your track record is just a
6 dismal. It's horrible.

7 MR. FEMLING: --

8 THE COURT: And again, it's all drug related.

9 MR. FEMLING: Yes, sir.

10 THE COURT: But, again, Mr. Buckley was probably
11 kinder than what I'm gonna say. I, you know, I guess what
12 I'm looking at is based on the State's recommendation of 60
13 months, I don't think I have anything to lose and everything
14 to possibly gain. If you come back, you're gonna go to
15 prison for a longer time.

16 MR. FEMLING: Absolutely, Your Honor. You're right.

17 THE COURT: And frankly, you know, there are things
18 to change and one of which is I calculate you're 27 now.
19 That's not old. But, you've been using for 14 years I think
20 is what I read. Started at 13.

21 MR. FEMLING: Yeah.

22 THE COURT: You know, it's gonna be your choice.
23 And I think you -- you know, one thing you said to me that
24 you've been -- you've been working hard about thinking about
25 doing treatment.

1 MR. FEMLING: Yes.

2 THE COURT: Now, you've gotta actually work hard on
3 the treatment part.

4 MR. FEMLING: And, that's exactly what I need.

5 THE COURT: And, I don't care. You know, your
6 family, I don't know who is here from your family, but I
7 think the fact that you have support sys something. You
8 know, again, if there was a 120 month recommendation versus
9 (indiscernible) would be different. I think 60 versus that.
10 I think my research into the program, as it exists today.
11 and, this is other concern. I don't know what the
12 legislature is gonna do. If I send you there and you get the
13 DOSA and suddenly the program dries up because of the
14 economic, I'm gonna be very upset at my decision, frankly.
15 Because the only reason I would give you the benefit is to
16 get you to treatment.

17 I'm gonna impose the DOSA. I think it's
18 appropriate. I think it's -- your criminal history clearly
19 evidences a history of crime based on -- on that.

20 Now, again, having said that, Mr. Buckly and
21 probably Mr. David has heard me say before, not everybody who
22 gets high commits crimes. So, you've got other issues to
23 deal with too.

24 MR. FEMLING: Yes, Your Honor, I do.
25

1 THE COURT: And, I don't know what those issues
2 are. I'm not here to lecture you. I'm just indicating to
3 you my 30 years' experience in Clark County criminal justice
4 system, my 13 years' experience with drug court says it's not
5 just the drugs. I know a lot of people, and I've said this
6 before, who drink and don't commit crimes. Other people who
7 actually used drugs and not committed crimes. So, you've got
8 other issues.

9 MR. FEMLING: Yes, sir.

10 THE COURT: I don't know what they are. You're
11 gonna have to confront them. You've got plenty of time to do
12 it.

13 MR. FEMLING: Thank you, Your Honor.

14 THE COURT: And, if you're not, again, successful
15 in this program, with your criminal history, you're looking
16 at huge amounts of time. I would encourage if you came back
17 that -- do we need credit for time served on these?

18 MR. DAVID: There was one here.

19 THE COURT: That's okay. I'm just saying, Mr.
20 Femling, if you come back and I'm the Judge I probably would
21 remember it.

22 Having said that, I do want to say one thing
23 though. Again, my experience is that relapse and I think
24 that it's interesting, what was her name, Kallicio?

25 MR. DAVID: Kallio.

1 THE COURT: Kallio. You know, she talked about
2 their changing process and relapse is part of recovery. I
3 had a person who was in my drug court, different chemical
4 dependency issue than you had, but the same addiction. He
5 graduated, he was clean and sober for almost two years, went
6 out and used. Know what the great thing was? He immediately
7 went back into treatment on his own and he's been clean and
8 sober for another two years.

9 MR. FEMLING: That's good.

10 THE COURT: So, the relapse, he was very upset with
11 himself. Because of the tools he learned, he was able to
12 deal with it. So, Mr. Femling, I don't want to hear excuses
13 I guess is what I'm telling you. Because, I'm not real good
14 at that. And, I guess I'm saying I don't think we have
15 anything to lose. We have everything to gain by making you
16 productive or by you making yourself productive.

