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STATE OF WASHINGTON

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Clerk

NO. 34547-1-II
Clark County No. 05-1-02317-1/05-1-02361-9

STATE OF WASHINGTON,

Respondent,

vs.

JAMES R. NELSON

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. THE SENTENCING COURT ERRED WHEN IT INCLUDED MR. NELSON'S PRIOR CONVICTION FOR BURGLARY THIRD DEGREE IN HIS OFFENDER SCORE.

II. THE SENTENCING COURT ERRED WHEN IT REFUSED TO CONDUCT ITS OWN SAME CRIMINAL CONDUCT ANALYSIS OF MR. NELSON'S PRIOR CONVICTIONS FROM LEWIS COUNTY.

III. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO REFLECT THAT MR. NELSON CANNOT BE REQUIRED TO SERVE TIME ON COMMUNITY CUSTODY BEYOND THE MAXIMUM SENTENCE FOR HIS CRIME, AND AMENDED TO REFLECT THE CORRECT STANDARD RANGE.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. THE SENTENCING COURT ERRED WHEN IT INCLUDED A PRIOR CONVICTION FOR BURGLARY THIRD DEGREE FROM NEW YORK IN MR. NELSON'S OFFENDER SCORE WITHOUT CONDUCTING A COMPARABILITY ANALYSIS.

II. THE SENTENCING COURT ERRED WHEN IT FOUND THE STATE HAD PROVEN THE EXISTENCE OF A PRIOR CONVICTION FOR ASSAULT IV FROM THE DALLES, OREGON, WHERE THE STATE FAILED TO PRESENT PROPER PROOF OF THIS ALLEGED CONVICTION.

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IV. THE JUDGMENT AND SENTENCE NEEDS TO BE AMENDED TO SPECIFY THAT IN NO EVENT CAN MR. NELSON BE REQUIRED TO SERVE TIME ON COMMUNITY CUSTODY BEYOND THE STATUTORY MAXIMUM OF SIXTY MONTHS, AND AMENDED TO REFLECT THE CORRECT STANDARD RANGE.

C. STATEMENT OF THE CASE

Appellant James Nelson pled guilty to one count of Forgery charged under Clark County cause number 05-1-02317-1 (CP 1), and one count of Unlawful Imprisonment (Domestic Violence) charged under Clark County cause number 05-1-02361-9 (CP 1). The pleas were entered on December 15th, 2006 before the Honorable Diane Woolard. CP 3-10 (05-1-02317-1); CP 3-10 (05-1-02361-9). At the time of the pleas, the parties advised the Court that Mr. Nelson disputed his criminal history. RP, 1. At sentencing, Mr. Nelson disputed the inclusion of a conviction for Burglary in the Third Degree from the State of New York in 1981 in his criminal history. RP 19. He also objected to the Court's consideration of an alleged misdemeanor assault conviction from the Dalles, Oregon from 1990, which would prevent the Burglary in the Third Degree from washing, because the State failed to produce a certified copy of the judgment and sentence of this conviction. CP 16 (05-1-02317-1), RP 24. Mr. Nelson also asked the Court to conduct its own assessment of whether two prior convictions from Lewis County, which were charged and pled under the same cause number from the year 2000, should be treated as

same criminal conduct for scoring purposes. CP 26, 29 (05-1-02317-1), RP 25.

Regarding the Burglary in the Third Degree from New York, the Court did not conduct a comparability analysis to determine if this crime was either legally or factually comparable to a Washington felony. RP 21. Although Mr. Nelson objected to the inclusion of the Burglary conviction in his offender score, this objection appears to have been based on his assertion that it washed, and not necessarily that it was not comparable. RP 16-24. To be fair, it is difficult to hold defense counsel to any one position in this Report of Proceedings given the excessive number of times he was interrupted by the Deputy Prosecutor and the Court, which gave rise to a very high number of “inaudibles” recorded by the transcriber. RP 16-31. When comparability was very briefly discussed, the Court noted that he had been charged with “intent to commit a crime therein, knowingly entered or remained in a building,” and then stated “That sounds like a residential burglary, or a Burg II.” RP 21. When defense counsel began to respond, he stated “But it was—,” at which point he was interrupted by the Court and then the prosecutor, who immediately changed the subject to the question of whether the conviction washed out. RP 21. When defense counsel again attempted to bring up the issue of comparability he was again interrupted by the prosecutor who declared

“But I think it equates here, doesn’t it? I mean, we don’t have to follow— otherwise, we wouldn’t be—,” at which point the Court said “Right, right.” RP 22. The issue of comparability did not come up again throughout the proceeding.

