NO. 90840-1

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

LORENZO WEBB, RESPONDENT

Court of Appeals Cause No. 43179-3
Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 10-1-02833-3

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed on August 26, 2014, in ***State of Washington v. Lorenzo Webb***, in COA No. 43179-3-II. *See* Appendix A.

C. ISSUE PRESENTED FOR REVIEW.

1. Does the decision below conflict with the United States Supreme Court's decision in ***Custis v. United States***,[1] and this Court's decision in ***State v. Ammons***,[2] and ***State v. Roberts***,[3] in that it exceeds the scope of the type of challenges those decisions permit to be raised at a sentencing hearing to preclude use of a prior conviction?

2. Did the Court of Appeals err in finding defendant's 1992 judgment for assault in the second degree was "facially constitutionally invalid" because it cited to an outdated statutory reference when the record

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[1] *See*, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).
[2] *See*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986), *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986).
[3] *See*, 142 Wn.2d 471, 529, 14 P.3d 713 (2000).

before the sentencing court showed that defendant, while assisted by counsel, entered a guilty plea to an amended information charging him with assault in the second degree for assaulting another person with a deadly weapon, and causing grievous bodily harm, and when defendant affirmatively admitted that he "got into an argument with [the victim] over drugs and caused serious injury to her with a knife" as the factual basis for his plea?

D. STATEMENT OF THE CASE.

Lorenzo Webb ("defendant") was convicted of assault in the second degree following a jury trial; the jury also returned a special verdict that the defendant and victim were members of the same family or household. 6/8/11.RP 3-7; CP 132 -137.

The sentencing hearing took place over three dates, January 27, February 3, and March 2, 2012. RP 361, 380, 430. The State provided certified copies of the judgments of defendant's prior convictions, as well as other relevant court documents pertaining to those judgments. RP 383-386. The State also called several witnesses to testify when defendant had been released from confinement on his prior convictions, when he had been booked into jail for probation violations on his prior convictions, and

to testify that a comparison of the fingerprints on these prior judgments matched the defendant's known prints. RP 386-415.

The State contended that defendant was a persistent offender based upon his current conviction for assault in the second degree, and his 1982 and 1992 convictions for assault in the second degree from Pierce County, Washington. CP 176-223, 159-171, 172-175. Defendant contended that neither of these pre -December 2, 1993, convictions was comparable to a strike offense. CP 145-153, 225-230. Defendant further contended that the 1992 conviction was constitutionally invalid on its face and should not be included in defendant's criminal history. CP 145-153.

The court found that the State had shown that the prior convictions belonged to defendant and that they did not wash-out. RP 431-432, 450-452, CP 282-287. It further found that both defendant's 1982 and 1992 convictions were comparable to strike offenses. RP 444-450; CP 282-287. It also found that defendant had not met his burden of showing a constitutionally defective judgment as to the 1992 conviction. RP 442-444. The court reduced its ruling to findings of fact and conclusions of law. CP 282-287; *see*, Appendix B. The court then sentenced defendant as a persistent offender to a sentence of life without the possibility of parole. CP 240-253.

Defendant appealed his conviction and sentence. The Court of Appeals affirmed defendant's conviction but reversed his sentence finding that the 1982 conviction for assault was not comparable to a most serious offense and that the 1992 assault conviction was "facially constitutionally invalid" because it was based upon an expired statute; it remanded for resentencing. Appendix A.

The State now seeks review of the court's finding that the 1992 conviction is facially constitutionally invalid.[4]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRED IN GRANTING RELIEF ON A CHALLENGE TO THE CONSTITUTIONALITY OF A PRIOR CONVICTION THAT EXCEEDED THE SCOPE OF THE CHALLENGES THAT MAY BE RAISED UNDER ***CUSTIS v. UNITED STATES*** AND ***STATE v. ROBERTS***.

A defendant's criminal history is used to determine the offender score which in turn is used to determine the applicable presumptive standard sentence range. ***State v. Ammons***, 105 Wn.2d 175, 187, 713 P.2d 719 (1986), *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). The State does not have the affirmative burden of proving the

[4] The State recognizes that because it is not seeking review of the Court of Appeals determination that the 1982 conviction is not comparable to a most serious offense that defendant will not be sentenced as a persistent offender upon remand. The State seeks review so that his 1992 conviction may be used in resentencing in this case and in future sentencings - should there be any.

constitutional validity of a prior conviction before it can be used in a sentencing proceeding. ***Ammons***, 105 Wn.2d 175, 187. This Court in ***Ammons*** stressed the policy reasons behind this rule:

> To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, 105 Wn.2d at 188.

