89900-2

Case No. 30658-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

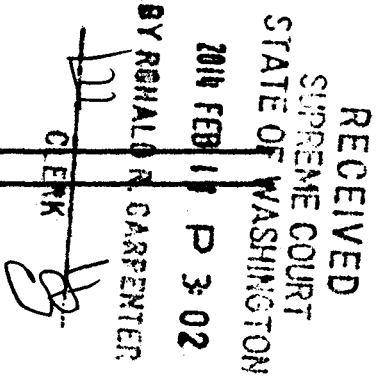
State of Washington,

Respondent,

vs.

Ignacio Cobos,

Petitioner.



PETITION FOR DISCRETIONARY REVIEW

Ignacio Cobos # 920217
Petitioner, **In Propria Persona**
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA. 99326

FILED IN COA ON JANUARY 30, 2014

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A. IDENTITY OF PETITIONER

Ignacio Cobos, the petitioner, **In Propria Persona**, asks this court to accept review of the Court of Appeals, Division III, decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division III, on December 31, 2013, entered a published opinion remanding for resentencing and allowing both the State and Petitioner to supplement the record, after finding that petitioner: "Cobos also shows the facts to which he objected were material. Cobos **objected** to every prior conviction." and acknowledging that the State **failed** to prove the existence of petitioner's prior convictions by a preponderance of the evidence. A copy of the published opinion is attached herein

C. ISSUES PRESENTED FOR REVIEW

1. Did the sentencing court erred in considering petitioner's prior convictions in the calculation of petitioner's offender score, after petitioner's written and oral specific objection and the State's **failure** to prove the existence of petitioner's prior convictions by a preponderance of the evidence?

a. Is the decision of the Court of Appeals in **conflict** with a decision of the Supreme Court?

b. Is the decision of the Court of Appeals in **conflict** with another decision of the Court of Appeals?

c. Is there a significant question of law under the Constitution of the State of Washington or of the United States involved?

d. Does the petition involves an issue of substantial public interest that should be determined by the Supreme Court?

D. STATEMENT OF THE CASE

After petitioner was found guilty by a jury, the court set the sentencing for January 18, 2012. On January 12, 2012, petitioner filed a motion for self-representation. On January 18, 2012, the court continued the sentencing to January 31, 2012. On January 31, 2012, the court, on its own motion, cancelled the sentencing hearing, and on February 6, 2012, petitioner, filed a Defendant's Objection to Continuance.

On February 7, 2012, petitioner appeared before the court for sentencing. Petitioner's counsel informed the court that petitioner wished to represent himself for sentencing. Arguments took place, and the court granted petitioner's motion and signed an Order removing counsel from case. At this hearing, petitioner's [ex] counsel acknowledged petitioner's offender score, as presented in the presentence investigation report. And court granted petitioner's oral motion to continue the sentencing

hearing to Ferbuary 14, 2012.

On February 14, 2012, petitioner, as the master of his legal strategy, filed a written objection to his offender score, and orally objected to every prior conviction. RP 4-10 And the court asked the State: "Ms. Highland, do you want to be heard as to criminal history?" And respondent stated:

> "Well, Your Honor, I am looking at the defendant's Triple I, which does contain all of those charges and convictions as articulated by the Court. It's my understanding that the information from Triple I comes from the booking. They have included his -- the defendant's fingerprints and the defendant's identification. So I -- I -- **have a good faith belief** that the criminal history that we've recited according to that is correct." RP 10-11

And the court asked the respondent if the record was sufficient to proceed, and the respondent answered:

> THE COURT: Well, let me ask you: Do you think the record is sufficient to proceed?
> MS. HIGHLAND: I do, Your Honor. RP 11

And the court continued to address the respondent concerning the necessity to prove petitioner's prior convictions by a preponderance of the evidence:

> THE COURT: Okay. If Mr. -- Mr. Cobos does not agree to this, do we need -- you do not believe we need to produce copies of the J&S's?
> MS. HIGHLAND: Well, if the Court wants to continue this over to this fall, I'll get the copies of the J&S's. RP 11

And the Court voiced its concern with petitioner's PSI:

> THE COURT: -- the -- everything that -- I --

I believe everything that you've got listed here on the J&S is contained in the -- in the criminal history that's set forth in the PSI.
MS. HIGHLAND: It is yes.
THE COURT: With the exception -- "with the exception" -- of the -- the last conviction out of Franklin County, the possession of methamphetamine in January of '09. So if -- if I recall the court rule correctly, the -- upon receiving the PSI -- And understanding that Mr. cobos is at little bit of disadvantage because he -- he undertook to represent himself at the last hearing. -- my understanding is that if the -- if the criminal history in the PSI is not objected to -- And let me just take a look at this. -- that that criminal history becomes the record.
MS. HIGHLAND: Right.
THE COURT: I didn't put that very well. Let me get -- let me get the rule out.
MS. HIGHLAND: I'm not sure about the state of (undecipherable) failure to object (undecipherable) kind of acceptance of what's been related, but the entire case clearly Mr. Cobos is objecting to all of his criminal history as it is (undecipherable). RP 12-13
THE COURT: I'm wondering whether that's going to **affect potentially** if we -- if we -- if we don't consider that last one, would it affect the washout -- the -- the -- the washout provisions.
MS. HIGHLAND: Your Honor, I suggest that we continue this for two weeks. **We'll get certified copies of every single Judgment & sentence** of Mr. Cobos's.
RP 14-15

Petitioner **objected** to the continuace, stating: "I believe that the prosecutor should have done something concerning that (proving criminal history) and not continuing this matter, you know. I -- I do have a right to an -- a speedy sentencing, you know." RP 16-20 And the Court addressed petitioner:

THE COURT: Okay. Mr. cobos, I need a "yes" or

"no" from you. And let me -- let me explain to you where I am at this point. At the point that you were -- that -- that Ms. Rosborough represented to the Court that she -- that she agreed with the standard range in the criminal history, which is set forth in the Judgment & Sentence, she was representing you. She was your attorney. Now, under those circumstances it seems to me that really we're walking the extra mile for you here. The -- that -- that '09 conviction could be -- could have fairly substantial consequences for you. I underst -- I -- I think with the -- with no priors, if your -- if every -- all your priors washout, I suspect your range with this -- with this - with these convictions would be somewhere like 12 plus to 24. With these convictions, if they don't wash out, you're looking at 60 plus to 120. I **don't think it's fair to have required the prosecutor to have produced**, under these circumstances, the -- the certified Judgment & Sentence. So I am prepared to proceed today. We will certainly proceed today, Mr. Cobos. Bit if we do, I am going to -- **I am going to proceed under the understanding that the criminal history set forth in the Judgment & Sentence is ACCURATE**. RP 22-23

And petitioner voiced his opinion:

"And if -- back then when I was, like the Court said, that I was represented by counsel, that was her opinion, you know. My opinion is that I don't agree to that calculation of the offender score. So whatever she says, I just want to make sure that it's an objection that I put in for the calculation of offender score. And if the Court wants to continue the sentencing, that's up to the Court. But I just want to -- to note an objection." RP 23-24

The court stated:

" . . . if you want to continue this for a couple -- of for a week so that counsel can bring you the certified Judgment & Sentence. But if you proc-- if you intent to proceed today -- And I will proceed today if it's your desire. --I'm going to rely, as Ms. Highland has, on the representation of your counsel last week. RP 25-26

> THE COURT: Okay. So I just need to hear from you. I -- I just need you to make a decision. If you want to continue this for a week, we will do so. And the prosecutor **has offered to produce the Judgment & Sentence. If you do not**, WE'LL PROCEED ON THE RECORD that we've got.
> THE DEFENDANT: Your Honor, the only thing I can say is that I submitted my objection to the offender score and I am objecting to any continuance. RP 27

The petitioner was sentenced.