Regarding the alleged misdemeanor assault conviction from Oregon, Mr. Nelson registered a specific objection to the Court’s consideration of this conviction because the State failed to produce a certified copy of the judgment and sentence of this conviction. RP 24. In response to the Court’s inquiry of whether it had a “certified copy,” the State replied “Yes. This is the certification at the bottom. I certified to a copy of the original.” RP 24. The Court ruled “That’s what it says. Disposition was nine days jail on November 7th, 1990.” RP 24. On that basis, the Court held the Burglary conviction did not wash out. RP 24.

The “certified” document to which the State referred, and submitted to the Court, is not a judgment and sentence but rather a computer printout, of an unidentified origin, addressed to “Clark County PA.” CP 16 (05-1-02317-1). In the middle of the document, computerized information appears to have been pasted into the document which identifies the offense as “Assault IV,” the citation number as “S14392,” and the disposition as “9 da.Jl 11/7/90.” CP 16 (05-1-02317-1). Further, it is not certified in accordance with RCW 5.44.010 and RCW

5.44.130. CP 16 (05-1-02317-1). The alleged certification to which the prosecutor referred is a stamp at the bottom of the page which says “I Certify a True Copy of Original by Dorene J. Brown, Court Clerk.” CP 16 (05-1-02317-1). A review of the documents actually submitted to the Court and contained in the court file revealed that the certification is not accompanied by a seal of the court, unlike the sentencing documents from Lewis County and New York, both of which possess the required seal (and both of which are actual judgment and sentence documents, as opposed to unidentified computer printouts). CP 16 (05-1-02317-1).¹

Regarding the question of whether Mr. Nelson’s prior convictions from Lewis County for Assault II and Harassment should be considered same criminal conduct, the State argued that in the original judgment and sentence for those offenses the court in Lewis County treated the offenses as separate offenses and imposed consecutive sentences on each count.

RP 17. Although the prosecutor later conceded that her prior representation to the Court was incorrect and that the Lewis County

¹ At the sentencing hearing, the documents at issue in this appeal were not admitted as exhibits but merely filed with the trial court. As such, they are designated as clerk’s papers and not exhibits. Appellant’s understanding is that the documents actually submitted will therefore remain in the court file of the Clark County Superior Court rather than transmitted to this Court, while copies of the documents have been transmitted as clerk’s papers. Appellant has physically inspected each of the documents submitted to the trial court and agrees that the conviction and sentencing documents from Lewis County (which contains an embossed impression seal) and from New York are properly certified. A physical inspection of the computer printout from the Dalles, Oregon reveals no seal of the court and is not certified in accordance with RCW 5.44.010 and RCW 5.44.130.

sentencing court had in fact imposed concurrent, rather than consecutive sentences, both she and defense counsel appeared to agree that the Lewis County court had treated the offenses as separate criminal conduct based on paragraph 2.1 in the judgment and sentence which said “Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are: NONE.” RP 18, 23, CP 36 (05-1-02317-1).

Regarding the action of the Lewis County sentencing court, the Court stated “And the judge indicated that these didn’t merge.” RP 22. The Court engaged in no further analysis of whether these two prior offenses should be treated as same criminal conduct in the current case. RP 22-31. When Mr. Nelson was given his chance to speak, he specifically asked the Court to consider whether the prior Assault II and Harassment should be treated as same criminal conduct, to which the Court replied: “Well, I appreciate that. And I don’t know how far any of the other judges are willing to take it, but, you know, you certainly have the right to take that up on appeal and even a PRP.” RP 26. The Court declined to give any further consideration to this issue. RP 26-31. The Court concluded by stating: “So I’m going to find that there’s sufficient evidence provided to the Court that you have nine points.” RP 26.