A sentencing court may not consider a prior conviction that: 1) has been previously determined to have been unconstitutionally obtained; or, 2) is constitutionally invalid on its face. ***Ammons***, 105 Wn.2d at 187-188. There is a distinction in the law between a judgment that shows facial constitutional invalidity, which is relevant to a challenge to the use of a prior conviction at a sentencing hearing, and a judgment that is invalid on its face, which might be relevant in determining whether a time bar is

applicable to an untimely collateral attack. The analysis used to determine facial constitutional invalidity differs from that used to determine whether a judgment is invalid on its face.

Both the United States Supreme Court and this Court have addressed what constitutes facial constitutional invalidity so as to render the conviction invalid for sentencing purposes. ***Custis v. United States***, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994); ***State v. Roberts***, 142 Wn.2d 471, 529, 14 P.3d 713 (2000). In ***Custis v. United States***, the Supreme Court made it unequivocally clear that a defendant in a federal sentencing proceeding has no constitutional right to collaterally attack the validity of a prior conviction, unless it was obtained in violation of the right to counsel as established in ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). ***Custis*** concerned a defendant who challenged the use of his prior convictions at a sentencing hearing for a variety of reasons including: 1) the denial of the effective assistance of counsel; 2) an involuntary guilty plea; and, 3) inadequate advisement of his rights in opting for a "stipulated facts" trial. In rejecting these as a basis for a sentencing court to review the constitutionality of the prior conviction, the United States Supreme Court articulated that one reason the denial of appointment of counsel is treated differently than other claims is the relative ease in determining whether such an infirmity exists

as the "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order", whereas "determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era." ***Custis***, 511 at 496; *see also* ***Johnson v. United States***, 544 U.S. 295, 303, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005)("We recognized only one exception to this rule that collateral attacks were off-limits [at sentencing hearings], and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel.").

This Court relied on ***Custis*** when reaching a similar conclusion as to the type of challenge that may be raised in a sentencing proceeding. *See* ***State v. Roberts***, *supra.* Roberts asserted that the sentencing court should not have considered some of his Canadian convictions because there was no showing that he was informed of the same rights of which he would have been informed in an American court. The Court, noting that an attack on the validity of a plea does not implicate the facial constitutional validity of the judgment, rejected the argument stating:

> Even were this true, the Canadian convictions would presumably still be admissible. *See* ***Custis v. United States***, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517

> (1994) (while denial of counsel renders a prior conviction per se invalid for sentencing purposes, other alleged errors, including involuntary plea, do not). ***Custis*** makes the same point this court made in ***Ammons***: absent facial constitutional invalidity or an affirmative showing of infirmity by the defendant, the sentencing court should not be forced to conduct an appellate review of each of the defendant's priors. ***Custis***, 511 U.S. at 496; ***Ammons***, 105 Wn.2d at 188.

State v. Roberts, 142 Wn.2d at 529. This Court's decision in ***Roberts*** reiterated the same concerns it had expressed in ***Ammons*** when it stated that allowing defendants to bring any sort of constitutional challenge would "turn the sentencing proceeding into an appellate review of all prior convictions." 105 Wn.2d at 188.

As noted in ***Roberts*** and ***Custis***, if the defendant can show a previous judicial determination of the infirmity of a prior conviction, or if the judgment reflects a denial of counsel on the prior conviction, then these claims, *and only these claims*, may be raised at a sentencing hearing to render the prior conviction constitutionally invalid for sentencing purposes. Other claims, even ones seemingly based on constitutional principles such as an involuntary plea, do not result in facial constitutional invalidity of a judgment. Under ***Ammons***, those type of constitutional claims must be raised in a collateral attack in the court where the prior

judgment was entered or by filing a personal restraint petition. ***Ammons***, 105 Wn.2d at 188.