On or about March 12, 2013, respondent filed a motion to supplement the record, asking the Court of Appeals, to allow the State to introduce certified judgment and sentences of petitioner's prior convictions. Arguments took place on April 24, 2013, telephonically, and on April 25, the Honorable Commissioner issued a ruling denying respondent's motion. The ruling made it clear that the only issue left for the panel was to decide whether or not the respondent was going to get a "second bite of the apple."

Respondent filed its response to petitioner's brief, and petitioner filed a reply and the matter went to the panel without oral argument.

On December 31, 2013, the Court of Appeals, Division III, issued its published opinion. The Court of Appeals, in its published opinion found that petitioner specifically and timely objected and that respondent failed to prove petitioner's prior convictions by a preponderance of the evidence, and remanded for resentencing allowing both parties to supplement the record.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Did the sentencing court ERRED in considering petitioner's prior convictions in the calculation of petitioner's offender score, after petitioner's WRITTEN and ORAL specific objection and the State's FAILURE to prove the existence of petitioner's prior convictions by a preponderance of the evidence?

At sentencing, pursuant to RCW 9.94A.500(1), the sentencing court is required to make a **final** decision as to defendant's criminal history, according to the convictions that were proven, and specify, **on-the-record**, the convictions it found to exist. As the Sentencing Reform Act (SRA) gives the person being sentenced, the "right" to know of and object to adverse facts, and **does not** compel that person to provide any information, as it is the State's responsibility to make sure the record before the sentencing court SUPPORTS the criminal history determination. Because it is inconsistent with the principles underlying our system of justice to sentence a person on the bases that the State either could **NOT** or **choose NOT to prove.** As constitutional due process **requires** the State to **meet** its burden of proof, **at** sentencing. State v. Lopez, 107 Wn.App 270 (2001), review granted, 145 Wn.2d 1020, affirmed 147 Wn.2d 515 (2002); State v. Thorne, 129 Wn.2d 736, 781 (1996); State v. James, 138 Wn.App 628 (2007); State v. Fleming, 140 Wn.App 132 (2007); State v. Ford, 137 Wn.2d 472, 480 (1999); State v. Grayson, 154 Wn.2d 333 (2005) (other citations omitted)

In the present case, at sentencing, petitioner filed a

"written" objection to the calculation of his offender score. RP 3-4

> MS. HIGHLAND: . . . Your Honor, the defendant is present for purposes of sentencing. He appears pro se. The State **is ready to proceed**. RP 3
> THE COURT: Well, Mr. Cobos, the first order of business is the -- the sentencing. And the prosecution has indicated to me they're willing -- they're -- **they're READY to proceed.** RP 4
> THE DEFENDANT: I prepared the defendant's **objection** to the calculation of the offender score. RP 4-5; CP 168

And the sentencing court acknowledged petitioner's "written" timely and specific objection:

> THE COURT: The defendant's **objection** is simply -- he -- he simply **objects** to the calculation of the offender score. RP 6

The petitioner, further objected, when the sentencing court recited petitioner's criminal history:

> THE COURT: Okay. And so you -- you simply are not in the position to say 'yea' or 'no' -- or 'nay' to that? Okay. RP 9-10

Therefore, the State, pursuant to the due process and the principles underlying our system, was required to prove, by a preponderance of the evidence, petitioner's prior convictions, in order for the sentencing court to have used them in the calculation of petitioner's offender score. The State **either could NOT or choose NOT to prove**, any of petitioner's prior convictions, **at** sentencing:

> MS. HIGHLAND: Well, Your Honor, I am looking at

> the defendant's Triple I, which does contain all of those charges and convictions as articulated by the court. It's my understanding that the information from Triple I comes from the booking. They have to include his -- the defendant's fingerprints and the defendant's identification. So I -- I -- I **have good faith belief** that the criminal history that we've recited according to that is correct. RP 10-11
>
> THE COURT: Well, let me ask you: Do you think the record is sufficient to proceed?
> MS. HIGHLAND: I do, Your Honor.
>
> THE COURT: Okay. If Mr. -- Mr. Cobos does not agree to this, do we need -- you do not believe we need to produce copies of the J&S's?
> MS. HIGHLAND: Well, if the Court **wants** to continue this over to this fall, **I'll get the copies of the J&S's.** RP 11

Therefore, the sentencing court shall have not considered petitioner's prior convictions in the calculation of of petitioner's offender score. RCW 9.94A.530(2); State v. Cadwaller, 155 Wn.2d 867, 874 (2005)

The Court of Appeals, in it's published opinion, acknowledged petitioner's timely and specific objections:

> "Cobos also shows the facts to which he objected were material. Cobos objected to every prior conviction." Opinion at 7

And held that: "The sentencing court relied on the material facts to which Cobos objected when determining his sentence." Opinion at 7

Therefore, based on the foregoing, it is crystal clear that petitioner, acting as his own counsel, and "sole" master of his legal strategy, timely and specifically **objected**, **at**

sentencing. And the State **failed** to prove petitioner's prior convictions, and therefore, at re-sentencing, the State **must be held** to the existing record. The State **CAN NOT** get a "second bite at the apple." State v. James, 138 Wn.App 628 (2007); State v. Knippling, 141 Wn.App 50 (2007); State v. Lopez, 107 Wn.App 270 (2001), affirmed, 147 Wn.2d 515 (2002); State v. McCorkle, 137 Wn.2d 490, 497 (1999)

IN the present case, the Court of Appeals, remanded for re-sentencing, allowing the State a "second bite at the apple." Opinion at 10 Therefore, this Court should accept review because (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, (3) there is a significant question of law under the Constitution of the State of Washington or of the United States, and (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

a. Is the decision of the Court of Appeals in conflict with a decision of the Supreme Court?

In State v. Lopez, 147 Wn.2d 515 (2002), after the Court of Appeals, Division III remanded for sentencing **on the existing record**, the State petitioned for discretionary review on the "sole" issue of whether the Court of Appeals erred when it remanded for sentencing **without** providing the state an opportunity to present evidence of Lopez's prior convictions on remand,

and this court held that: "Where the defendant raises a specific objection and 'the disputed issues have been fully argued to the sentencing court, we hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing WITHOUT allowing further evidence to be adduced.'" (citing State v. Ford, 137 Wn.2d 472, 485 (1999))

In the present case, petitioner raised a "written" and "oral" objections and the disputed issues were argued to to the sentencing court, and the Court of Appeals, remanded allowing the State a second opportunity to prove petitioner's criminal history, therefore, the Court of Appeals decision is in conflict with this Court's decision in State v. Lopez, and therefore, the Court of Appeals, erred, and this Court should accept review.

In State v. McCorkle, 137 Wn.2d 490 (1999), this Court held that: "Where the State fails to carry its burden of proof after specific objection it would **not be** provided a further opportunity to do so." at 497

In the present case, the petitioner made a timely and specific objection, and the Court of Appeals remanded for resentencing allowing the State a further opportunity to do so, therefore, the Court of Appeals decision is in conflict with this Court's decision in State v. McCorkle, and therefore, the Court of Appeals, erred, and this Court should accept review, and reverse the Court of Appeals decision, in the interest of justice and

fairness.

RCW 9.94A.530(2) states in pertinent part: "Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point." State v. Cadwallader, 155 Wn.2d 867, 874 (2005)

In the present case, the Court of Appeals held that: "The sentencing court relied on the material facts to which Cobos [petitioner] objected when determining his sentence." Opinion at7 Therefore, the sentencing court should have not considered petitioner's prior convictions that were not proven by the State, at sentencing, and therefore, review should be accepted.