The Court sentenced Mr. Nelson to 51 months' confinement on the Unlawful Imprisonment based on an offender score of nine, and 29 months' confinement on the Forgery. CP 49 (05-1-02317-1). The judgment and sentence for the Unlawful Imprisonment correctly identified the maximum penalty as five years' confinement, yet identified the standard range as 51 to 68 months. CP 21 (05-1-02361-9). At the time Mr. Nelson entered his plea, however, he was orally advised of the correct standard range of 51 to 60 months. RP 6. The Court imposed community custody for a term of 9 to 18 months on the Unlawful Imprisonment. CP 24 (05-1-02361-9). Mr. Nelson timely appealed his sentence in these matters. CP 35 (05-1-02361-9), CP 58 (05-1-02317-1).

D. ARGUMENT

I. THE SENTENCING COURT ERRED WHEN IT INCLUDED A PRIOR CONVICTION FOR BURGLARY THIRD DEGREE FROM NEW YORK IN MR. NELSON'S OFFENDER SCORE WITHOUT CONDUCTING A COMPARABILITY ANALYSIS.

The New York statute proscribing Burglary in the third degree is found in New York Consolidated Laws section 140.20 and provides: "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." This law has not been amended since 1967. See Appendix. The definition

of “building,” found in New York Consolidated Laws section 140.00 (2) is as follows:

“Building,” in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed [sic] motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.

See Appendix. The definition of “dwelling,” found in New York Consolidated Laws section 140.00 (3) is as follows: “‘Dwelling’ means a building which is usually occupied by a person lodging therein *at night*.” (Emphasis added). See Appendix. This law has not been amended since 1979. See Appendix.

RCW 9A.52.025 proscribing Residential Burglary provides:

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling *other than a vehicle*. (Emphasis added).

RCW 9A.52.030 proscribing Burglary in the second degree provides:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in building *other than a vehicle or a dwelling*. (Emphasis added).

Here, no comparability analysis was conducted by the Court beyond the Court briefly noting that Mr. Nelson had been charged, in the

New York case, with “Burglary in the Third Degree in New York that charges him with ‘intent to commit a crime therein, knowingly entered or remained unlawfully in a building.’” RP 21. The Court then ruled “That sounds like a residential burglary, or a Burg II.” Id. When defense counsel attempted to protest the ruling, he was promptly interrupted by the Court and the prosecutor, who immediately changed the subject to the question of whether the conviction had washed.

To be fair to the State, defense counsel did little to make his voice heard in the face of repeated interruptions by the prosecutor and Court. It would be unfair to characterize the hearing as one in which defense counsel was *prevented* from specifically identifying each of the objections Mr. Nelson had to the State’s recitation of his criminal history. Nevertheless, it also cannot be said that Mr. Nelson affirmatively acknowledged the comparability of this conviction, particularly when the State and the Court were on notice that Mr. Nelson objected to the inclusion of this conviction in his criminal history.

Illegal or erroneous sentences, or computations of an offender score that alter the defendant’s standard sentence range, may be challenged for the first time on appeal. *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996); *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Jackson*, 129 Wn.App. 95,

103 (2005). Where a defendant's criminal history includes out-of-state convictions, the Sentencing Reform Act of 1981 (SRA) requires these convictions be classified according to the comparable offense definition and sentence provided by Washington law. *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). When no effort is made to classify out-of-state convictions to comparable Washington crimes prior to their use in scoring criminal history, the resulting sentence is erroneous. *State v. Beals*, 100 Wn.App. 189, 196, 997 P.2d 941, *review denied*, 141 Wn.2d 1006 (2000).

Washington courts use a three-step evidentiary hearing analysis when determining the Washington sentencing consequences of an out-of-state conviction. *State v. Russell*, 104 Wn.App. 422, 440, 16 P.3d 664 (2001). The first step is to convert the out-of-state crime into its Washington counterpart. *Russell* at 440. The second step is to determine the relevant sentencing consequences of the Washington counterpart. *Russell* at 440. The third step is to assign those same sentencing consequences to the out-of-state conviction, thus treating a person convicted outside the state as if he or she had been convicted in Washington. *Russell* at 440.

The purpose of the evidentiary hearing is constitutional in nature. 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. *Ford* at 472. Absent a sufficient record, the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score. *Ford* at 480-81.