In the case now before the Court, the Court of Appeals ignored the holdings of ***Custis***, ***Ammons***, and ***Roberts***, and the limited claims these cases permit to be raised in a sentencing hearing to challenge the constitutionality of a prior conviction. In this case, defendant contended that his judgment shows that he was convicted of a crime that did not exist as it cited to the former statute proscribing assault in the second degree rather than the one that was in effect at the time he committed his crime. This claim did not fall into either of the two constitutional challenges that may be raised in a sentencing hearing under ***Ammons***, ***Roberts*** and ***Custis***, as he did not allege that his prior conviction was obtained without the benefit of counsel, nor did he show a prior judicial determination that his 1992 conviction was constitutionally infirm. Thus, under ***Ammons***, he must challenge his 1992 conviction in a personal restraint petition or by collaterally attacking the conviction in the court where the judgment was entered; he may not challenge it in a sentencing hearing on a new offense.

Under ***Custis***, ***Ammons***, and ***Roberts***, it was the defendant's burden to show that his 1992 conviction was constitutionally invalid so as to preclude its use in a subsequent sentencing hearing and he could do so *only* by showing that: 1) he was denied the assistance of counsel in 1992;

or, 2) another court had previously held that 1992 conviction to be constitutionally invalid. As defendant made neither of those showings to the sentencing court, it properly included the 1992 conviction in defendant's criminal history. The Court of Appeals essentially allowed defendant to collaterally attack the voluntariness of his 1992 guilty plea at a subsequent sentencing hearing in contravention of this Court's decisions. Review is warranted under RAP 13.4(b)(1).

2. THE COURT OF APPEALS ERRED IN FINDING DEFENDANT'S 1992 JUDGMENT FOR ASSAULT IN THE SECOND DEGREE WAS "FACIALLY CONSTITUTIONALLY INVALID" BECAUSE IT CITED TO AN OUTDATED STATUTORY REFERENCE WHEN THE RECORD BEFORE THE COURT DID NOT AFFIRMATIVELY SHOW THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED.

In ***Ammons,*** this Court described "constitutionally invalid on its face" as meaning "a conviction which without further elaboration evidences infirmities of a constitutional magnitude." ***State v. Ammons***, 105 Wn.2d at 188. This Court articulated that for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant's rights were violated. ***Ammons***, 105 Wn.2d at 189. The Court in ***Ammons*** refused to consider claims of a consolidated defendant, Garrett, that his guilty plea was not entered with knowledge of

the rights he was giving up or that it was based upon an insufficient factual basis.

The Court stated:

> [S]uch a determination cannot be made from the face of the guilty plea form. There is no indication that Garrett was told he did not have the right to remain silent or that he was not informed of the elements of the crime or the consequences of the plea. Absent such an affirmative showing, Garrett must pursue the usual channels for relief.

Id at. 189.

Here, the Court of Appeals found that the judgment was facially invalid because it cited to an expired version of the second degree assault statute, RCW 9A.36.020, rather than the statute that was in effect the date of defendant's crime, RCW 9A.36.021. Appendix A at p. 7. The crime of assault in the second degree has long been on the books in the State of Washington. ***State v. Adlington-Kelly***, 95 Wn.2d 917, 924, 631 P.2d 954 (1981) (since 1909 there has been more than one degree of assault in Washington). In 1986, the legislature repealed the statute proscribing assault in the second degree in RCW 9A.36.020 at the same time it enacted a new statute, RCW 9A.36.021, proscribing assault in the second degree. 1986 Laws of Washington, Ch. 257, § 5, 9, 10. These changes became effective on July 1, 1987. 1986 Laws of Washington, Ch. 257, § 12. Both the new and the old assault laws proscribed assaulting another

with a deadly weapon, albeit in slightly different language. ***Compare***, 1979 Laws of Washington, 1st Ex. Sess. Ch. 244, §9; (a person is guilty of assault in the second degree when he "shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm."), and 1986 Laws of Washington Ch. 257, § 5 (a person is guilty of assault in the second degree when he "assaults another with a deadly weapon."). Despite the change in statutory language, the crime of assault in the second degree existed both before and after the 1986 legislative changes took effect; it was always illegal to assault another person with a knife.

In ***State v. Hopper***, 118 Wn.2d 151, 822 P.2d 775 (1992), this Court addressed the impact of an erroneous statutory reference to assault in the second degree on the validity of the resulting conviction. The situation in ***Hopper*** is similar, albeit reversed, to the one presented here. Hopper had committed an assault in the second degree on June 30, 1988, the last day that RCW 9A.36.020 was in effect. The information charging him cited to RCW 9A.36.021, which took effect on July 1, 1998. 118 Wn.2d at 159. Hopper raised a challenge claiming a defective information for the first time on appeal. The Court summarily rejected his argument stating:

> Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." CrR 2.1(b). We have consistently upheld convictions based on charging documents which contained technical defects such as this one. This rule is also applied by federal courts. Since no prejudice is alleged here, the information was not defective because of the error in the citation.

