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A. ASSIGNMENTS OF ERROR

1. Mr. Robinson's offender score was improperly calculated.
2. Mr. Robinson's out-of-state convictions were improperly classified without any comparability analysis.
2. Mr. Robinson received ineffective assistance of counsel where his trial counsel conceded to the existence and comparability of Mr. Robinson's California convictions.
3. Mr. Robinson received ineffective assistance of counsel where his trial counsel failed to object to witnesses testifying as to the contents of phone records where the records had not been properly authenticated and the contents of the records were not admissible under any hearsay exception.
4. Prosecutorial misconduct deprived Mr. Robinson of his right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is a defendant's offender score properly calculated where the trial court refuses to conduct the required comparability analysis between the purported out of State prior convictions of the defendant and Washington crimes?
(Assignments of Error Nos. 1 and 5)
2. Does a defendant receive effective assistance of counsel where his trial counsel effectively stipulates to the existence of the defendant's prior out of State convictions and fails to object to the trial court not conducting the required on the record comparability analysis?
(Assignments of Error Nos. 2 and 5)
3. Is it effective assistance of counsel for trial counsel to fail to object to witnesses reading from and testifying as to the contents of business records where the records has not been verified or properly introduced into evidence and the evidence contained in the records is a critical piece of the

State's case? (Assignments of Error Nos. 3 and 5)

4. Does a prosecutor commit misconduct where the prosecutor fails to correct the court's mistaken understanding of the requirement that the trial court perform the comparability analysis between a defendant's prior out of state convictions with Washington to determine the defendant's offender score? (Assignments of Error Nos. 4 and 5)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On May 9, 2005, Janice Copeland was awakened at 4 A.M. by someone knocking on the front door to her apartment. RP 54-56, 9-12-06.¹ Ms. Copeland went to her door, looked out the window next to the door, and saw a man at the door. RP 57-59, 9-12-06. The man told Ms. Copeland that he was from Northwest Services and that he needed to get into her apartment to shut off the water because there was water leaking into the apartment below. RP 63, 9-12-06. When Ms. Copeland opened her door, the man grabbed her and attacked her. RP 66, 9-12-06. The intruder took Ms. Copeland into her bedroom, put her on the floor, then tied her up using clothes from her dresser. RP 67, 70, 9-12-06. The intruder told Ms. Copeland that he wasn't going to rape her, but that he wanted money for crack. RP 68, 9-12-06.

¹ The volumes of the report of proceedings are not numbers continuously. Reference will be made by giving the page number followed by the date of the hearing.

After the man tied up Ms. Copeland, he took her personal Bank of America ATM card and her business debit card from her purse laying on the kitchen table. RP 70, 72, 77, 9-12-06. He asked Ms. Copeland for the PIN numbers and told her that if she didn't give him the correct PIN number he would be back to "get her." RP 70, 9-12-06. The man also took Ms. Copeland's cell phone, car keys, post office box key, two containers of change, and a tote bag she had received as a gift. RP 77, 9-12-06.

Ms. Copeland identified the man as Mr. Robinson, who she recognized because Mr. Robinson worked for Northwest Services, the company that did the maintenance work at Ms. Copeland's apartment complex. RP 59, 9-12-06, 142-148, 9-13-06, 417-420, 9-18-06. Ms. Copeland testified that Mr. Robinson had been to her apartment two to three weeks earlier to fix the faucets in her bathtub. RP 111, 9-12-06.

After the intruder left her apartment, Ms. Copeland hopped out of her apartment and to the apartment next to hers and pounded on the door of her neighbor's apartment to get help. RP 80, 9-12-06. The neighbor let Ms. Copeland in and they called 911. RP 81, 9-12-06. Ms. Copeland told Ms. Nash that a man had gotten into her apartment and that she recognized the man as a maintenance man at the apartment complex. RP 129-130, 9-12-06.