In State v. Bergstrom, 162 Wn.2d 87 (2007), this Court provided three approaches to anylize the issue in question herein: "Where the sentencing court's offender score determination is challenged on appeal for insufficient evidence of prior convictions." The second approach states:

> "if the defense **does** specifically objects during the sentencing hearing and the State **FAILS** to produce any evidence of the defendant's prior convictions, then the State **may NOT** present new evidence at resentencing."

Therefore, following this excellent guidance by this Court, it is crystal clear that the Court of Appeals erred by allowing the State a second opportunity to prove petitioner's prior convictions, which the State choose not to prove or could not prove, at sentencing, therefore, review should be accepted to correct the Court of Appeals wrong interpretation of existing law.

b. **Is the decision of the Court of Appeals in conflict with another decision of the Court of Appeals?**

In State v. Lopez, 107 Wn.App 270 (2001), the Court of Appeals, Division III, ~~the Court~~ held that: "Where the State fails to carry its burden of proof after specific objection, it would not be provided a further opportunity to do so." (citing State v. McCorkle, 137 Wn.2d 490, 497 (1999)) And stated that: "We are not able to find specific authority granting the State another opportunity to carry its burden under these circumstances." And held that: "Remand for an evidentiary hearing is appropriate where the defendant has failed to object." (citing State v. Ford, 137 Wn.2d 472, 485 (1999))

In the present case, the Court of Appeals held that: "In short, the sentencing court erred when it failed to hold an evidentiary hearing and instead relied on material facts to which Cobos objected." Opinion at 8

Therefore, a second evidentiary hearing is only allowed when the defendant fails to object. Petitioner objected, and therefore, the State must be held to the existing record, at resentencing.

And therefore, the Court of Appeals decision is in conflict with the decision it made in State v. Lopez, and therefore, the Court of Appeals, erred allowing the State a second bite of the apple. And therefore, review should be accepted.

In State v. Knippling, 141 Wn.App 50 (2007), the Court

of Appeals, Division III, held that: "A remand for an evidentiary hearing is appropriate ONLY when the defendant has failed to specifically object to the State's evidence of the existence of a prior conviction. But where the defendant raises a specific objection and the disputed issues have been fully argued to the sentencing court, the appellate court HOLDS the State to the existing record." (citing State v. Lopez, 147 Wn.2d 515, 520 (2002)) (quoting State v. Ford, 137 Wn.2d at 485)

In the present case, the petitioner objected to every prior conviction. Opinion at 7 Therefore, the Court of Appeals, Division III, erred, in giving the State a "second bite of the apple." And therefore, review should be accepted, and the Court of Appeals, Division III, reversed, with directions to hold the State to the existing record, at resentencing.

c. Is there a significant question of law under the Constitution of the State of Washington or of the United States?

Fixing of legal punishment for criminal offenses is legislative, rather than judicial function. State v. Mulcane, 189 Wash. 625, 628 (1937) As early as 1909, ~~this~~ this Court stated:

> "The spirit of the law is in keeping with the acknowledged power of the legislature to provide a minimum and a maximum term within which the trial court may exercise its discretion in fixing sentence." State v. Le Pitre, 54 Wash. 166, 169 (1909)

The SRA allows "[t]he court [to] impose any sentence within the presumptive sentence range that it deems appropriate, **after**

the State proves, by a preponderance of the evidence the defendant's prior convictions the State wants the sentencing court to use in the calculation of the defendant's offender score. (citations omitted) In other words, constitutional due process requires the State to meet its burden of proof, at sentencing. State v. Bergstrom, 162 Wn.2d 87, 93 (2007); In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876 (2005) Therefore, the question is, if the State fails to meet its burden of proof at sentencing, Did the State violates due process? And if so, should the State be held to the record as existed at sentencing?

d. Does the petition involves an issue of substantial public interest that should be determined by the Supreme Court?