Hopper, 118 Wn.2d at 159-160 (internal citations omitted). The decision in ***Hopper*** is instructive because it holds that the error in statutory citation is not enough, by itself, to show a constitutional defect in the resulting conviction. *See also*, ***State v. Vangerpen***, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995); ***In re Mayer***, 128 Wn. App. 694, 117 P.3d 353 (2005)(citation to first degree murder statute in amended information did not render guilty plea to second degree murder invalid when elements of second degree murder were set forth and defendant understood he was pleading guilty to second degree murder).

In this case, the State submitted a certified copy of defendant's 1992 conviction for assault in the second degree in Pierce County Cause No. 92-1-02264-0. EX 3D; RP 384. It shows that defendant was represented by counsel on this charge. EX 3D. The judgment indicates that it concerns an assault in the second degree with a deadly weapon finding under RCW 9A.36.020(1)(b) and 9A.94A.310 and .370. EX 3D.

Defendant pleaded guilty to an amended information; the amended information charged defendant with violating 9A.36.020(1)(b), by knowingly inflicting grievous bodily harm upon [the victim] with a weapon - to wit: a knife. EX 3B. In defendant's guilty plea statement he admitted that in April 1992, he "got into an argument with [the victim] over drugs and caused serious injury to her with a knife." EX 3C. Defendant received a sentence that included an additional 12 months for the deadly weapon finding. EX 3D. Although the sentencing court erred in considering this challenge to defendant's prior conviction, *see* argument *supra*, the sentencing court properly found that these documents showed that defendant, in entering his plea, was put on notice of the elements of assault in the second degree under the 1992 version of the statute by assaulting another with a deadly weapon and that his plea statement acknowledged facts that were proscribed by the 1992 second degree assault statute. Consequently, the sentencing court correctly found the citation to the erroneous statute did not render his conviction constitutionally invalid. RP 442-44.

Under ***Hopper*** and ***Mayer***, defendant's judgment does not show a facial constitutional invalidity just because it cites to the wrong statutory provision as the sentencing court correctly concluded. Although ***Hopper*** was cited to the Court of Appeals below, it did not mention or distinguish

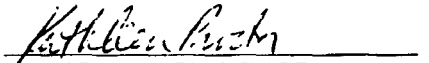
this case in its decision. As such, the decision below is in conflict with a decision of this Court which is a reason for review under RAP 13.4(b)(1). Because the decision also conflicts with Division III's decision in ***Mayer***, it is a reason for review under RAP 13.4(b)(2).

F. CONCLUSION.

The Court of Appeals has incorrectly permitted an improper collateral attack to a prior conviction to be raised in a sentencing hearing on a new offense contrary to this Court's decisions in ***Ammons*** and ***Roberts***. It has also incorrectly held that a valid 1992 conviction for assault in the second degree to be "facially constitutionally invalid" due to an erroneous statutory citation despite contrary authority from this Court. This erroneous ruling will forever remove a valid conviction from defendant's criminal history. For the forgoing reasons, the State asks this Court to accept review of the decision below

DATED: September 25, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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

9.25.14 _____
Date Signature

APPENDIX "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LORENZO WEBB,

Appellant.

No. 43179-3-II

PUBLISHED OPINION

MELNICK, J. — Lorenzo Webb appeals his second degree assault conviction and persistent offender sentence. He argues that his right to a public trial was violated when the attorneys conducted peremptory challenges on paper. He also argues that the trial court erred when it considered his two previous assault convictions at sentencing because the 1982 conviction is not comparable to a most serious offense and his 1992 conviction is facially constitutionally invalid. We hold that the trial court erred when it considered Webb's prior convictions because the 1982 assault does not qualify as a most serious offense under the persistent offender statute and because the 1992 assault conviction was based on an expired statute and therefore is facially constitutionally invalid. Finally, no violation of Webb's public trial right occurred. We affirm Webb's second degree assault conviction, reverse his persistent offender sentence, and remand for resentencing.