A challenge to the classification of an out-of-state conviction is reviewed de novo. *Jackson* at 106. The classification process involves comparison of both legal and factual comparability. *State v. Stockwell*, 118 P.3d 395, 397-98 (2005). If the statutes being compared contain the same elements, they are legally comparable and the out-of-state conviction is properly included in the offender score calculation. *Stockwell* at 397. If the statutes in question contain different elements, the court may look at the defendant's conduct to determine whether the conduct would have violated the comparable...statute. *Stockwell* at 397, citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) is controlling here. In *Ford*, the defendant objected to the inclusion of three California convictions in his offender score because the penalty for those crimes (civil commitment) was not comparable to any penalty that would be

imposed for a felony conviction in Washington. *Ford* at 476. The defendant did not raise a specific objection to the comparability of the California convictions. *Id.* The Supreme Court nevertheless reversed Ford's sentence, holding that the State had been placed on notice that the defendant objected to the inclusion of the California convictions in his criminal history, albeit for a different reason than the one proffered on appeal. *Ford* at 482-83. The Court emphasized that it is the State's, not the defendant's, burden to ensure that "the record supports the existence and classification of out-of-state convictions." *Ford* at 480. Although the State argued that Ford acknowledged the out-of-state convictions by failing to register a specific objection to their comparability, the Court rejected this assertion.

In the normal course, the State gathers evidence pertaining to a defendant's criminal history. If the evidence of prior out-of-state convictions is sufficient to support classification under comparable Washington law, that evidence should be presented to the court for consideration. If the evidence is insufficient or incomplete, the State should not be making assertions regarding classification which it cannot substantiate.

Ford at 482. Regarding the burden, the Court stated "[i]t is not overly difficult to meet." *Ford* at 480.

Mr. Nelson, like the defendant in *Ford* objected to the inclusion of his out-of-state conviction from New York in his offender score. Like the defendant in *Ford*, his objection with the trial court did not relate

specifically to the lack of comparability of the elements of the out-of-state crime, but more to the differences in sentencing consequences.

Nevertheless, according to the standard adopted in *Ford*, Mr. Nelson is entitled to challenge the inclusion of the New York conviction for Third Degree Burglary in his offender score based on the court's failure to satisfy the requirement of the SRA that out-of-state convictions, sought to be used by the State at sentencing, be classified according to their Washington counterparts. *Ford* at 483.

As noted above, Burglary in the Third Degree does not directly compare to either Burglary Second Degree or Residential Burglary in Washington. Because the definition of "building" under New York Consolidated Laws section 140.00 (2) includes vehicles or watercraft used for overnight lodging, New York's Burglary Third Degree statute is substantially more broad than Washington's statutes proscribing Residential Burglary and Burglary Second Degree. One can be convicted of Burglary Third Degree in New York for conduct which would constitute Vehicle Prowling in the First Degree in Washington (see RCW 9A.52.095). Vehicle Prowling in the First Degree is a class C felony with a five year wash-out period, not ten years as in Burglary Second Degree or Residential Burglary. If the underlying conduct of Mr. Nelson's Burglary Third Degree conviction compares to Vehicle Prowling First Degree in

Washington, then the inclusion of this conviction in Mr. Nelson's offender score is erroneous because if the conviction would have washed out.

The State will resort to the argument that remand for a comparability analysis is not required because the indictment which charged Mr. Nelson with Third Degree Burglary (and was included by certified copy with the materials submitted to the Court) stated, in relevant part: "The defendant...with intent to commit a crime therein, knowingly entered and remained unlawfully in a building, to wit, a house owned by Aaron Wagman, located at 83 Williams Avenue, Hillcrest, New York." CP 22 (05-1-12317-1).

Our Supreme Court has previously held that in cases where the elements of the Washington crime and the foreign crime are not substantially similar, "the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). However in *Personal Restraint of Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005), the Supreme Court retreated from that holding somewhat. The *Lavery* court expressed concern about the potential for an *Apprendi/Blakely* violation where a trial court engages in an inquiry about "facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a

reasonable doubt in the foreign conviction...Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.” *Lavery* at 258. The *Lavery* court cautioned that where the foreign crime and the Washington crime are not identical on their face, they are “*different crimes.*”