Detective Jason Temple responded to Ms. Copeland's call. RP 306-308, 9-14-06. Detective Temple entered Ms. Copeland's apartment to look for evidence and recovered a driver's license, a Red Cross card, and a credit card. RP 309, 9-14-06. Detective Temple examined these items for fingerprints but was unable to obtain any. RP 309-310, 9-14-06.

Officer Jeffrey Engle also responded to Ms. Copeland's apartment on May 89. RP 195-196, 9-13-06. Officer Engle collected a notebook, two galvanized nails, some latent fingerprints, and some socks from Ms. Copeland's apartment. RP 198, 9-13-06.

Ms. Banks did not make any transactions on May 9. RP 83, 9-12-06. Detective Temple received information that Ms. Copeland's banking account had been accessed from an AM/PM, a location of the Westside Community Bank, and a location of the Bank of America. RP 310, 9-14-06. Detective Temple went to these three businesses, recovered surveillance video from each location and gave the video to Detective Ed Baker of the Tacoma Police Department. RP 310-313, 9-14-06.

On May 9, Ms. Copeland's cell phone was used to call several phone numbers without her permission. RP 93-94, 9-12-06. One of the phone numbers called belonged to the Golden Lion [sic] Hotel, and the

other phone number belonged to Kirby Christopher.² RP 328-331, 9-14-06.

Ms. Banks is a prostitute who was acquainted with Mr. Robinson. RP 560, 9-19-06. Ms. Banks and Mr. Robinson smoked crack together on several occasions. RP 561, 9-19-06. On May 10, 2006, Ms. Banks drove Mr. Robinson's truck into a tree after she had stolen it from Mr. Robinson. RP 562-564, 9-19-06. Ms. Banks had stolen the truck from Mr. Robinson at 11 P.M. on May 9. RP 566, 9-19-06. Ms. Banks testified that Mr. Robinson was in the truck with her when it crashed, but that he had walked away from the wreck. RP 563-566, 9-19-06.

A friend of Mr. Robinson's, Verndeleao Banks, lived at the Golden Lion Motel. RP 567, 9-19-06. Ms. Banks said that she lived at the motel because the drugs and prostitution occurring at the motel suited her lifestyle. RP 567, 9-19-06. Mr. Robinson had other acquaintances at the motel that he knew through Ms. Banks. RP 657, 9-19-06.

Ms. Banks sold drugs at the Golden Lion Motel. RP 594, 9-19-06. She also testified that Mr. Robinson gave Ms. Banks \$300 on May 9, 2005, to buy crack from a man named Kirby Christopher, who also sold drugs at the Golden Lion. RP 571-572, 594, 9-19-06.

² The Report of Proceedings shows Detective Temple's testimony as having been that the phone number belonged to the "Gold Mine" Hotel. This apparently was an error in transcription. Detective Temple was actually referring to the Golden Lion Hotel.

Other than the statements of Ms. Banks, Detective Temple was unable to make any link between Mr. Robinson and Mr. Christopher. RP 380, 399-400, 9-14-06.

On May 10, Detective Temple showed Ms. Copeland a photomontage, which included a picture of Mr. Robinson and asked her to identify the man who attacked her. RP 118-119, 9-12-06, 376-379, 9-14-06. Ms. Copeland was unable to identify the man who attacked from the photomontage. RP 118-119, 9-12-06, 376-379, 9-14-06.

Robert Johnson is a forensic scientist with the Washington State Patrol Crime lab. RP 214, 9-13-06. Mr. Johnson analyzed the notebook collected by Officer Engle and one other set of fingerprints recovered from Ms. Copland's apartment to determine if the fingerprints matched those of Mr. Robinson. RP 221, 9-13-06. There were no identifiable fingerprints on the fingerprint lifts and the notebook only had one usable impression, which did not match Mr. Robinson. RP 222, 227-228, 9-13-06.

On May 12, 2005, the State filed an Information alleging Mr. Robinson committed the crimes of first degree kidnapping, first degree burglary, and second degree robbery. CP 1-4.