FACTS

The State charged Webb with second degree assault after he attacked his girlfriend. At trial, counsel conducted voir dire in open court. After voir dire, the trial court stated,

> At this time, the attorneys are going to exercise their peremptory challenges which are the challenges they have by law for which they don't have to give a reason. They do it on paper. They pass a sheet of paper back and forth. While this

> happens, you are free to stand up and stretch if you want. You can have a quiet conversation with your neighbor. . . . They will pass that back and forth, and we should get the jury selected this afternoon.

Report of Proceedings (RP) (June 1 & 2, 2011) at 64. The record indicates a pause in the proceedings. Counsel exercised their peremptory challenges. The court then said, "We have the jury selected for this case." RP (June 1 & 2, 2011) at 64.

The jury found Webb guilty of second degree assault, domestic violence. The State argued that Webb, a persistent offender, should be sentenced to a term of total confinement for life without the possibility of release. The State asserted that Webb's two previous second degree assault convictions from 1982 and 1992 were comparable to most serious offenses under RCW 9.94A.030(32)(b) and (u).[1] Webb argued that (1) he was not a persistent offender because his prior assaults were not comparable to most serious offenses and (2) his 1992 assault was facially constitutionally invalid because the plea listed the wrong version of the statute.

The trial court ruled that Webb's 1982 and 1992 assault convictions were both comparable to a most serious offense, second degree assault. It also found that Webb's 1992 conviction was not facially constitutionally invalid. Accordingly, it sentenced Webb as a persistent offender to total confinement for life without the possibility of release. Webb appeals his judgment and sentence.

[1] Former RCW 9.94A.030 (2010) was in effect at the time of Webb's current assault. The legislature has amended RCW 9.94A.030 since, but the amendments do not affect our analysis. Accordingly, we cite to the current version of the statute.

ANALYSIS

I. PUBLIC TRIAL RIGHT

Webb first argues that his right to a public trial was violated because counsel conducted peremptory challenges on paper. This contention fails. In *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014), we previously decided a similar issue. In *Dunn*, we held that the trial court did not violate a defendant's right to a public trial when the attorneys exercised peremptory challenges at a side bar. 180 Wn. App. at ___, 321 P.3d at 1285; *see also State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013) (peremptory challenges at sidebar). Following *Dunn's* rationale, we hold that the trial court did not violate Webb's public trial right.

II. PERSISTENT OFFENDER

Webb next argues that the trial court erred when it found him to be a persistent offender. He asserts that his 1982 assault conviction is not comparable to a most serious offense and that his 1992 conviction is constitutionally invalid on its face. We agree with both arguments.

A. 1992 Conviction—No Comparability

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is one who has been convicted of a most serious offense and has two prior felonies that are also most serious offenses. RCW 9.94A.030(37)(a). Second degree assault is a most serious offense. RCW 9.94A.030(32)(b). Felonies committed before December 2, 1993, are classified as most serious offenses if they are comparable to a most serious offense. RCW 9.94A.030(32)(u). We review de novo a trial court's decision to consider a prior conviction a most serious offense for persistent offender purposes. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

To determine whether crimes are comparable, the court first looks at the elements of the crime. *State v. Failey*, 165 Wn.2d 673, 677, 201 P.3d 328 (2009); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the elements of the prior conviction are comparable to the elements of a most serious offense on their face, the prior conviction is considered a most serious offense.[2] *Morley*, 134 Wn.2d at 606. If the elements are different or if the former statute is broader than the current statute, the court may then look at the defendant's conduct, as evidenced by the information, to determine whether it would have violated the comparable most serious offense statute. *Morley*, 134 Wn.2d at 606 (quoting *State v. Mutch*, 87 Wn. App. 433, 437, 942 P2d 1018 (1997)). In making this factual comparison, the sentencing court may rely on facts in the former record only if they are admitted, stipulated to, or proved beyond a reasonable doubt. *Thiefault*, 160 Wn.2d at 415. The State bears the burden of establishing the comparability of a prior conviction. *State v. Thomas*, 135 Wn. App. 474, 488, 144 P.3d 1178 (2006).

The trial court found that Webb's 1982 assault conviction was comparable to the current[3] version of second degree assault, a most serious offense. Under the current statute, the elements are that a person is guilty of second degree assault if he "intentionally assaults another and thereby *recklessly inflicts substantial bodily harm*." RCW 9A.36.021(1)(a) (emphasis added). In 1982, a person was guilty of second degree assault if he "*knowingly inflict[ed] grievous bodily harm*" on

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[2] At oral argument, the State argued it only needed to show that the elements were "substantially similar." Wash. Court of Appeals oral argument, *State v. Webb*, No. 43179-3-II (June 26, 2014), at 9 min., 32 sec.-9min., 36 sec. (on file with the court). But the State has not shown how the elements are substantially similar if grievous bodily harm encompasses a broader range of injury than substantial bodily harm.