This Court, in State v. Bergstrom, supra, provided with an excellent three approaches to analizy the issue in question herein, with one exception, because the present case, involves a petitioner, who acted as his own counsel, and "sole" master of his legal strategy, and Bergstrom **does not** includes an approach for when the defendant represents himself, and therefore, the petition does involves an issue of substantial public interest that should be determined by this Court. And therefore, this Court should add a fourth approach, similar to the second approach in Bergstrom that could read as follows:

> Fourth, if a defendant, acting as his own counsel does specifically objects during the sentencing hearing and the State **fails** to produce any evidence of defendant's prior convictions

then the State will not be permitted to present new evidence at resentencing.

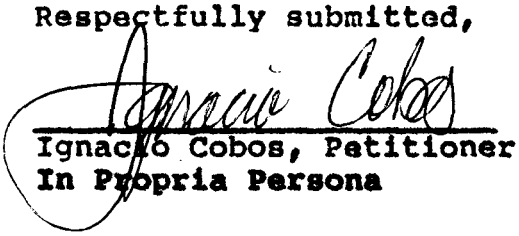
This fourth approach will provide excellent guidance for the Courts in the future, as there is reasonable probability that another petitioner, in the same position as the petitioner in this case, will come with an identical issue, and therefore, guidance is needed, and therefore, this Court should accept review, and determine whether or not, a fourth approach is needed.

F. CONCLUSION

For the foregoing reasons, petitioner prays to this Court to grant review, and reverse the Court of Appeals, Division III, decision to allow the State a "second bite of the apple" at resentencing, which is contrary to prior decisions from the same Court and in conflict with prior decisions of that court and this Court.

DATED THIS 27th day of January, 2014.

Respectfully submitted,



Ignacio Cobos, Petitioner,
In Propria Persona

DECLARATION OF SERVICE BY MAIL

IN ACCORDANCE WITH 28 USC § 1746, I declare that on this date, I mailed the following documents:

A. Petition for Discretionary Review
B. Declaration of service by mail; and
C. Cover letter

directed to:

Renee S. Townsley
Court Administrator/Clerk
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA. 99201

and served a copy to:

Carole L. Highland
Deputy Prosecuting Attorney
P.O. Box 37
Ephrata, WA. 98823

DATED THIS 27th day of January, 2014.

Ignacio Cobos

FILED
DEC. 31, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 30658-5-III
Respondent,	)	
	)	
v.	)	
	)	
IGNACIO COBOS,	)	PUBLISHED OPINION
	)	
Appellant.	)	

FEARING, J. — Statutes and case law aspire to accurate criminal sentences regardless of untimely objections to their correctness and despite a previous failure to supply sufficient data to levy informed sentences. "[Our] purpose is to preserve the integrity of the sentencing laws" and to avoid widely varying sentences. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). We have the opportunity to fulfill this aspiration and satisfy this purpose in this appeal.

INTRODUCTION AND RULING

A jury convicted Ignacio Cobos of delivery of methamphetamine, possession of

methamphetamine, and voyeurism. The trial court sentenced Cobos to 120 month's confinement.

Cobos appeals his sentence, arguing that, despite timely objecting to his offender score at sentencing, the court failed to hold an evidentiary hearing. The State concedes Cobos objected to his offender score at a sentencing hearing, but argues that, at a prior sentencing hearing, his attorney agreed with the offender score, and the State relied on the agreement. The State also argues that, if this court finds Cobos' subsequent objection to his offender score negates his attorney's prior representation, it be allowed, on remand, to enter certified records of Cobos' prior convictions to substantiate his offender score. Cobos opposes the State's entreaty and requests this court hold the State, on remand, to the existing record. We agree with Cobos that he is entitled to a sentencing evidentiary hearing and agree with the State that it may enter additional evidence at the new hearing.

FACTS

After Ignacio Cobos' convictions, the court scheduled sentencing hearings for January 18, and January 31, 2012. Both hearing dates were postponed and the first sentencing hearing was held on February 7, 2012.