17 If you're pulling my leg, I'll just tell you also,
18 you're not the first one who's ever done it and I'll also
19 tell you you're not gonna be the last one. So, it's up to
20 you. Mr. Buckley can explain more of that to you.

21 THE COURT: Say that again.

22 MR. FEMLING: I was wondering if I was getting -- I
23 was in here and I was like two or three weeks waiting to get
24 bail. I just wanted to know if that time got credited
25 towards the --

1 THE COURT: I think you both have agreed to the
2 same amount of time, haven't you?

3 MR. DAVID: I believe so. It was 136 days.

4 MR. FEMLING: Oh, is that just since I've been in
5 since August 18th?

6 THE COURT: You know what? I'm gonna go with what
7 both parties have agreed to at this time.

8 MR. FEMLING: Okay.

9 THE COURT: If it's incorrect, it can be corrected
10 later. I don't have any problem with that.

11 Frankly, I was glad to hear what I did today. They
12 were very clear about a lot of misconceptions.

13 MR. BUCKLEY: I was enlightened.

14 THE COURT: Frankly, one of the reasons I took my
15 time with this too is I told the other judges what's going on
16 and they can listen to the tape if they so wish. You're
17 welcome to share this with other defense attorneys.

18 MR. BUCKLEY: Would be nice to have a CLE on this.

19 THE COURT: I'm sorry.

20 MR. BUCKLEY: It would be nice to have a CLE on
21 this for the defense.

22 THE COURT: Talk to Ms. Christian and I'm happy to
23 help. I think it would be beneficial if we did to have the
24 State there as well so they can -- did I sign, Mr. David, do
25

1 you have that one, the first one? I have them both here.

2 Never mind.

3 MR. DAVID: While you're doing that, Judge, your
4 client was whispering about what days he was in. It looks
5 like on the -- it looks like on the PSP1 case that occurred
6 on 08/23 -- 08/23 and then he was held without bail for a
7 time.

8 MR. BUCKLEY: Actually, he was held without bail on
9 the prior one, the drug case. Let me look here.

10 THE COURT: Mr. David, do you have an extra
11 Appendix H for the other case?

12 MR. DAVID: I -- no.

13 THE COURT: That's the --

14 MR. DAVID: Is that the PSP or is that the --

15 THE COURT: That's this one.

16 MR. DAVID: Yes.

17 THE COURT: Oh.

18 MR. DAVID: Is that the drug case?

19 THE COURT: It's the 823-3 case.

20 MR. DAVID: 823-3.

21 THE COURT: I don't have an Appendix H that I think
22 I need to have. The other thing I can do is just add the
23 case number and then beg Julie to make a copy.

24 MR. DAVID: Can you do that?

25 THE COURT: Can you do that?

1 MR. DAVID: Just photocopy that page --

2 THE COURT: Before you scan it take a copy.

3 THE CLERK: No, because it needs your signature and
4 I have to have an original.

5 THE COURT: No you don't. Nope. I'm endorsing this
6 as an original and a copy is fine.

7 MR. DAVID: I do not, Judge. I do not have an
8 extra.

9 THE COURT: Otherwise, we're gonna have to bring
10 him back and that's gonna be a nightmare. So, the answer is
11 this. I'm endorsing this as an original and a copy of -- of
12 Appendix H. Never mind, he's got it.

13 MR. DAVID: I may have to change the cause number
14 on it.

15 THE COURT: That's fine. And, Mr. Femling, one
16 thing I'm gonna also remind you of. I do see you have a
17 bunch of people in here. Don't look at them, don't
18 communicate with them whatsoever.

19 MR. FEMLING: Yes, sir.

20 THE COURT: Just looking this way or that way.

21 MR. FEMLING: Yes, sir.

22 THE COURT: All right. I know they tell you that
23 but let's -- you're getting a break that I think you deserve,
24 but like I said, let's --
25

1 MR. DAVID: The statute says it's must be 12
2 months.

3 THE COURT: What's that?

4 MR. DAVID: If the standard range --

5 THE CLERK: You know, you can --

6 THE COURT: I'll deal with it. Okay. All right.
7 Let's have you step over there with your client.

8 (Continued with different case)

9 (COURT ADJOURNED)

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02/18/2022 - SENTENCING HEARING

Before the Honorable Jennifer Snider:

THE COURT: Mr. Downs, could we talk about item No. 3, Femling.