On May 15, 2005, Mr. Robinson was arrested regarding this case. RP 351, 9-14-06.

Mr. Robinson was initially tried in front of Judge Hickman, but the trial ended in a hung jury. RP 2, 9-11-06.

On July 17, 2006, the State amended the charges against Mr. Robinson to one count of kidnapping in the first degree, one count of burglary in the first degree, one count of robbery in the first degree, one count of theft in the second degree, one count of possession of stolen property in the second degree, and one count of harassment. CP 52-55.

On September 12, 2006, the second jury trial began. RP 52, 9-12-06.

The second jury trial resulted in verdicts of guilty on all counts except the jury found Mr. Robinson guilty of the lesser included crime of unlawful imprisonment on the first degree kidnapping charge. RP 820-824, 9-22-06.

At sentencing, Mr. Robinson's offender score was calculated to be 9+ including five purported prior convictions of Mr. Robinson in California. CP 101-112. Trial counsel did not object to the inclusion of the California convictions in Mr. Robinson's offender score and, in fact, incorporated them into the Defendant's Sentencing Memorandum. CP 71-74, RP 826-854, 11-3-06. Mr. Robinson informed the trial court at sentencing that he calculated his offender score as a seven and objected to both the State's and his trial counsel's calculation of his offender score.

RP 836-837, 842-846, 11-3-06.

Notice of Appeal was timely filed on November 3, 2006.

D. ARGUMENT

1. **The trial court erred in failing to conduct a comparison of Mr. Robinson's prior California convictions to the comparable Washington law for purposes of calculating Mr. Robinson's offender score.**

“We have consistently recognized that a convicted defendant has a liberty interest which minimal due process protects.” *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, *cert. denied* 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). The use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. *Ammons*, 105 Wn.2d at 186, 713 P.2d 719; *State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452, (1999), *review denied on appeal after remand* 142 Wn.2d. 1003, 11 P.3d 824 (2000).

An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is a felony in Washington. *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994); *State v. Ford*, 87 Wn.App. 794, 942 P.2d 1064 (1997), *review granted* 134 Wn.2d 1019, 958 P.2d 316, *reversed on other grounds and remanded* 137 Wn.2d 472, 973 P.2d 452 (1999).

Where the state seeks to use prior out-of-state convictions to calculate an offender score, the State must prove the conviction would be a felony under Washington law and must identify what Washington law would be violated by the conduct “according to the comparable offense definitions and sentences provided by Washington law.” *Ford*, 137 Wn.2d at 479-480, 973 P.2d 452. Further, “[t]o properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.” *Ford*, 137 Wn.2d at 479, 973 P.2d 452.

Where a defendant’s criminal history contains out of state convictions, the SRA requires these convictions be classified “according to the comparable offense definitions and sentences provided by Washington law.” *Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To properly compare out of state convictions with the Washington law, the sentencing court must compare the elements of the out of state offenses with the elements of potentially comparable Washington crimes. *Id.* If the elements are not identical, or if the Washington statute defines offenses more narrowly than does the foreign statute, it may be necessary to look into the record of the out of state conviction to determine if the defendant’s conduct would have violated the comparable Washington

conviction. *Ford*, 137 Wn.2d at 479, 973 P.2d 452.

For purposes of calculating an offender score based on prior out-of-state convictions, the best evidence of a prior conviction is a certified copy of the judgment; however, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history. *State v. Gill*, 103 Wn.App 435, 448, 13 P.3d 646 (2000), citing *Ford*, 137 Wn.2d at 480, 973 P.2d 452.

The SRA expressly places on the State the burdens of introducing evidence of some kind to support the alleged criminal history and including evidence supporting the classification of out-of-state convictions as Washington felonies because it is inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove. *Ford*, 137 Wn.2d at 480, 973 P.2d 452. This comparison must be conducted on the record. *State v. Labarbera*, 128 Wn.App. 343, 349, 115 P.3d 1038 (2005).

