69118-0

69118-0

No. 69118-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Appellant/Cross-Respondent,

v.

JOHN A. JONES III,

Respondent/Cross-Appellant.

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

The Honorable George N. Bowden

BRIEF OF RESPONDENT/CROSS-APPELLANT

THOMAS M. KUMMEROW
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ISSUES ON APPEAL

1. Whether the trial court properly exercised its discretion when it refused the State's request to supplement the record where the State had two prior opportunities to supplement the record with the same transcript but failed to obtain the transcript?

2. Whether the trial court properly refused to admit any additional evidence at the third sentencing hearing where the State had the opportunity to prove the California prior convictions at the prior two sentencing hearings but failed in its burden of proof, and the trial court so ruled?

B. CROSS-ASSIGNMENT OF ERROR

The trial court abused its discretion in imposing a 60 month exceptional sentence that was clearly excessive.

C. STATEMENT OF THE CASE

Following a jury trial, John Jones III was convicted of one count of second degree assault involving domestic violence. CP 392, 401. The jury also found in a special verdict that Mr. Jones committed the assault within sight or sound of the victim's minor child. CP 391. On September 22, 2008, the trial court imposed an exceptional sentence of 120 months, the statutory maximum for that offense. CP 372, 376. Mr.

Jones appealed his conviction and sentence. On January 25, 2010, this Court reversed and remanded for resentencing, finding the trial court erred in failing to properly determine the offender score and standard range prior to imposing an exceptional sentence. CP 363. This Court noted that in calculating the offender score, the trial court apparently included prior California convictions without conducting a comparability analysis. CP 363. Mr. Jones had argued the State should be barred from presenting any new evidence at resentencing since it had already had one opportunity to do so. CP 364. This Court, apparently persuaded by the State's assurance that it had all the evidence it needed to prove the California prior convictions, ruled that the issue of comparability on remand was premature. CP 363-64.

On remand, the State supplemented the record with voluminous material regarding the California convictions. CP 209-308. At this resentencing hearing on December 13, 2010, Mr. Jones objected to the inclusion of the California convictions in his offender score. CP 309-25. The trial court failed once again to engage in the comparability analysis on the record, and merely included the prior convictions in Mr. Jones' offender score without comment. The court imposed the same 120 month exceptional sentence. CP 174-77, 183-84, 197-98.

On this second appeal, this Court again reversed Mr. Jones's sentence, again finding the State had failed to prove the California convictions were comparable to Washington felonies. CP 192-93. This Court ruled that it was the State's burden to prove comparability and the State had failed to carry that burden.

> The facts in the probation report have not been proved beyond a reasonable doubt nor admitted by the defendant in his guilty plea. Our record fails to show whether Jones's conduct constituted intentional second degree murder or second degree felony murder under Washington law as the State contends. *It is the State's burden to prove comparability of out-of-state offenses. The State failed to carry that burden.*

CP 193 (emphasis added). This Court remanded the matter for "resentencing consistent with this opinion." CP 194.

In both prior appeals, the State provided the trial court material from the California prior convictions, but did not provide a certified copy of the transcript from the preliminary hearing, believing that the California abbreviation "px" referred to the probation report as opposed to the transcript of the preliminary hearing.[1] CP 192-93. The probation report failed to include any facts proven or admitted by Mr. Jones. CP 193.

---

[1] *See generally* http://multimedia.journalism.berkeley.edu/tutorials/criminal-court-records/preliminary-hearing.

At the third sentencing hearing, Mr. Jones objected to the trial court considering any additional documentation presented by the State, submitting that the State already had the opportunity to prove comparability and had failed. CP 143-44.

On the day of sentencing, the State attempted to supplement the record with a non-certified copy of the transcript of the California preliminary hearing. RP 2-3. The trial court refused to consider this non-certified copy, and the court refused to continue the sentencing in light of the State's failure to obtain the transcript before the two prior two sentencing hearings.

> In reading *Mendoza* as well as *Hunley*, it is my conclusion that the State, in this case, does not get another bite of the apple. And I think that's underscored when the appellate court here decided in March, the remand came back, and today, following yesterday's hearing, we still do not have an authenticated record of the transcript available.
>
> So I decline the offer to set this over a few days so that a certified transcript of that record can be provided in part because I think *Mendoza* is clear that the State is stuck with the record it created at the resentencing hearing the first time. When that record was found to be inadequate to establish criminal history for the California drive-by shootings.

RP 9-10.