MR. DOWNS: Yes, Your Honor.

THE COURT: All right. I did not receive anything from anybody with regards to Mr. Femling. So, I'll need an update as to where we are. This was cited on by the Court show cause on a Blake situation.

MR. DOWNS: Right. And, I spoke with one of the assigned DPAs about this and I informed her that the defense had submitted some materials for request for SB6164, felony resentencing and their staffing, prosecutor's office staffings are not going on until April. So, we were going to be requesting to set this over so that we can get a response on whether the State will allow sentencing that results in a release or if we're going to proceed with just resentencing with an open argument.

THE COURT: Okay. So, I'm sorry. This can't be staffed for two months?

MR. DOWNS: For 6164 requests they're not doing staffings right now for a couple of months.

THE COURT: Okay. Did you have a date in mind that we would set it over to?

1 MR. DOWNS: I don't know if the Court has
2 availability in April, but that would be my request and I
3 spoke to my client about it as well as to what we're --
4 what's happening.

5 THE COURT: Okay.

6 MR. DOWNS: So, he's fine with a setover.

7 THE COURT: Are we --

8 THE CLERK: Let's look. You're criminal the first
9 week. On April 15th you have the afternoon docket at 1:30.

10 THE COURT: How about April 15th at 1:30? This same
11 docket and we'll just check in and see where we're at at that
12 time.

13 MR. DOWNS: That works for me.

14 MR. IKATA: That works for the State.

15 THE COURT: All right. And, I just want to note
16 for the record, items 1 and 2 were tracked but they're not
17 affected by anything related to Blake. And so, it's just
18 item No. 3 that needs to go forward. Okay.

19 MR. DOWNS: Thank you.

20 THE COURT: All right. Thank you.

21

22 (COURT ADJOURNED)

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1 04/15/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: All right. Mr. Downs --

4 UNKNOWN: Thank you.

5 THE COURT: -- can we talk about two, three, and
6 four, please?

7 MR. DOWNS: Yes, Your Honor.

8 THE COURT: Thank you. Show cause. So, you can
9 update me on what's going on with Mr. Femling's cases.

10 MR. DOWNS: Yes. So, Mr. Femling, we've submitted
11 a 6164 petition to the prosecutor's office. They're supposed
12 to staff the matter this month. However, they didn't get to
13 this case. I'm waiting for an update from the appellate unit
14 as to when they're going to be able to staff that. So,
15 depends on what happens with that staffing as to whether
16 we're moving forward with the R-7.8 motion or not, or if we
17 have an agreed felony resentencing at that point. So, at
18 this point, we ask Court to set over that hearing, probably a
19 month would be adequate.

20 THE COURT: Okay. So, when you say set over the
21 hearing, you mean, just set over for check-in status on a
22 show cause to see if we're going to set a resentencing or
23 not?

24 MR. DOWNS: That's correct.

25

1 THE COURT: Okay. And if you decide mutually that
2 that is going to happen, you can work with my department to
3 set the date and not have to do a show --

4 MR. DOWNS: Yes.

5 THE COURT: -- another show cause. Okay.

6 MR. DOWNS: Right. We'll give you a heads up.

7 THE COURT: Okay. Lori, is there a good day to do
8 that? He -- Mr. Femling won't be present for show cause. We
9 could do it on an out of custody docket.