Thus, the State bears the burden of ensuring the record supports the existence and classification of out-of-state convictions, and, should the state fail to establish 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*, 137 Wn.2d at 480-481, 973 P.2d 452.

Challenges to the classification of prior out-of-state convictions, used in calculating offender score under the SRA, may be raised for the first time on appeal. *Ford*, 137 Wn.2d at 477-478, 973 P.2d 452.

Here, at sentencing, Mr. Robinson accurately quoted Washington law and specifically asked the trial court to conduct the required on the record comparability analysis between his prior California convictions and Washington law. RP 844, 11-3-06. *See State v. Morley*, 134 Wn.2d 588, 602, 952 P.2d 167 (1998) (“purpose of the offender score statute is to ensure that defendants with equivalent prior convictions are treated the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere.”)

However, the trial court refused to conduct the analysis and said, “I’m not going to accept Mr. Robinson’s suggestion that we do some type of a comparative analysis with California. That doesn’t make sense to me.” RP 850, 11-3-06.

Here, the trial court clearly failed to conduct comparability analysis of the out of state prior convictions as is required by RCW 9.94A.525(3)³ and Washington case law. *i.e. State v. Morley*, 134 Wn.2d

³ RCW 9.94A.525(3) provides, in pertinent part, “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.”

588, 606, 952 P.2d 167 (1998) (“To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime. More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed”); *State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994) (“for out-of-state convictions, the SRA requires courts to translate the convictions according to the comparable offense definitions and sentences provided by Washington law.”)

a. *The proper remedy is remand for resentencing.*

Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process. Determinations regarding the severity of criminal sanctions are not to be rendered in a cursory fashion. Sentencing courts require reliable facts and information. To uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public:

...
Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions.

Ford, 137 Wn.2d at 484, 973 P.2d 452, citing *ABA Standards for Criminal*

Justice: Sentencing std. 18-5.17, at 206 (3d ed. 1994) (emphasis added).

It is clear that the sentencing determination in this case did not comport with the requirement that Mr. Robinson's out of State convictions be compared to Washington offenses prior to being included in the calculation of his offender score. The proper remedy for this serious procedural error is for this court to remand the case for resentencing: "[W]here the State presents information relating to comparability and the trial court fails to consider it on the record, we remand for resentencing for comparability analysis based on the information before the court at the original sentencing." *Labarbera*, 128 Wn.App. at 350, 115 P.3d 1038.

b. At the resentencing hearing, the State should be barred from entering any new evidence with regards to the California crimes.

In its sentencing memorandum the State included information regarding Mr. Robinson's prior California convictions. CP 75-90. At sentencing, Mr. Robinson objected to the calculation of his offender score and the State failed to introduce any further evidence. RP 844, 11-3-06.

"[W]hen the defendant objects to the calculation of his offender score and the State does not provide the additional necessary evidence of the comparability of the out-of-state convictions at the time of sentencing, the State is held to the existing record on remand and the defendant is resentenced without including the out-of-state convictions." *Labarbera*,

128 Wn.App at 350, 115 P.3d 1038, *citing Ford*, 137 Wn.2d at 485, 973 P.2d 452. This is precisely what happened in this case. This court should remand for resentencing and bar the State from introducing any new evidence at resentencing.

2. Mr. Robinson received ineffective assistance of counsel.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480, *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *cert. denied*, 126 S.Ct. 2294, 164 L.Ed. 820 (2006) (*citing State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)).

To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing*

Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993)).

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

The remedy for ineffective assistance of counsel is remand for a new trial. See *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

- a. *It was ineffective assistance of counsel for Mr. Robinson's trial counsel to fail to object to the court's failure to conduct the comparability analysis on the record.*

As discussed above, the trial court failed to conduct the requisite comparability analysis between Mr. Robinson's California convictions and

Washington law. Here, although trial counsel did request a comparability analysis at the time of sentencing, trial counsel failed to object to the court's refusal to conduct a comparability analysis. Given that there is a statutory requirement that this comparability analysis be performed, had counsel for Mr. Robinson objected and informed the court that the analysis was necessary, the trial court would have conducted the analysis.