In *Lavery*, the State asked the Supreme Court to remand the case to the sentencing court for an examination of the underlying facts of the foreign conviction to determine comparability. The *Lavery* court cautioned that where the foreign statute is broader than the Washington statute (as in Mr. Nelson’s case), such an examination “may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.” *Lavery* at 257, citing *State v. Ortega*, 120 Wn.App. 165, 84 P.3d 935 (2004). For example, in *Ortega*, the defendant pled guilty to first degree child molestation and the State sought to have him imprisoned for life under the POAA. To do so, the State sought inclusion of a Texas conviction for indecency with a child in the second degree as a strike in Mr. Ortega’s offender score. *Ortega* at 169. The most comparable crime in Washington required the child to be under the age of 12, yet the Texas statute under which Mr. Ortega was convicted was substantially broader

and criminalized contact with children under the age of 17. *Ortega* at 168-172. “Ortega had not admitted or stipulated to the age of the child in Texas. Further, even if the child in the Texas case had claimed to be 11, Ortega would have had no incentive to challenge and prove that the child was actually 12 at the time of the contact.” *Lavery* at 257 (internal citations omitted), citing *Ortega* at 172.

Like the defendants in *Lavery* and *Ortega*, Mr. Nelson “had no motivation in the earlier conviction to pursue defenses that would have been available to him” under Washington’s burglary statutes. Even more troubling, the documentation submitted to the Court here did not include Mr. Nelson’s guilty plea form, which presumably would have included a factual basis for the plea containing some description of his underlying conduct. CP 17-25. Nor did the State submit any of the applicable New York statutes to the Court. The State merely pointed to the language in the indictment quoted above, and the Court concluded, *with no further inquiry*, that this conviction was comparable to either Residential Burglary or Burglary Second Degree in Washington.

Regarding the remedy for the Court’s failure to conduct a comparability analysis, Mr. Nelson submits that the point he was given for the Third Degree Burglary conviction should be removed from his offender score because the State was on notice that he was objecting to the

inclusion of this conviction and should have been prepared to meet their burden of proof. Furthermore, remand to the sentencing court will require the sentencing court to engage in fact finding that, Mr. Nelson argues, is prohibited under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) and *Blakely v. Washington* 542 U.S. 296, 124 S.Ct. 2531 (2004). Last, even if such fact finding does not violate *Apprendi* and *Blakely*, it may be impossible where, as in *Lavery* and *Ortega*, the foreign crime is substantially broader and the defendant had no motivation to develop the record in such a way that it would defend against the crime's inclusion in a Washington offender score. Should this Court decline to order removal of this conviction from Mr. Nelson's offender score, Mr. Nelson submits that in the very least, remand for a comparability analysis is required.

II. THE SENTENCING COURT ERRED WHEN IT FOUND THE STATE HAD PROVEN THE EXISTENCE OF A PRIOR CONVICTION FOR ASSAULT IV FROM THE DALLES, OREGON, WHERE THE STATE FAILED TO PRESENT PROPER PROOF OF THIS ALLEGED CONVICTION.

Even assuming Mr. Nelson's Burglary Third Degree conviction compares to either Residential Burglary or Burglary Second Degree in Washington, it was still error for the trial court to include it in Mr. Nelson's offender score where its inclusion was dependent upon the existence of a misdemeanor assault conviction from Oregon, the existence of which the State failed to prove. Because Mr. Nelson registered a

specific objection to the inclusion of this charge in his offender score based on the State's failure to prove its existence by proper evidence, the sole issue in this appeal is whether the State met its burden of proving the existence of this alleged conviction.

The State is required to prove the existence of a prior conviction by a preponderance of the evidence. *State v. Rivers*, 130 Wn.App. 689, 699, 128 P.3d 608 (2005). The reviewing court reviews the sentencing court's calculation of the offender score de novo. *Id.* "To establish the existence of a conviction, a certified copy of the judgment and sentence is the best evidence. The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. In that case, comparable documents of record or trial transcripts may suffice." *Rivers* at 699, citing *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); and *Ford* at 480.

In *Rivers*, the State sought to have the defendant sentenced as a persistent offender under the POAA, yet failed to produce any court certified documentation of his prior conviction for Robbery in the Second Degree. *Rivers* at 701. Instead, the State produced certified copies of other judgments and sentences showing the robbery conviction as a prior conviction, as well as a packet of Department of Corrections documents certified by a records custodian of the Washington State Patrol showing

the robbery conviction. *Rivers* at 702-703. The Court of Appeals, in reversing Rivers' sentence, held that neither method of proof satisfied the State's burden.