Mr. Jones's standard range based upon an offender score of "1" was six to 12 months. CP 131. The trial court imposed an exceptional sentence of 60 months based upon the jury's special verdict. CP 131-32; RP 10-11.

The State appealed the trial court's failure to continue the sentencing hearing or allow the State to provide additional evidence of the California prior convictions. CP 368-69. Mr. Jones has cross-appealed. CP 367.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO CONTINUE THE SENTENCING HEARING IN LIGHT OF THE STATE'S COMPLETE FAILURE TO OBTAIN A CERTIFIED COPY OF THE TRANSCRIPT PRIOR TO THE THIRD SENTENCING HEARING

When a defendant's criminal history includes out-of-state prior convictions, the Sentencing Reform Act (SRA) requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). The best evidence to establish a

defendant's prior conviction is the production of a certified copy of the prior judgment and sentence. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002), *citing State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). "However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *State v. Hunley*, ___ Wn.2d ___, 287 P.3d 584, 589 (2012), *quoting Ford*, 137 Wn.2d at 480. In determining the proper offender score, the court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2).

This Court reviews a trial court's decision to grant or deny a motion to continue sentencing for an abuse of discretion. *State v. Roberts*, 77 Wn.App. 678, 685, 894 P.2d 1340 (1995). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Woods*, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001).

Mr. Jones was convicted and originally sentenced in September 2008, to an exceptional sentence of 120 months. The sentence was reversed by this Court on January 25, 2010, for the trial court's failure to establish the standard range prior to imposing an exceptional

sentence, and for failing to establish the comparability of the California prior convictions upon which the State relied. The State at that time indicated it had sufficient evidence to prove the California prior convictions on remand. CP 363-64.

The trial court again sentenced Mr. Jones to an exceptional sentence of 120 months on December 10, 2010. At this sentencing hearing, the State presented a voluminous amount of evidence of the California prior convictions, but did not provide anything showing the facts underlying the California prior convictions had been proven or acknowledged by Mr. Jones despite the State's assurance to this Court that it had all the documentation necessary to prove comparability. This Court again reversed, this time finding the State failed in its burden of proving comparability, noting the absence of the preliminary hearing transcript.

Thus, it was clear the State had over three years and two sentencing hearings to obtain the preliminary hearing transcript but simply failed to do so. The trial court's conclusion that the State had ample time and had failed to obtain the transcript, as well as concluding the State had already had its bite at the apple and failed, was not

erroneous. Thus, the trial court's refusal to continue the sentencing in light of these findings was not an abuse of discretion.

2. THE TRIAL COURT PROPERLY REFUSED TO CONSIDER ANY ADDITIONAL EVIDENCE AT SENTENCING AS THE STATE HAD ALREADY HAD ITS OPPORTUNITY TO PROVE COMPARABILITY AND FAILED

When the defendant objects to the calculation of his offender score and the State does not provide the additional necessary evidence of the comparability of the out-of-state convictions at the time of sentencing despite having the opportunity, the State is held to the existing record on remand. *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009); *Ford*, 137 Wn.2d at 485.

Here, the State had not one but *two* opportunities to prove comparability of the out-of-state prior convictions. More importantly, in reversing the sentence imposed at the second sentencing hearing, this Court specifically stated that the State carried the burden of proof and failed in carrying that burden. CP 193.

The State's argument that the decision in *Ford* has been superseded by 2008 amendments to RCW 9.94A.530 is belied by the Supreme Court's recent decision in *Hunley*, which plainly reaffirmed *Ford*. 287 P.3d at 591-92. In fact, the *Hunley* Court went further and

found the amendment to RCW 9.94A.530(2) unconstitutional on its face and as a consequence, the amendments cannot be relied upon by the State here. 287 P.3d at 593.

Here, Mr. Jones's matter was remanded to the trial court the first time to allow the trial court to reexamine its prior sentencing in light of its failure to properly calculate the offender score or standard range, and to engage in the proper comparability analysis. The State assured this Court it had the necessary documentation to prove comparability. At the second sentencing hearing, Mr. Jones specifically objected to the inclusion of the California convictions in his offender score, arguing that the convictions were not comparable. The State possessed the burden of proving the comparability of the prior convictions at this hearing, but its proof, specifically the failure to obtain and enter into evidence the preliminary hearing transcript from California, failed to prove the comparability of the California prior convictions. On remand again, at the *third* sentencing hearing, the State still had not obtained a certified copy of transcript. But the transcript was not necessary because, as this Court stated in its decision and the trial court reaffirmed, the State had already had its opportunity to prove the prior

convictions and had failed. The State should not have a fourth opportunity. Enough is enough.