10 MADAM JA: We're down here the week of -- your
11 criminal week of May 30th. So, we could put it on the
12 criminal docket --

13 THE COURT: Is it too far out to go to June 1st, Mr.
14 Downs?

15 MADAM JA: That's a change of plea.

16 MR. DOWNS: That'd be fine. I'm going to be in
17 trial, actually, out of county at that time.

18 THE COURT: Okay.

19 MADAM JA: How about May 2nd. Let me go May 2nd,
20 no, May 3rd. Do we have a custody problem. Is that too
21 soon?

22 THE COURT: I don't know if that's gonna be enough
23 time. That's only two weeks away. May 3rd?

24 MR. DOWNS: That would work.

25

1 THE COURT: Okay. May 3rd, that's at 1:30 on the
2 out of custody docket. Just tracking these three cases to
3 see if we're going set a resentencing on it.

4 MR. DOWNS: All right. Thank you.

5 THE COURT: Thank you for the update.

6 (CASE ADJOURNED)
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1 05/03/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 MR. DOWNS: So, for Raymond Femling, Your Honor,
4 this is a Blake review case. The -- the defendant has a 6164
5 request in with the prosecutor's office. We're still waiting
6 for that to be staffed. This was set over last time. We had
7 court for the same reason. Just asking to set it over again.
8 Would be available either Friday, June 3rd at 9:00 or June
9 10th at the 1:30 docket.

10 THE COURT: Okay, Lori, are either one of those
11 mine? Because these are my Blake cases.

12 MADAM JA: I -- I didn't hear what he said.

13 THE COURT: June 3rd or June 10th at 1:30.

14 MADAM JA: A June 3rd show cause. I mean, June 3rd
15 you have the criminal docket at 9:00 a.m. And what was the
16 other date?

17 THE COURT: June 10th.

18 MADAM JA: You do have -- no. You're off that
19 afternoon.

20 THE COURT: Oh. Okay. So, we could do it on June
21 3rd on 9:00 a.m.

22 MR. DOWNS: Okay.

23 THE COURT: All right. So, Mr. Femling's matters
24 then, we'll set those over. And if we know something in
25 advance of June 3rd, please advise my department, because

1 this is really on for show cause to set a date for
2 resentencing, or whatever ends up happening, right? So --

3 MR. DOWNS: Yeah and it -- the 6164 request --

4 THE COURT: Yeah.

5 MR. DOWNS: -- results in a better outcome --

6 THE COURT: Yeah.

7 MR. DOWNS: -- for my client. So that's why we're

8 --

9 THE COURT: Got you.

10 MR. DOWNS: -- setting it over.

11 THE COURT: Got you. Okay. So, just let us know
12 what's going on with that, then we set those over to June 3rd
13 at 9:00 a.m. on the motions docket. Thank you.

14 (CASE ADJOURNED)

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E-Filing

February 10, 2025 - 3:10 PM

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Appellate Court Case Number: 1035357
Appellate Court Case Title: State of Washington v. Raymond Jay Femling
Trial Court Case Number: 10-1-00823-3

DOC filing on behalf of FEMLING - DOC Number 891005

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06/03/2022 - MOTION HEARING

1
2 Before the Honorable Jennifer Snider:

3 THE COURT: -- require a defendant present. Mr.
4 Femling's cases, I think Mr. Downs is on those cases. Sean
5 Downs?

6 MR. DOWNS: Yes, Your Honor. Present.

7 THE COURT: All right. Thank you. We had a show
8 cause on Mr. Femling's cases. What's the status of those?

9 MR. DOWNS: Yes, sure. Yeah, I've been speaking
10 with Jessica Smith, the assigned DPA on these cases, and
11 we're still trying to come up with an agreed resolution.
12 It's a complicated fact pattern with these three different
13 cases, and how they interrelate with one another in terms of
14 credit for time served, whether matters are run consecutive
15 to one another. So parties are asking to bump this out for a
16 couple of months so we can hopefully come to an agreed
17 resolution on it.

18 THE COURT: Okay. Mr. Ikata, is that your
19 understanding as well?

20 MR. IKATA: That is my understanding, Your Honor.

21 THE COURT: Okay. August 5th at 9:00 a.m.?

22 MR. DOWNS: That works for me.

23 MR. IKATA: That works for the State, Your Honor.
24
25

1 THE COURT: Oh wait, maybe it isn't. Let's -- let
2 me ask -- let me figure out who that is first. I might have
3 to move that up one week.