Mr. Robinson was prejudiced by his trial counsel's failure to object to the court's failure to conduct the requisite comparability analysis in that his due process rights to have the comparability analysis performed on the record was violated. It was not objectively reasonable, nor was it legitimate trial strategy, for counsel for Mr. Robinson to fail to object to the court's refusal to follow the statutorily mandated sentencing procedure.

b. It was ineffective assistance of counsel for Mr. Robinson's trial counsel to concede to the existence and classification of Mr. Robinson's prior California convictions.

As discussed above, the State bears the burden of establishing the existence of a defendant's out of State convictions and of providing the trial court with sufficient materials with which to conduct the comparability analysis. Further, should the State meet its burden of demonstrating the existence of the out of state convictions, it is the

responsibility of the trial court to determine which Washington crimes are comparable to the prior out of state convictions for purposes of determining how those convictions will affect the defendant's offender score.

Here, trial counsel for Mr. Robinson filed a sentencing memorandum in which trial counsel calculated Mr. Robinson's offender score by including Mr. Robinson's prior California convictions and by assigning a point value to those convictions. CP 71-74. Trial counsel for Mr. Robinson effectively stipulated to the existence and comparability of Mr. Robinson's prior convictions and thereby relieved the State of its statutory and due process burden of demonstrating the existence of the prior convictions and relieved the court of its duty to conduct an on the record comparability analysis.

Given that the existence and classifications of the prior convictions has a significant impact on Mr. Robinson's offender score and ultimate sentence, it was not objectively reasonable and it was not legitimate trial strategy for Mr. Robinson's trial counsel to stipulate to the existence and comparability of the prior convictions.

c. It was ineffective assistance of counsel for Mr. Robinson's trial counsel to fail to object to the testimony of witnesses regarding the contents of Ms. Copeland's telephone bills where the bills had not been authenticated or properly admitted.

At trial, the State argued that Mr. Robinson committed these crimes in order to finance his drug habit. RP 722-724, 9-20-06. To establish this fact, the State introduced the testimony of Ms. Copeland (RP 92-96, 9-12-06) and Officer Temple (RP 327-331) regarding the telephone numbers called by Ms. Copeland's cell phone after it had been stolen, and introduced the telephone records of Ms. Copeland's cell phone (RP 92-93, 96, 9-12-06) and the phone records of Christopher Kirby (RP 331, 9-14-06).

Specifically, the State introduced testimony that Ms. Copeland's cell phone was used to call Kirby Christopher, a purported drug dealer, and the Golden Lion Motel. RP 93-96, 9-12-06, RP 328-329, 9-14-06. The State used the testimony of Ms. Banks to establish that the Golden Lion Motel was a location where she had purchased crack for Mr. Robinson and that Kirby Christopher was a crack dealer. RP 559-561, 569-571, 9-19-06.

To introduce the evidence relating to Ms. Copeland's phone records, the State relied on Plaintiff's Exhibit No. 12, a document which was purported to be Ms. Copeland's telephone bill, but which was never authenticated as a business record.

- i. The documents Ms. Copeland testified were her phone bills were hearsay.

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Under ER 801(a), a “statement” is an oral or written assertion if it is intended by the person as an assertion.

The issue of whether or not a telephone bill is hearsay appears to be one of first impression in Division II.

In *State v. Modest*, 88 Wn. App. 239, 944 P.2d 417 (1997), *review denied* 134 Wash.2d 1017, 958 P.2d 317 (1998), Division III of the Court of Appeals held that, “any spoken word, writing or nonverbal conduct that is not intended to be assertive is not hearsay. Clearly a telephone bill is not an assertive statement and is not excludable as hearsay.” *Modest*, 88 Wn.App. at 249 (citations omitted).