[3] The legislature has amended RCW 9A.36.021 since 2010, the date of Webb's current offense. LAWS OF 2011 ch. 166, § 1. But this change does not affect our analysis. Accordingly, we cite to the current version.

another. Former RCW 9A.36.020(1)(b) (1979) (emphasis added). Webb argues that the elements differ as to both the mental state required and the type of harm that ensued.

We begin our analysis by comparing the terms "substantial bodily harm," as used in the current version, and "grievous bodily harm," as used in the 1982 version. "Substantial bodily harm" means bodily injury that involves temporary but substantial disfigurement, causes a temporary but substantial loss of the function of any body part or organ, or causes a fracture of any body part. RCW 9A.04.110(4)(b). "Grievous bodily harm," on the other hand, means "a hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character. By 'grievous' is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature." *State v. Salinas*, 87 Wn.2d 112, 121, 549 P.2d 712 (1976).

"Grievous bodily harm" is broader than "substantial bodily harm." As an example, an injury that resulted only in pain and discomfort would be considered grievous but not substantial. Webb could have been convicted of assault in 1982 based on an injury involving only pain, but he could not be convicted of assault under the current statute for an injury involving only pain. The 1982 assault statute is broader than the current second degree assault statute. The type of harm required for a conviction under the two statutes is not comparable. Because we reach this conclusion, we need not decide whether the same mens rea is required to violate each version of the statute.

Because the statutes are not legally comparable, we proceed to the second prong of the test and examine the convictions for factual comparability. The only facts contained in the record are contained in the 1982 amended information. This charging document merely recites the elements of the second degree assault statute. There is insufficient proof to determine whether Webb's

conduct would have violated the current second degree assault statute. *See Morley*, 134 Wn.2d at 606.

The 1982 conviction is not legally or factually comparable to a most serious offense. Therefore, the trial court erred when it sentenced Webb as a persistent offender.

B. 1992 Conviction—Facial Constitutional Invalidity

Next, Webb argues that the trial court erred when it considered his 1992 conviction because it is unconstitutional on its face. We agree.

The State is not required to prove the constitutional validity of prior convictions before they can be used at sentencing. *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986). Generally, the defendant has no right to contest prior convictions at a subsequent sentencing because there are more appropriate methods for contesting the validity of prior convictions. *Ammons*, 105 Wn.2d at 188.

But a prior conviction that is unconstitutionally invalid on its face may not be considered at sentencing. *Ammons*, 105 Wn.2d at 187-88. "On its face" includes the judgment and sentence and documents signed as part of a plea bargain. *State v. Thompson*, 143 Wn. App. 861, 866-67, 181 P.3d 858 (2008). A conviction is facially invalid if constitutional invalidities are evident without further elaboration.[4] *Ammons*, 105 Wn.2d at 188.

In 1992, a person committed second degree assault if he intentionally assaulted another and thereby recklessly inflicted substantial bodily harm. Former RCW 9A.36.021(1)(a) (1988).

[4] However, in *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000), the court held that the defendant's judgment and sentence was facially invalid where the State charged him with a crime that did not exist when the alleged events occurred. This invalidity only became evident by looking at outside sources, i.e., the undisputed statutory history. We adopt the same approach in this case.

The information for Webb's 1992 conviction cites former RCW 9A.36.020(1)(b) (1979), which expired July 1, 1987. It states that Webb "on or about the 21st day of April, 1992, . . . knowingly inflict[ed] grievous bodily harm upon [K.R.], a human being, with a weapon, to-wit: a knife." Ex. 3B. His judgment and sentence also cites former RCW 9A.36.020(1)(b). Thus, the State charged Webb and the court sentenced him under an expired version of the second degree assault statute.

This invalidity is clear from the face of the judgment. It states the date of the crime, April 21, 1992, but cites to and specifies the elements of a statute, former RCW 9A.36.020, repealed in 1987. LAWS OF 1986, ch. 257, § 9, § 12.