4 MADAM JA: 9:00 a.m. is Department 3 that day.

5 THE COURT: Okay, so, on July 29th it's me.

6 MADAM JA: Correct.

7 THE COURT: Okay. Gentlemen, July 29th. I need to
8 --

9 MR. DOWNS: That works.

10 THE COURT: -- set this to myself, not someone
11 else. Okay? July 29th then for those three matters, we'll
12 continue over. Hopefully we can -- if you come up with
13 something before then, we'll get a special set put together,
14 okay?

15 MR. IKATA: Your Honor, at this point, that sounds
16 good, Your Honor. At this point, is Mr. Downs agreeable that
17 we no longer have -- have to have the two 2010 matters
18 tracking? It's my understanding that both sides are in
19 agreement that this actually -- not a Blake basis for the
20 2010 cases.

21 MR. DOWNS: They're all interrelated because the
22 2014 cases run consecutive to the revoked 2010 cases, and so
23 that's why we're asking to track -- if I have to, I'll end up
24 filing a motion on those, as well, but trying to come to an
25 agreed resolution.

1 MR. IKATA: Okay. Understood. Thank you for that
2 information.

3 THE COURT: All right. Thank you for that update.

4 (CASE ADJOURNED)

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1 07/29/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE COURT: -- it's Ray Femling.

4 MADAM JA: I think two and three are just tracking.

5 THE COURT: Mr. Downs -- is someone from his office
6 here today?

7 MS. SMITH: I wasn't sure it was on the docket this
8 morning. So, I didn't really email anyone on that. I can
9 send him an email.

10 THE COURT: Yeah, he's appointed on these. They're
11 Blake --

12 MS. SMITH: Okay.

13 THE COURT: -- situations and --

14 MS. SMITH: Let's see if I can (indiscernible) Mr.
15 (indiscernible) and let him know what's going on.

16 THE COURT: Okay.

17 MS. SMITH: Yeah. Hold on a minute.

18 THE COURT: Thanks.

19 (RECESS TAKEN)

20 THE COURT: Ok, Mr. Downs. Can you talk to me
21 about Mr. Fleming's matters, please?

22 MR. DOWNS: Yes, Your Honor. These are on for
23 Blake review. I've been in touch with the assigned DPA on
24 these, excuse me, on these cases. We've had continuing
25 resolution on it. It looks like it's likely we'll have to

1 litigate these issues. I was going to file some supplemental
2 briefing on these three cause numbers for the Court also was
3 going to file a 7.8 motion regarding a prior conviction for
4 bail jumping and pursue the possession of controlled
5 substance conviction. So, I was going to ask that all of
6 those be heard at the same. The prosecutor and myself are in
7 agreement to set this over for one last time. We might need
8 a special set hearing. I doubt that on one of these dockets
9 it would be appropriate because it would probably be, at the
10 least, ten minutes to argue.

11 THE COURT: All right. Thank you. Okay, so
12 perhaps what we should do is, I can have -- who is the
13 assigned DPA on it?

14 MR. DOWNS: It's Jessica Smith.

15 THE COURT: Jessica Smith. All right. So, I think
16 what I'll do rather than wasting time now is ask Lori to
17 contact you and Ms. Smith for a special set time and we'll
18 get that set with my department special set and get these
19 matters resolved.

20 MR. DOWNS: Okay. Thank you.

21 THE COURT: Okay. So, look for an email from Lori.

22 MR. DOWNS: All right.

23 THE COURT: Thank you for the update.

24 (CASE ADJOURNED)

25

1 09/23/2022 - MOTION HEARING

2 *Before the Honorable Jennifer Snider:*

3 THE CLERK: Court is now in session. The Honorable
4 Jennifer Snider presiding.

5 THE COURT: Thank you. Okay. Good afternoon, Ms.
6 Smith and Mr. Downs. I was just asking Lori about Mr.
7 Femling's presence. It was not requested that he be part of
8 this. Are we still at show cause today? Okay.