With regard to the court-certified judgments and sentence documents of other convictions which reflected the robbery conviction in the criminal history, the *Rivers* Court admonished that such evidence will only satisfy the State's burden of proof where the defendant does not challenge the State's computation of his criminal history. *Rivers* at 702. In cases where the defendant challenges the use of these documents, as Rivers did and as Mr. Nelson did here, "...the State must present additional evidence to carry its burden of proving the convictions by a preponderance of the evidence." *Rivers* at 702.

With regard to the packet from the Department of Corrections containing documents certified by a WSP records custodian, the *Rivers* Court noted that the copy of the robbery judgment and sentence contained in the packet was not, contrary to the State's insistence, court-certified. *Rivers* at 703. The certification to which the State referred was not affixed to the photocopy of the judgment and sentence. *Id.* The *Rivers* Court, citing to *State v. Murdock*, 91 Wn.2d 336, 339-40, 588 P.2d 1143 (1979), cautioned that in order for a document to be court-certified, it must be "certified by the court *with the seal of the court annexed* as required by

RCW 5.44.010.” *Rivers* at 702, citing *Murdock* at 339-40. The *Rivers* Court rejected the State’s assertion that it was permitted to prove the existence of a prior conviction with documents that did not comply with RCW 5.44.040 (requiring that public records to be used as evidence be duly certified by their respective officers under their respective seals). Records not complying with RCW 5.44.040 may be used to prove only the identity of the defendant, not the existence of a prior conviction. *Rivers* at 705. The *Rivers* Court was also troubled by the State’s failure to either obtain a properly certified judgment and sentence or explain why it was unable to do so. *Rivers* at 705. The *Rivers* Court concluded “[t]he lack of a court-certified copy of the judgment and sentence for the second degree robbery conviction is fatal to the State’s claim that it bore its burden of proof.” *Rivers* at 703.

Using *Rivers* and the cases upon which it relies as a guide, two problems are evident in the sentencing court’s inclusion of Mr. Nelson’s alleged Assault IV conviction from Oregon in his offender score to prevent the wash-out of the New York Burglary: First, the document the State submitted as proof of this conviction is not a judgment and sentence. CP 16 (05-102317-1). In fact, it is not clear what it is. It is printed on letterhead from the Municipal Court of the City of the Dalles, Oregon, and simply says “To: Clark County PA,” and “RE: James Raymond Nelson.”

Then, in the middle of the page, there is information printed in a different font than the remainder of the letter, and slightly crooked on the page, which appears to have been copied into the document from a computer printout of some kind. It states “NELSON, James Raymond 9-15-61,” and lists his address as “1020 E. 11th.” On the next line it states “Date,” and below that states “10/31/90,” but nowhere does this document clarify what this date refers to (whether it was the date of the alleged offense, the alleged disposition, the date the information was entered into a computer, etc.). Next to that it says “Offense” and below that it says “Assault IV.” Next to that it says “Citation” and below that it says “S14392.” And last, it says “Disposition” and below that it says “9 da.Jl. 11/7/90.” CP 16 (05-1-02317-1).

Below this text is text of the original font stating: “*THIS IS THE ONLY INFORMATION WE HAVE HAVE [sic] MR. NELSON, IS HIS CARD FILE...” Id. The salutation on the letter is “Dorene J. Brown, Court Clerk, City of the Dalles, Municipal Court,” and below that is a signature in ink by Dorene J. Brown. Id. In the lower left hand corner of the page is a stamp which says “I Certify A True Copy Of Original By _____,” and on the line is the signature of Dorene J. Brown in ink, with “Court Clerk” written in ink below the line. Id. There is simply no

way to discern exactly what this document is, beyond the obvious fact that it is *not* a judgment and sentence. *Id.*

Second, this unidentifiable document contains no court-certification. There is no seal of the court annexed as required by RCW 5.44.010 and 040, either in ink or in the form of an embossed impression as required by RCW 5.44.130. *Id.* It is totally unclear what Dorene Brown is certifying this as a “true copy” of. A true copy of the computerized information, of unknown origin, that was sloppily copied onto the face of this letter? This “certification” is not a court certification. Because Mr. Nelson specifically objected to the use of this document to prove the existence of this conviction, the State was required to do more to meet its burden of proof. This document is utterly useless as a means of proving the existence of this alleged prior conviction and the sentencing court erred in considering it. Without proof of this conviction, the State was unable to prove that Mr. Nelson’s Burglary Third Degree conviction failed to wash-out and it was error for the sentencing court to include this conviction in Mr. Nelson’s offender score.