Additionally, the conviction and sentence is unconstitutional. "'Due process requires that a guilty plea be knowing, voluntary, and intelligent.'" *State v. Easterlin*, 159 Wn.2d 203, 212-13, 149 P.3d 366 (2006) (quoting *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987)). "'A plea is not voluntary in the constitutional sense unless the defendant has adequate notice and understanding of the charges against him.'" *Easterlin*, 159 Wn.2d at 213 (quoting *Hews*, 108 Wn.2d at 590).

Here, Webb did not have adequate notice and understanding of the charges against him because the State charged and the court sentenced him for a crime that did not exist when the alleged events occurred. *See Thompson*, 141 Wn.2d at 719, 722 (holding that a judgment and sentence was constitutionally invalid on its face when the defendant was charged with a crime that did not yet exist). The assault statute in effect in 1992, when Webb committed the acts, required different elements than the 1979 statute that the State erroneously charged Webb under and for which he was sentenced. Second degree assault in 1992 required infliction of substantial bodily harm, while the statute listed in the information required only grievous bodily harm. *Compare* former RCW 9A.36.021(1)(a) (1988) *with* former RCW 9A.36.020(1)(b) (1979). As we discussed

in the preceding section, grievous and substantial bodily harm encompass different types of injuries. Accordingly, Webb has shown that his 1992 sentence is facially constitutionally invalid. The trial court erred by considering it.

Finally, Webb argues that his persistent offender sentence violates his due process and equal protection rights. Because we are reversing his sentence, we do not reach this issue. We affirm Webb's assault conviction, reverse his persistent offender sentence, and remand for resentencing.

Melnick, J.

Melnick, J.

We concur:

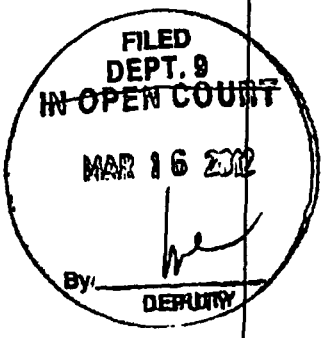
Johanson, C.J.

Johanson, C.J.

Maxa, J.

Maxa, J.

APPENDIX "B"



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LORENZO WEBB, Defendant.	CAUSE NO. 10-1-02833-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING PERSISTENT OFFENDER DECLARATION/SENTENCE

THIS MATTER came on for sentencing on March 2, 2012, before the Honorable Edmund Murphy. After considering the materials submitted by the State, including the exhibits, and hearing arguments of counsel, the court found the defendant to be a persistent offender and sentenced him to life in prison without the possibility of release or parole.

Being duly advised in this matter, the court hereby enters the following findings of fact and conclusions of law relating to the defendant's status as a persistent offender and the resulting sentence of life without parole imposed by the court:

FINDINGS OF FACT

I.

In 1982, the defendant was convicted of Assault in the Second Degree in Pierce County Superior Cause No. 82-1-01616-2.

II.

In 1992, the defendant was convicted of Assault in the Second Degree in Pierce County Superior Court Cause No. 92-1-02264-0.

III.

In 2010, when the defendant committed his current crime, Assault in the Second Degree was a most serious offense under RCW 9.94A.030(32)(b) (2010).

IV.

In 2010, when the defendant committed his current crime, RCW 9.94A.030(32)(u) allowed for any felony offense in effect prior to December 2, 1993 that is comparable to a most serious offense under subsection (32) to be included in the definition of "most serious offense "

V.

In this case, the defendant was convicted of Assault in the Second Degree.

VI.

In 2010, when the defendant committed his current crime, Assault in the Second Degree was a Class B felony under RCW 9A.36 021(2)(a). The defendant's conviction for Assault in the Second Degree is a most serious offense / strike under RCW 9.94A.030(32)(b)(2010).

VII.

The defendant was born on September 7, 1957. His most serious offense crimes were committed in 1982, 1992, and 2010, therefore the defendant was over the age of eighteen each time he committed one of his most serious offenses. Therefore, the defendant qualifies as an "offender" at each of the relevant times as that term was defined in RCW 9.94A.030(34)(2010).

VIII.

Assault in the Second Degree is a Class B felony under RCW 9A.36.020 (1982) and 9A.36.021 (1992, 2010). Per the "wash" out provisions of the SRA, class B felonies are included in the defendant's offender score unless the defendant has spent, since the last date of confinement pursuant to a felony conviction, ten consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2).

IX.