9 MR. DOWNS: Yes, Your Honor. And I didn't have a
10 Zoom link to forward to DOC. I know Mr. Femling wanted to be
11 here, but I think given the State's request, we probably
12 won't do anything too substantive today. I think the Court
13 just technically should order show cause orders and we'll
14 have to reset a motion hearing date for that.

15 From my perspective, I don't have an objection. I
16 did file motions regarding the 2010 cases about a week ago
17 and a motion about the 2008 case a little over a week ago.
18 It took a while for these cases to kind of -- for it to make
19 sense to me and then to explain it in a motion form for the
20 Court and for the State that admittedly, it's I think the
21 most complicated Blake case or cases that I've had, so it's
22 taken a little bit of time, more than is usual.

23 THE COURT: Okay. Ms. Smith?
24
25

1 MS. SMITH: Your Honor, with regard -- as Mr. Downs
2 said, this is a very complicated kind of constellation of
3 issues.

4 THE COURT: Yes.

5 MS. SMITH: On all four of these cases. This is
6 definitely not your straightforward Blake case.

7 With regard to the 2008 bail jump case, we are
8 asking to set that show cause over. I don't believe we
9 received a citation for that. If we did, we've missed it.
10 That will probably be handled by our appellate unit. But,
11 those attorneys are both out today.

12 There are two very recent Court of Appeals cases
13 directly on point for that, but we are asking to set that
14 over so that we can respond appropriately.

15 With regard to the 2014 case, we are agreeing that
16 we can go to resentencing on that. We're not going to attempt
17 to nullify the plea for violation of the plea agreement.
18 There was some discussion about that.

19 There are issues we will need to address at
20 sentencing. For example, this was a stipulated exceptional
21 sentence I don't know that we necessarily agree with the
22 score calculation in defense's motion. But, that being said,
23 we can address those things at the sentencing hearing, the
24 resentencing hearing.

25

1 With regard to the two 2010 cases, those are
2 actually being handled by Mr. Vaughn. Is he in the
3 courtroom?

4 THE COURT: He's present on zoom.

5 MS. SMITH: Okay. So, I will defer to him with
6 regard to whether he's ready to proceed with show cause or
7 whether he would like to set that over.

8 So, we obviously won't be able to proceed to
9 resentencing on any of these cases without resolving the bail
10 jump issue first. And so, I would propose that we -- we
11 could set the 2014 case for a resentencing date and then I
12 would ask to set at least the 2008 case, possibly the 2010
13 cases, over for show cause in the interim, so we can address
14 those, figure out what's happening and then we'll have a
15 better idea what point calculation is going to be for that
16 resentencing hearing.

17 THE COURT: All right. Mr. Vaughn, any comments?

18 MR. VAUGHN: Yes, Your Honor. As far as the 2010
19 cases go, essentially, the only -- well, more or less, the
20 only issue, the preliminary issue that's involved there is
21 this matter of the validity of this bail jump conviction in
22 '08. So, those two cases I'd assert are more or less wholly
23 contingent on the outcome of that '08 case. Because
24 essentially, that case comes down to an argument, the State's
25 asserting his score remains unchanged for resentencing. Mr.

1 Downs is asserting with that bail jump, if that were not
2 included, that would be a different sentencing range. So,
3 that's what those two cases essentially come down to.

4 THE COURT: Okay. Mr. Downs, follow up?

5 MR. DOWNS: I agree. The Court probably should
6 make a determination on the 2008 bail jumping case and then
7 we'll have clarity on the 2010 cases and clarity on the 2014
8 cases in terms of the offender score and what will come from
9 that.

10 THE COURT: Okay. In terms of then setover what
11 are we thinking? This has been one that's been on my radar
12 screen/to do list for almost a year.

13 MS. SMITH: If we could do a few weeks, Your Honor,
14 that should be sufficient.

15 THE COURT: Okay. Lori, do you want to come in
16 with some proposed dates for us? Do you want me to just set
17 the 2008 at this time and just track these other cases.