The trial court did not err in ruling the State had failed in its burden of proving comparability at the third sentencing hearing. This Court should reject the State's attempt to gain a fourth attempt to prove comparability, affirm the trial court, and affirm Mr. Jones' sentence.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A CLEARLY EXCESSIVE 60 MONTH SENTENCE WHERE MR. JONES'S STANDARD RANGE WAS SIX TO 12 MONTHS[2]

To reverse an exceptional sentence, this Court must find: "(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive." RCW 9.94A.585(4).

A trial court abuses its discretion when it imposes an exceptional sentence that is clearly excessive. *State v. Kolesnik,* 146 Wn.App. 790, 805, 192 P.3d 937 (2008), *citing State v. Law,* 154

[2] Should this Court reverse Mr. Jones's sentence and remand to allow the State another "bite of the apple," Mr. Jones alternatively asserts the trial court abused its discretion in imposing the exceptional sentence.

Wn.2d 85, 93, 110 P.3d 717 (2005). "A 'clearly excessive' sentence is one that is clearly unreasonable, 'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *Kolesnik,* 146 Wn.App. at 805, *quoting State v. Ritchie,* 126 Wn.2d 388, 393, 894 P.2d 1308 (1995). When a sentencing court does not base its sentence on improper reasons, this Court will find a sentence excessive where its length shocks the conscience in light of the record. *Kolesnik,* 146 Wn.App. at 805.

> In order to abuse its discretion in determining the length of an exceptional sentence above the standard range, the trial court must do one of two things: rely on an impermissible reason (the "untenable grounds/untenable reasons" prong of the standard) or impose a sentence which is so long that, in light of the record, it shocks the conscience of the reviewing court (the "no reasonable person" prong of the standard).

Ritchie, 126 Wn.2d at 395-96, quoting *State v. Ross,* 71 Wn.App. 556, 571–72, 861 P.2d 473 (1993). A sentence that shocks the conscience is one that "no reasonable person would adopt." *State v. Halsey,* 140 Wn.App. 313, 324-25, 165 P.3d 409 (2007).

Here, Mr. Jones was originally charged with one count of fourth degree assault, three counts of second degree assault, one count of third degree assault, and three counts of harassment. CP 442-43. Mr. Jones was acquitted of all of the counts except for a single count of second

degree assault; based upon a broken nose. CP 146, 385-402. The court based its imposition of the exceptional sentence on the jury's special verdict that the offense was one of domestic violence and the offense occurred with the sight or sound of the victim's or the defendant's minor child or children under the age of 18. CP 139; RCW 9.94A535(3)(h)(ii). While the jury's special verdict arguably merited some consideration in imposing the appropriate sentence, the trial court imposed a sentence that was *five* times the high end of the standard range based solely on one aggravating factor. Further, the trial court concluded it had an "open door" as to the length of the sentence it could impose, which was contrary to the clearly excessive standard. RP 11.

Finally, to the extent the trial court had an "open door" and the length of the sentence is essentially unreviewable, Mr. Jones was denied his constitutionally protected right to appeal. *See* Art. I, § 22.

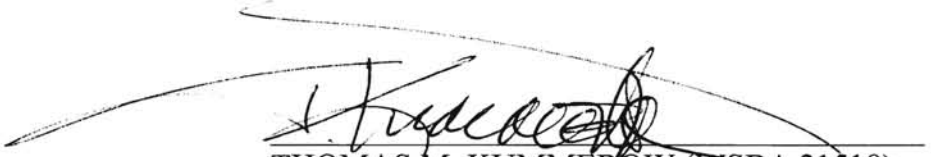
This Court should reverse Mr. Jones's exceptional sentence as clearly excessive and remand for imposition of a standard range sentence.

D. CONCLUSION

For the reasons stated, Mr. Jones requests this Court reject the State's arguments and affirm his sentence, or reverse the exceptional sentence and remand for a standard range sentence.

DATED this 27th day of December 2012.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21918)
tom@washapp.org
Washington Appellate Project - 91052
Attorneys for Respondent

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

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
	)	NO. 69118-0-I
	)	
	)	
JOHN JONES III,	)	
	)	
Respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	JOHN JONES III 366 STATEN AVE. APT 105 OAKLAND, CA 94610	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 27TH DAY OF DECEMBER, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711