At the February 7 hearing, Cobos moved to represent himself. After Cobos brought the motion, but before the court granted the motion, the State and Cobos' attorney agreed on an offender score of 9. Afterward, the sentencing court granted

Cobos' motion to represent himself and, at the request of Cobos, the court continued the sentencing hearing one week to February 14, 2012.

At the February 14 hearing, Cobos objected for the first time to his offender score listed in the report. CrR 7.1(c) requires a party challenging a presentence report to notify opposing counsel at least three days before the sentencing hearing. When questioned why he objected, Cobos replied that he must verify whether convictions included in his score were reversed on appeal. During the Valentine's Day hearing, the court also expressed concern over a discrepancy between the presentence investigation report (PSI) and the Interstate Identification Index (Triple I). The PSI omitted one conviction contained in the Triple I.

During the February 14 hearing, the State alertly offered to obtain certified records of Cobos' judgments and sentences if the court continued the sentencing hearing. Cobos objected to a postponement, claiming a right to "speedy sentencing." Verbatim Report of Proceedings (Feb. 14, 2012) at 20. RCW 9.94A.500(1) requires that sentencing occur within 40 days of a defendant's conviction, but a court may extend that time period for good cause shown or on its own motion. And, when a defendant objects to facts material to their offender score, a sentencing court must hold an evidentiary hearing. RCW 9.94A.530(2).

During the February 14 sentencing hearing, the court gave Ignacio Cobos

two options: (1) continue the sentencing hearing for one week so that the State can obtain certified records of his prior convictions, or (2) proceed with the sentencing hearing and the court would rely on the offender score his former attorney and the State agreed to at the February 7 hearing. Cobos rejected both options, and the court proceeded with sentencing. Relying on Cobos' former attorney's representation that the offender score is accurate, the court sentenced Cobos to 120 months.

ANALYSIS

Sentencing Hearing. Ignacio Cobos asks this court to remand his sentencing because he objected to his offender score and the sentencing court failed to hold an evidentiary hearing to establish his prior convictions. The State responds that it reasonably relied on the ratification of Cobos' offender score by his attorney at the February 7 hearing, such that an evidentiary hearing was unneeded. We grant Cobos' request.

The trial court must conduct a sentencing hearing before imposing a sentence on a convicted defendant. RCW 9.94A.500(1); *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012). A defendant's criminal history or offender score affects the sentencing range and is generally calculated by adding together the defendant's current offenses and prior convictions. RCW 9.94A.589(1)(a); *Hunley*, 175 Wn.2d at 908-09. At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *Mendoza*, 165 Wn.2d at 920. The State, not the defendant, holds the

obligation to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480. The best evidence of a prior conviction is a certified copy of the judgment. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting *Ford*, 137 Wn.2d at 480). Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove prior convictions. *Hunley*, 175 Wn.2d at 910.

When a convicted defendant disputes facts material to his sentencing, "the court must either not consider the fact or grant an evidentiary hearing on the point." RCW 9.94A.530(2); *accord State v. Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). Thus, we must ask: (1) whether Cobos' objection to the offender score at the February 14 hearing overrode his former counsel's ratification at the February 7 hearing, (2) whether the facts to which Cobos objected were material to his sentencing, and (3) whether the court considered those facts when sentencing Cobos.

We rule that Ignacio Cobos' objection to his offender score at the February 14 hearing superseded his former attorney's representation. After winning the motion to represent himself, Cobos should have become the master of his legal strategy. The court had yet to determine the score. His counsel had agreed to a score while Cobos' motion to represent himself was pending. Thus, the State was on notice that counsel may be

shortly removed. Sentencing is a critical step in the criminal justice system. *Hunley*, 175 Wn.2d at 910 (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). Since the offender score affected Cobos' length of punishment, the score concerned a substantive right, not a procedural right, *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); *Mead v. Comm'r of Corr.*, 282 Conn. 317, 323, 920 A.2d 301 (2007); *Krebs v. State*, 534 So.2d 1236, 1237 (Fla. Dist. Ct. App. 1988), for which counsel lacked authority to bind his client.

