No. 89302-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOHN A. JONES III,

Respondent.

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

The Honorable George N. Bowden

ANSWER TO PETITION FOR REVIEW

THOMAS M. KUMMEROW
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A. ISSUE PRESENTED

Whether the Court of Appeals correctly held that the 2008 amendments to RCW 9.94A.530 did not overrule this Court's decision in *State v. Ford,* 137 Wn.2d 472, 973 P.2d 452 (1999), barring the State from getting a second chance to prove comparability after failing in its burden of proof in the face of a defendant's objection?

B. STATEMENT OF THE CASE

1. Facts from the sentencing hearing. 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.

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

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

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.

2. Court of Appeals Decision. In rejecting the State's arguments, and in an unpublished decision, the Court of Appeals ruled that:

> Jones made a specific objection at the time of the original sentencing. The State did not come forward with proof of the comparability of the California convictions. If *Ford, McCorkle, Lopez,* and *Cadwallader* control the outcome of the present case, the State does not have the right to another opportunity to correct its failure of proof.

Decision at 8.

In rejecting the State's reliance on the 2008 amendments to RCW 9.94A.530, the Court concluded:

> This court is not in a position to declare that the "no second chance" rule set forth in *Ford* is no longer in effect. Once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court. *State v. Gore,* 101 Wn.2d 481, 487-88, 681 P.2d 227 (1984). *Ford* is a foundational case on sentencing procedure in Washington. The court was concerned with preserving the integrity and dignity of the sentencing process as a matter of due process generally. *See Ford,* 137 Wn.2d at 484 ("The meaning of appropriate due process at sentencing is not ascertainable in strictly utilitarian terms' "), quoting *American Bar Ass'n,* STANDARDS FOR CRIMINAL JUSTICE: SENTENCING std. 18–5.17, at 206 (3d ed.1994). If the State is to have unlimited opportunities to introduce new evidence of criminal history whenever a defendant is resentenced, the State must first convince the Supreme Court that it lacked a constitutional basis for establishing the contrary rule in *Ford.*

Decision at 11-12.

D. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

THE COURT OF APPEALS PROPERLY RULED THAT THE 2008 AMENDMENTS TO RCW 9.94A.530 DID NOT OVERRULE THIS COURT'S DECISION IN *STATE v.FORD*

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). 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); *citing Ford*, 137 Wn.2d at 485.

The Court of Appeals concluded that this Court's decision in *Mendoza* and *Ford* controlled here and foreclosed the State's

opportunity to bring forth additional evidence of comparability in light of the defendant's objection at the prior sentencing hearings and the State's previous opportunity to prove comparability. Decision at 8. In light of this ruling, the State now urges this Court to accept review to rule that the 2008 amendments to RCW 9.94A.530 overruled this Court's decision in *Mendoza* and *Ford*. Petition at 4-9.

In amending RCW 9.94A.530, the Legislature purported to overrule the decision in *Ford*:

> Given the decisions in *In re Cadwallader,* 155 Wn.2d 867 (2005); *State v. Lopez,* 147 Wn.2d 515 (2002); *State v. Ford,* 137 Wn.2d 472 (1999); and *State v. McCorkle,* 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing.

Laws of 2008 chap. 231 § 1.

From this statement, the State urges this Court to find the provision in *Ford* foreclosing a second chance to prove comparability was superseded by the 2008 amendment to RCW 9.94A.530. Petition at 6. "The legislature may change a statutory interpretation, but it cannot modify or impair a judicial interpretation of the constitution." *State v. Hunley,* 175 Wn.2d 901, 914, 287 P.3d 584 (2012), *citing*

Seattle School District No. 1 v. State, 90 Wn.2d 476, 497, 585 P.2d 71 (1978).

While this particular provision of the 2008 amendments was not at issue in *Hunley*, this Court nevertheless held that the decision in *Ford* "was rooted in principles of due process. Our constitutional analysis in that case cannot be separated from the opinion." *Hunley*, 175 Wn.2d at 914. Thus, in light of this language in *Hunley*, the Court of Appeals decision was correct in finding the 2008 amendments to RCW 9.94A.530 did not overrule *Ford.*

Nevertheless, the State contends *Ford* was not constitutionally based, thus the amendments should apply. Petition at 8. Based upon a review of this Court's jurisprudence, the State is incorrect.

The decision in *Ford* references this Court's decision in *State v. Ammons*:

> In *State v. Ammons,* 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), we held that the use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. *See* RCW 9.94A.110 (criminal history must be proved by a preponderance of the evidence).

Ford, 137 Wn.2d 479-80. Later in the *Ford* opinion, this Court noted:

> Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due

> process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record. *See, e.g., Torres v. United States,* 140 F.3d 392, 404 (2d Cir.1998); *United States v. Safirstein,* 827 F.2d 1380, 1385-87 (9th Cir.1987); *United States v. Bass,* 535 F.2d 110, 118-19 (D.C.Cir.1976); *United States v. Looney,* 501 F.2d 1039, 1042 (4th Cir.1974); *State v. Johnson,* 856 P.2d 1064, 1071 (Utah 1993); *Mayes v. State,* 604 A.2d 839, 843 (Del.1992). *See also State v. Herzog,* 112 Wn.2d 419, 426, 771 P.2d 739 (1989) (any action taken by the sentencing judge which fails to comport with due process requirements is constitutionally impermissible).

Id. at 471. Based on this language it is clear that the decision in *Ford* was constitutionally based under due process. This includes not merely the reliability of the evidence used to prove comparability, but also in placing the burden of proof on the State.

The Court of Appeals decision was firmly based upon the decisions of this Court. As a consequence, this Court should deny the State's petition for review.

E. CONCLUSION

For the reasons stated, Mr. Jones respectfully requests this Court deny the State's petition for review.

DATED this 7th day of October 2013.

Respectfully submitted,

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 89302-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Snohomish County Prosecutor's Office

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 7, 2013

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Please accept the attached document for filing in the above-subject case:

Answer to Petition for Review

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