18 MADAM JA: Is the week of October 17th too far out?

19 THE COURT: Too soon.

20 MADAM JA: Too soon. Okay.

21 THE COURT: Sorry, counsels. Did you want me to
22 just set the 2008 matter and then once we've kind of -- go
23 ahead.

24 MS. SMITH: We could do it a couple of different
25 ways. We could just set our one over to just the show cause

1 just so they're all tracking together or we could set the
2 2014 case for resentencing, maybe, you know, eight weeks out
3 and then set the show cause four weeks out. I would defer to
4 the Court and to Mr. Downs as to how he would like to handle
5 that. I don't really have a position.

6 MR. DOWNS: Either way is fine. I'll defer to the
7 Court.

8 THE COURT: All right. Let me get a date from Lori
9 and I think we'll just set them all on show cause and then I
10 would like Mr. Femling to be able to listen to the next
11 hearing. So, we'll have a Zoom link so that we can get that
12 information to DOC.

13 MADAM JA: Well, if you're putting it on a docket
14 week, I can do November 16th at 9:00 a.m. Is this a hearing
15 with Mr. Femling that a virtual request needs to be created?

16 THE COURT: The next one, yes. The next one I
17 would like that because we're gonna be discussing the 2008
18 case and --

19 MADAM JA: Okay. But, that will only give you an
20 hour. Or, you can do November 18th, which is a Friday at
21 1:30. That will give you as much time as you need.

22 THE COURT: Hang on just a second.

23 MADAM JA: Or, I can give special sets, you know,
24 or --

25

1 THE COURT: Okay. So, let's go ahead and set the
2 resentencing on the 2014 for Friday, November 18th. And, what
3 time was that?

4 MADAM JA: That could be at 1:30.

5 THE COURT: 1:30. And then, Lori, a -- something
6 you said during the week of October 17th was available?

7 MADAM JA: That's your non-jury week. So, you have
8 Monday all day available and you have Wednesday afternoon
9 available.

10 THE COURT: Okay. How about Wednesday, October 19th
11 at 1:30? The setover show cause on the 2008 and 2010 cases?

12 MADAM JA: Okay. And then we need --

13 MR. DOWNS: Works for me. And then, for the
14 resentencing date, was that 9:00 a.m. or 1:30?

15 THE COURT: November 18th at 1:30.

16 MR. DOWNS: Thank you.

17 THE CLERK: And a virtual request for both days for
18 Mr. Femling to be present?

19 THE COURT: Yes, please... We'll do virtual requests
20 for both of those hearing dates.

21 MS. SMITH: With that resentencing date, is that on
22 a docket or a special set?

23 THE COURT: It's in the afternoon on Friday,
24 November 18th. I don't think that's a docket. I think it's
25 just a special set with me when I'm available.

1 MS. SMITH: Okay. Thank you, Your Honor.

2 MR. DOWNS: And, the other date, did I get that
3 correct, was October --

4 THE COURT: 19th.

5 MR. DOWNS: 19th at 1:30?

6 THE COURT: Yes.

7 MR. DOWNS: Okay, thank you. And that one is
8 special set?

9 THE COURT: Yes.

10 MR. DOWNS: Okay, thank you.

11 THE COURT: Okay. Anything else for today,
12 counsels?

13 MS. SMITH: No, Your Honor. Thank you.

14 MR. DOWNS: No, thank you.

15 MR. VAUGHN: No.

16 THE COURT: All right. Thank you very much. Have a
17 great weekend everyone.

18 (CASE ADJOURNED)

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C E R T I F I C A T I O N

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DATED this 2nd day of August, 2023.

/S/ AMY M. BRITTINGHAM

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Superior Court Case Number: 10-1-00823-3

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September 10, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND JAY FEMLING,

Appellant.

No. 57959-6-II

UNPUBLISHED OPINION

GLASGOW, J.—Raymond Jay Femling appeals the trial court’s denial of his CrR 7.8 motion for resentencing based on *State v. Blake*.¹ In his sole assignment of error, he asks us to order the trial court to strike the crime victim penalty assessment from his judgment and sentence. But this issue is not within the scope of this appeal. Thus, although Femling is entitled to have the assessment stricken, he must seek this relief directly in the trial court.

