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61513-4

No. 61573-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LAMOR SPEARS,

Appellant.

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

The Honorable Richard McDermott
The Honorable Christopher A. Washington

REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
COURT OF APPEALS

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A. ARGUMENT

THE STATE IS FORECLOSED FROM PRESENTING
ANY NEW EVIDENCE AT A RESENTENCING
HEARING WHERE THE STATE FAILED TO PROVE
COMPARABILITY AT THE ORIGINAL SENTENCING

At the sentencing on April 17, 2008, Mr. Spears objected to the inclusion of his California prior conviction for burglary as not comparable to a Washington felony offense. In its response brief, the State concedes the evidence it presented to the trial court was insufficient to prove the California prior conviction was comparable to a Washington felony offense but urges this Court to remand for resentencing where it can provide additional information on the comparability. Mr. Spears urges this Court to accept the State's concession of error and remand for resentencing, but without the California prior conviction included in his offender score.

The State argues that on remand, it should allowed to present new evidence concerning comparability under the amended RCW 9.94A.530(2), despite the fact it had the opportunity to prove the comparability at the original sentencing. See Laws of 2008, ch. 231. While the amendment to RCW 9.94A.530 purports to be retroactive, RCW 9.94A.345 plainly states that "[a]ny sentence imposed under this chapter shall be determined in

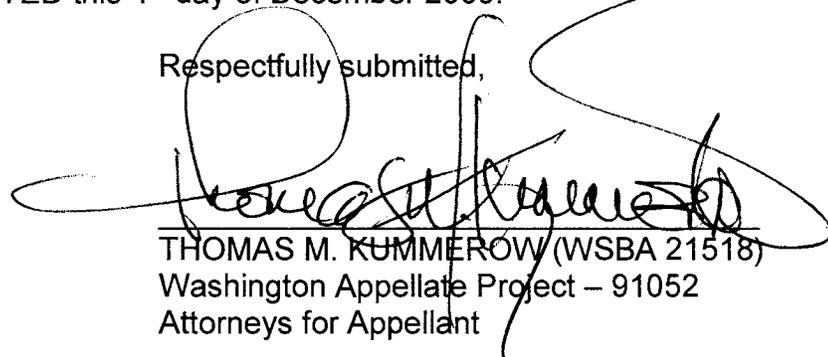
accordance with the law in effect when the current offense was committed.” See *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (interpreting RCW 9.94A.345). Since the 2008 amendments to RCW 9.94A.530 were not in effect at the time Mr. Spears committed his offenses, the 2008 amendments do not apply and the State should be barred from presenting new evidence to attempt to prove the comparability of the California prior burglary conviction at the resentencing. See *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (“In the normal case, where the disputed issues have been fully argued to the sentencing court, we would 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.”).

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Spears submits this Court must reverse his convictions and remand for a new trial, or alternatively, remand for resentencing.

DATED this 4th day of December 2009.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends upwards into the 'Respectfully submitted,' line.

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 61573-4-I
v.)	
)	
KEVIN SPEARS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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