The court explained its holding by quoting dicta from *In re Dependency of Penelope B.*, 104 Wn.2d 643, 652, 709 P.2d 1185 (1985); “If tulips bloom, they are not making assertions that it is spring; but the testimony of a witness that tulips were observed to be blooming may be offered as circumstantial evidence of spring.” *Modest*, 88 Wn.App. at 249, n. 5, 944 P.2d 417, *citing Penelope B.*, 104 Wn.2d at 653, 709 P.2d 1185. The *Modest* court misunderstood *Penelope B.*

In *Penelope B.*, the court was exploring the admissibility of child

hearsay in dependency hearings. The discussion of blooming tulips occurred as a metaphor in the context of the court discussing whether or not nonassertive verbal or nonverbal *conduct* was governed by the rules relating to hearsay,

Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay. An involuntary act such as trembling would be admissible as nonassertive nonverbal conduct whereas the act of nodding one's head affirmatively or pointing to identify a suspect in a lineup would be hearsay and not admissible because it is assertive nonverbal conduct.

The admissibility of nonassertive verbal or nonverbal conduct as circumstantial evidence of a fact in issue is governed by principles of relevance, not by hearsay principles. An assertion that is circumstantial evidence proves a fact indirectly, by implication; credibility of the declarant is not important because the relevance of the assertion does not depend on its truth. **If tulips bloom, they are not making assertions that it is spring; but the testimony of a witness that tulips were observed to be blooming may be offered as circumstantial evidence of spring.** If a dog limps, it is not thereby making an assertion and the testimony of a witness that the dog was observed to be limping may be offered as circumstantial evidence that the dog was injured. Similarly, the testimony of a witness that he or she observed a person limping may be offered as circumstantial evidence that the person was injured.

Penelope B., 104 Wn.2d at 652-653, 709 P.2d 1185 (italics by court, emphasis added).

Stated another way, the court in *Penelope B.* was simply saying that the rules of hearsay only apply to assertions, and the act of a tulip

blooming or a dog limping are not assertions. The *Modest* court misconstrued the *Penelope B.* court's ruling when it held that the admissibility of a telephone bill was not governed by the rules relating to hearsay because the telephone bill was not an assertion. As recognized by Professor Tegland, a telephone bill is clearly a written assertion by the telephone company,

With all due respect, the court's analysis in *Modest* seems unusual. A long-distance telephone bill states that specific calls were made on specific dates, from a specific telephone number to specific telephone numbers, and that as a result, the customer owes X amount of money to the telephone company. Is this not an assertion by the telephone company? A more plausible explanation for the result in *Modest* might be that the telephone bill was hearsay, but admissible under the exception for business records. A telephone bill is nothing more than a printed version of the telephone company's own records of calls made by its customers, compiled in the regular course of running a telephone company. Washington has case law holding that an invoice qualifies as a business record, and if anything, a telephone bill is probably more likely to be accurate than a hand-written invoice.

Karl B. Tegland, 5B Washington Practice, Evidence Law and Practice (5th Ed.), §801.3.

As stated by Mr. Tegland, a telephone bill is clearly an assertion by the telephone company that telephone calls were made from the subscriber's telephone to the numbers listed in the bill. As such, telephone bills *are* hearsay, but would likely be admissible under ER 803(a)(6) and

RCW 5.45.020. The Ninth Circuit Court of Appeals agrees with Prof. Tegland's analysis; in *US v. Miller*, 771 F.2d 1219 (1985), the Ninth Circuit Court of Appeals assumed, without discussion, that telephone billing records were hearsay and that such records were admissible under Federal Rule of Evidence 803(6), the Federal business records hearsay exemption. *Miller*, 771 F.2d at 1236-1237.

Decisions of a division of the Court of Appeals are not binding on other divisions of the Court of Appeals. *State v. Schmitt*, 124 Wn.App. 662, 669 n. 11, 102 P.3d 856 (2004). This court should reject the holding of *Modest* and adopt the reasoning of the Ninth Circuit that telephone billing records are hearsay.