On remand, the State should not be given a second opportunity to prove this alleged conviction. The State was put on notice that Mr. Nelson objected to the court’s consideration of this alleged conviction, and they were specifically informed as to the basis for the objection: That it was

not a court-certified judgment and sentence. RP 24. The fact that the State apparently did not comprehend exactly what is required of them in meeting their burden of proof in this situation does not excuse their total failure to present any proper evidence of this alleged conviction, particularly in the face of a specific objection from the defense. *Ford* at 485, citing *State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997). The State must be held to the existing record on remand. *Id.*

III. THE SENTENCING COURT ERRED WHEN IT REFUSED MR. NELSON'S REQUEST THAT IT CONDUCT ITS OWN ANALYSIS OF WHETHER HIS PRIOR CONVICTIONS FROM LEWIS COUNTY FOR ASSAULT II AND HARASSMENT CONSTITUTED SAME CRIMINAL CONDUCT.

The trial court erred when it refused to consider whether Mr. Nelson's prior convictions in Lewis County for Assault II and Harassment, under the same cause number, should be considered same criminal conduct and counted as one point. Mr. Nelson specifically requested that the trial court conduct its own same criminal conduct analysis of these two prior convictions. The Court, apparently believing that it was bound by what it believed to be the decision of the Lewis County sentencing court regarding same criminal conduct, declined to even consider Mr. Nelson's request.

A long line of cases have held that the current sentencing court must make its own determination of whether prior offenses constitute

same criminal conduct where the defendant specifically asserts they do, irrespective of the findings of prior sentencing courts. *State v. Lara*, 66 Wn.App. 927, 931, 834 P.2d 70 (1992); *State v. Reinhart*, 77 Wn.App. 454, 459, 891 P.2d 735 (1995); *State v. Johnson*, 49 Wn.App. 239, 742 P.2d 178 (1987); *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996). Where the current sentencing court fails to exercise its discretion and consider whether prior offenses should be counted as same criminal conduct, remand for such consideration is the proper remedy. *Lara* at 932, *Reinhardt* at 459. Here, the sentencing court, just as in *Lara* and *Reinhardt*, refused to even consider the question of whether prior offenses encompassed same criminal conduct, erroneously believing it was bound by the determination of the original sentencing court in Lewis County. This was error and remand for proper consideration of this question is required.

IV. THE JUDGMENT AND SENTENCE NEEDS TO BE AMENDED TO SPECIFY THAT IN NO EVENT CAN MR. NELSON BE REQUIRED TO SERVE TIME ON COMMUNITY CUSTODY BEYOND THE STATUTORY MAXIMUM OF SIXTY MONTHS, AND AMENDED TO REFLECT THE CORRECT STANDARD RANGE.

Because the court sentenced Mr. Nelson to 51 months' incarceration on the Unlawful Imprisonment, the term of community custody specified in the judgment and sentence (9 to 18 months) may

exceed the statutory maximum of sixty months which Mr. Nelson can be required to serve for this offense. *State v. Sloan*, 121 Wn.App. 220, 221, 87 P.3d 1214 (2004). In *Sloan*, Division I addressed the problem presented where a defendant is sentenced to a term of community custody which, if served in the manner specified by the judgment and sentence, could exceed the statutory maximum penalty. The court noted that because of the possibility of earned early release credits, it cannot be known until a defendant is released how much time remains available for community custody.

In acknowledging, albeit reluctantly, that some community corrections officers might interpret a judgment and sentence literally and not appreciate that an offender cannot be subjected to the conditions of community custody beyond the statutory maximum that an offender can be incarcerated for a crime, the court fashioned the following rule: “To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.” *Sloan* at 223-24.