The defendant was released from his prison confinement for his 1982 Assault in the Second Degree conviction on September 24, 1985. He committed two counts of Forgery on October 22, 1991 and was released from confinement pursuant to that conviction on April 13, 1992. On April 21, 1992 the defendant committed Assault in the Second Degree with a Deadly Weapon and was released from confinement pursuant to that conviction on October 18, 1995. The defendant was returned to custody pursuant to that conviction on January 24, 1996 for a community custody violation.

On December 27, 1995 the defendant committed the crime of Willfully Violating Community Custody Conditions. On March 14, 1996 the defendant was booked into the Pierce County Jail pursuant to that charge, and on March 29, 1996 he was sentenced to two months in custody. Pursuant to Department of Corrections and Pierce County Jail records the defendant was transported from the Pierce County Jail to the Department of Corrections on April 2, 1996 then returned to the Pierce County Jail from DOC/McNeil Island on May 9, 1997 and released from the jail on June 7, 1997. On August 3, 2005 the defendant was booked into the Pierce County Jail pursuant to his 1992 Assault in the Second Degree conviction for a probation hold and was released on August 4, 2005.

The defendant also has intervening misdemeanor convictions; two counts of Assault in the Fourth Degree committed on April 6, 2001 and Unlawful Possession of Drug Paraphernalia committed on November 8, 2005.

The defendant's convictions are not, therefore, subject to the wash-out provision.

X

The defendant was convicted of, sentenced, confined, and released on his first most serious offense (assault in the second degree) before he committed his second most serious offense. He was convicted of, sentenced, confined, and released on his second most serious offense (assault in the second degree) before he committed this, his third most serious offense. Therefore, under even the most strict interpretation, the defendant qualifies as a persistent offender under RCW 9.94A.030(37) (2010).

XI.

When the defendant committed his current crime, and at every time since, the only lawful sentence to be imposed on a person who qualifies as a persistent offender is a sentence of life in prison without the possibility of release or parole. ***See*** RCW 9.94A.570 (2010).

From the above findings, the court hereby makes the following conclusions of law:

CONCLUSIONS OF LAW

I.

The defendant's 1982 conviction for assault in the second degree is comparable, pursuant to RCW 9.94A.030(32)(u), to the most serious offense of assault in the second degree as it existed after December 2, 1993. In 1982 the assault in the second degree statute required knowing infliction through an assault of great bodily harm. After 1993, the assault in the second

degree statute required an intentional assault and reckless infliction of substantial bodily harm. Great bodily harm is at least a harm that is equal to substantial bodily harm. WPIC 35.50 defined "assault" in 1982 as an intentional act. When an individual acts recklessly, he also acts knowingly. RCW 9A.08.010. Therefore the defendant's 1982 conviction for assault in the second degree is a most serious offense.

II.

The defendant's 1992 conviction for assault in the second degree is comparable, pursuant to RCW 9.94A 030(32)(u), to the most serious offense of assault in the second degree as it existed after December 2, 1993. Assault with a deadly weapon was a means of committing assault in the second degree both before and after 1993. Therefore, the defendant's 1992 conviction for assault in the second degree is a most serious offense.

III.

The citation in the amended information to the former assault in the second degree statute, RCW 9A.36.020, rather than the statute that was in effect at the time of the conviction, RCW 9A.36.021, in the defendant's 1992 conviction for assault in the second degree does not render the judgment and sentence, and the conviction, constitutionally invalid on its face. The defendant was provided sufficient notice of the crime that he was charged with and pleading guilty as the language is clear in the plea form and the judgment and sentence that the defendant was pleading guilty to an assault with a deadly weapon.

IV.

The defendant is a persistent offender.

V.

The defendant is sentenced to life in prison without the possibility of release or parole.

The court's oral ruling on this issue was given in open court in the presence of the defendant on March 2, 2012.

The defendant's presence has been waived at the hearing for presentment of these finds of fact and conclusions of law, signed this 16th day of March, 2012.

JUDGE EDMUND MURPHY

Presented by:

KARA E. SANCHEZ
Deputy Prosecuting Attorney
WSB# 35502

Approved as to form only with arguments & objections made on record

LAURA CARNELL
Attorney for Defendant
WSB# 27860

FILED
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IN OPEN COURT
MAR 13 2012
By

PIERCE COUNTY PROSECUTOR

September 25, 2014 - 4:00 PM

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Court of Appeals Case Number: 43179-3

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