In 2010, Femling pleaded guilty in two Clark County Superior Court cases.² In this case, he pleaded guilty to one count of possession of a controlled substance with intent to deliver. As part of his plea agreement, he received a prison-based drug offender sentencing alternative (DOSA) and the trial court imposed multiple legal financial obligations (LFOs). The trial court

¹ 197 Wn.2d 170, 481 P.3d 521 (2021).

² Femling’s appeal involving his second superior court case, number 10-1-01376-8, is linked to this appeal.

later revoked Femling's DOSA after he was convicted of additional crimes in 2014, and he returned to prison to serve the remainder of his sentence.

In 2021 and 2023, Femling filed motions to strike interest and LFOs. In 2021, the trial court declined to waive or strike the LFOs and declined to waive interest on nonrestitution LFOs because Femling was still incarcerated. The court also explained that certain fees were mandatory at that time. The trial court granted the 2023 motion in part but denied it in part, declining to strike the crime victim penalty assessment and other fees that were mandatory at the time.

In 2022, Femling filed a CrR 7.8 motion for resentencing based on *State v. Blake*. His motion did not mention the crime victim penalty assessment or LFOs. He also filed CrR 7.8 motions in two of his other cases. Following a hearing on all three of these CrR 7.8 motions, the trial court denied the motions for resentencing on Femling's 2010 convictions, concluding that although *Blake* reduced his offender score, his later convictions increased his offender score such that there was no net change.

Femling's notice of appeal sought to appeal only "the denial of the motion for resentencing." Clerk's Papers at 204. However, in his sole assignment of error, Femling does not challenge the trial court's denial of his motion for resentencing. Rather, he argues that this court should remand the case to the trial court with instructions to strike the \$500 victim penalty assessment based on recent amendments to RCW 7.68.035.

In 2023, the legislature eliminated the \$500 victim penalty assessment for indigent criminal defendants. LAWS OF 2023, ch. 449, § 1(4). RCW 7.68.035 further provides that the court shall waive any crime victim penalty assessment imposed prior to July 1, 2023, upon a motion by a defendant if the person does not have the ability to pay the assessment because they are indigent

as defined in RCW 10.01.160(3). RCW 7.68.035(5)(b). The State does not dispute that Femling is indigent as defined in the statute.

We generally agree that Femling is entitled to ask the trial court to strike the \$500 victim penalty assessment from his judgment and sentence. However, this appeal is not the appropriate vehicle to obtain that collateral relief because it is not within the scope of the notice of appeal.

Our review must be limited to the trial court's decision on the issues raised in the motion for resentencing. *See State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). The motion for resentencing did not include a challenge to the victim penalty assessment. And Femling did not appeal the trial court's order on his separate pro se motion, which declined to strike the crime victim penalty assessment because of its mandatory nature at the time. The order addressing the crime victim penalty assessment did not prejudicially affect the order Femling appealed—the motion for resentencing. *See* RAP 2.4(a). Thus, Femling's assignment of error seeking relief from the crime victim penalty assessment is not within the proper scope of his notice of appeal.

Femling may nonetheless seek relief from the victim penalty assessment by filing a CrR 7.8 motion in superior court as contemplated under RCW 7.68.035(5) or by filing a personal restraint petition in this court.

Femling also filed a statement of additional grounds (SAG) for review. When Femling was arrested and convicted in 2014, the trial court ran his sentence consecutively to the remainder of his sentence for his 2010 convictions. In his SAG, he claims that he is entitled to resentencing on his 2014 sentence to apply credit for the time served on his 2010 convictions. But Femling's 2014 sentence is also not the subject of this appeal. An appeal of that sentence is currently pending with

No. 57959-6-II


our court in number 58129-9-II. Accordingly, we do not reach Femling's request to reduce his 2014 sentence.

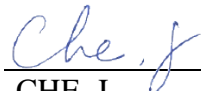
We affirm.

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


GLASGOW, J.

We concur:


PRICE, J.


CHE, J.