Mr. Nelson contends, and expects the State will concede, that no such clarifying statement appears anywhere on Mr. Nelson’s judgment and

sentence. CP 24-27 (05-1-02361-9). To avoid the inevitable filing of a PRP (should this court affirm Mr. Nelson's sentence), Mr. Nelson's judgment and sentence should be amended to include language directing the Department of Corrections to release Mr. Nelson from community custody at the expiration of sixty months.

Further, the judgment and sentence should be amended to reflect that the correct top of the standard range on the Unlawful Imprisonment is 60 months, not 68 months, for the purposes of clarity and avoiding further litigation of this issue. Again, Mr. Nelson expects that the State would not object to this proposed amendment.

E. CONCLUSION

Mr. Nelson's sentence should be vacated and remanded to the sentencing court for removal from his offender score of his conviction for Third Degree Burglary, for the sentencing court to conduct a same criminal conduct analysis of his prior convictions from Lewis County, and for amendment of his judgment and sentence to reflect the correct term of community custody and his correct standard range for Unlawful Imprisonment.

RESPECTFULLY SUBMITTED THIS 23rd day of October, 2006.



APPENDIX

1. NY CLS Penal § 140.00 (2006)

§ 140.00. Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

1. "Premises" includes the term "building," as defined herein, and any real property.
2. "Building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.
3. "Dwelling" means a building which is usually occupied by a person lodging therein at night.
4. "Night" means the period between thirty minutes after sunset and thirty minutes before sunrise.
5. "Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner. A person who enters or remains in or about a school building without written permission from someone authorized to issue such permission or without a legitimate reason which includes a relationship involving custody of or responsibility for a pupil or student enrolled in the school or without legitimate business or a purpose relating to the operation of the school does so without license and privilege.

Legislative History:

History:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from §§ 400, 401.

Sub 2, amd, L 1967, ch 791, § 14, L 1969, ch 1151, § 1, L 1979, ch 698, § 2, eff Sept 1, 1979.

Sub 5, amd, L 1979, ch 698, § 3, eff Sept 1, 1979.

2. NY CLS Penal § 140.20 (2006)

§ 140.20. Burglary in the third degree

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Burglary in the third degree is a class D felony.

Legislative History:

History:

Add, L 1965, ch 1030, § 1, eff Sept 1, 1967, with substance derived from §§ 404, 405.

3. § 9A.52.025. Residential burglary

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.

4. § 9A.52.030. Burglary in the second degree

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

(2) Burglary in the second degree is a class B felony.

5. § 9A.52.095. Vehicle prowling in the first degree

(1) A person is guilty of vehicle prowling in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a motor home, as defined in RCW 46.04.305, or in a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities.

(2) Vehicle prowling in the first degree is a class C felony.

6. § 5.44.010. Court records and proceedings -- When admissible

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

7. § 5.44.040. Certified copies of public records as evidence

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

8. RCW 5.44.130 Seal, how affixed.

A seal of court or public office, when required to any writ, process, or proceeding to authenticate a copy of any record or document, may be affixed by making an inked, printed, or embossed impression directly on the document and shall be considered valid.

FILED
COURT OF APPEALS

06 OCT 25 AM 11:54

STATE OF WASHINGTON

BY AC
CLERK

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

STATE OF WASHINGTON,)	Court of Appeals No. 34547-1-II
)	Clark County No. 05-1-02317-1/05-1-02361-9
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
JAMES R. NELSON,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 23rd day of October 2006, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

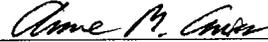
1
2
3
4 AND

5 Mr. James Nelson
6 DOC# 767846
7 Coyote Ridge Correction Center
8 1301 N. Ephrata
9 P.O. Box 769
10 Connell, WA 99326-0769

11 and that said envelope contained the following:

- 12 (1) BRIEF OF APPELLANT
13 (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)
14 (3) R.A.P. 10.10 (TO MR. NELSON)
15 (4) AFFIDAVIT OF MAILING

16 Dated this 23rd day of October 2006,

17 

18 ANNE M. CRUSER, WSBA #27944
19 Attorney for Appellant

20 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
21 Washington that the foregoing is true and correct.

22 Date and Place:

23 October 23rd, 2006, Kalama, Washington

24 Signature:

25 Anne M. Cruser