An attorney can waive his client's substantive rights only with specific authorization. *State v. Ford*, 125 Wn.2d 919, 922, 891 P.2d 712 (1995) (quoting *In re Adoption of Coggins*, 13 Wn. App. 736, 739, 537 P.2d 287 (1975)). While an attorney is impliedly authorized to waive procedural matters, a client's substantial rights may not be waived without that client's consent. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980); *State v. Sain*, 34 Wn. App. 553, 556-57, 663 P.2d 493 (1983). Although no case directly answers the question, a rule mentioned in passing in one decision suggests that an opposing party may not assume an attorney has authority to bind his client on any matter, when the opposing party has notice that the client wishes to terminate the services of the attorney, regardless of whether the attorney has yet to withdraw. In *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978), our high court wrote:

> But once a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention.

Our Supreme Court has also held that a sentencing court must conduct an evidentiary hearing when a defendant objects to the State's calculation of the offender score, even if that defendant's counsel agreed with the offender score. *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007). In *Bergstrom*, the State relied on Bergstrom's attorney's acknowledgment of the standard sentence range and offender score. *Id.* at 95. Despite the State's reasonable reliance, the court still held that, because the sentencing court considered Bergstrom's pro se motion objecting to his offender score, "the sentencing court erred when it failed to hold an evidentiary hearing and instead sentenced Bergstrom." *Id.* at 97. Bergstrom had not sought or been granted the ability to represent himself, but only disagreed with his counsel. *Id.* at 91. The *Bergstrom* ruling applies with stronger force to Cobos' situation since he represented himself by the time of the sentencing hearing.

Cobos also shows the facts to which he objected were material. Cobos objected to every prior conviction. Because the prior convictions control his offender score, his objections are material. RCW 9.94A.525.

The sentencing court relied on the material facts to which Cobos objected when determining his sentence. The court's remarks at sentencing show it imposed the

maximum sentence possible because many prior convictions demonstrated prison will not change his behavior.

In short, the sentencing court erred when it failed to hold an evidentiary hearing and instead relied on material facts to which Cobos objected.

Evidence at Resentencing. Ignacio Cobos contends the State should be precluded from entering new evidence into the record on the remand for resentencing. He relies on *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002) where the court precluded the State from entering new evidence of the defendant's alleged prior convictions on remand for resentencing because the defense timely notified the State of its obligation to establish the prior convictions. Cobos' case is unlike *Lopez* and more analogous to *Bergstrom*, where the State was allowed to introduce new evidence on remand for resentencing because the defendant's pro se objection was untimely, and the sentencing court failed to hold an evidentiary hearing. *Bergstrom*, 162 Wn.2d 87.

We need not decide, however, whether to follow *Lopez* or *Bergstrom*. Subsequent to the two decisions, the state legislature amended RCW 9.94A.530(2) to permit, in all cases, new evidence at resentencing. RCW 9.94A.530(2) now reads:

> On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

See LAWS OF 2008, ch. 231, § 4. The intent of this amendment is confirmed by another 2008 amendment. *See* LAWS OF 2008, ch. 231, § 1. Former RCW 9.94A.525(21) (2008) provided: "Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence."

Our high court has proclaimed as unconstitutional two sections of the 2008 amendments, one that requires the defendant to affirmatively object to a score and one that declares presentence reports prima facie evidence because of a violation of due process rights. *Hunley*, 175 Wn.2d 901. Nevertheless, the amendment to RCW 9.94A.530(2), allowing inclusion of additional convictions on resentencing, is constitutional. The amendment is consistent with the United States Supreme Court's holding in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack. Our Supreme Court has already permitted the entry of new evidence upon resentencing. *Bergstrom*, 162 Wn.2d 87.

CONCLUSION

We remand for resentencing and allow both the State and Cobos to supplement the record.

Fearing, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.