- ii. The State failed to follow the proper procedure to have the telephone bills admitted into evidence.

RCW 5.45.020 provides,

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Thus, in order for the telephone bills to be properly admitted into evidence, the State would have had to call a records custodian from the

telephone company and lay the proper foundation. No records custodian was called in this case in regards to the telephone bills. Instead, the State elicited testimony from Ms. Copeland that Plaintiff's Exhibit No. 12 was a true and accurate copy of her phone bill. RP 92-93, 9-12-06. Ms.

Copeland was not qualified to testify as to the mode of the preparation of the bill, yet trial counsel for Mr. Robinson failed to object when the State offered the bill into evidence and requested that Ms. Robinson read from portions of the bill to the jury. RP 92-94, 9-12-06.

- iii. It was not objectively reasonable or legitimate trial strategy for Mr. Robinson's trial counsel to fail to object to the questioning of the witnesses regarding the contents of the bill and the introduction of the bill into evidence.

The questioning of Ms. Copeland reveals that Ms. Copeland's testimony as to the telephone numbers called from her cell phone was clearly hearsay and was clearly beyond the scope of Ms. Copeland's personal knowledge and was, in fact, based on the inadmissible contents of the telephone bill:

Q: Did you make all of the phone calls, all the outgoing phone calls that appear on that bill?

A: No, sir, I did not.

Q: Can you tell us which ones you did not make?

A: I made none of the calls on May the 9th.

Q: Which ones are those, the phone numbers, please?

A: **You want the phone numbers on May 9th that I did not make?**

Q: Correct?

RP 93-94, 9-12-06 (emphasis added).

Ms. Copeland went on to list two ten digit telephone numbers for calls made from her stolen cell phone which she did not make. RP 94, 9-12-0-6. If Ms. Copeland did not make the phone calls, then she had no direct knowledge of what numbers were called. Therefore, Ms. Copeland's testimony as to the numbers that were called is patent hearsay based on Ms. Copeland reading the bill in court.

Given that the evidence of what phone numbers were called from Ms. Copeland's cell phone were such an important part of the State's case, and given that the telephone bill was hearsay and the proper foundation had not been laid for the bill or its contents to be entered into evidence, it was not objectively reasonable nor could it be considered legitimate trial strategy for Mr. Robinson's trial counsel to fail to object to the admission of the bill into the record and to fail to object when witnesses read from the bill to the jury during testimony.

- iv. Mr. Robinson was prejudiced by his trial counsel's failure to object to the introduction of Ms. Copeland's telephone bill and its

contents.

Had Mr. Robinson's trial counsel objected to the contents of the telephone bill being entered into the record, the State would have had to rely solely on the testimony of Ms. Banks, an admitted drug dealer and prostitute who was testifying as part of a agreement with the State for a lenient sentencing recommendation (RP 577-580, 9-19-06) for the evidence linking Mr. Robinson to any sort of drug activity which the State claimed was the motivation of Mr. Robinson committing the crime. Mr. Robinson was prejudiced by his trial counsel's failure to object in that the State was allowed to introduced inadmissible hearsay evidence to support the assertion that Mr. Robinson committed the crimes in order to purchase drugs.

3. **It was prosecutorial misconduct for the prosecutor to fail to correct the court's mistaken understanding of the requirement that the trial court perform the comparability analysis between a defendant's prior out of state convictions with Washington to determine the defendant's offender score.**

The due process clauses of both the federal and Washington constitutions guarantee a defendant the right to a fair trial.

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). "[I]t is the duty of a prosecutor, as a quasi judicial officer, to see that one accused of a crime is

given a fair trial.” *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), *cert. denied* 396 U.S. 1019, 90 S.Ct. 587, 24 L.Ed.2d 511 (1970).

The Washington Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in Huson, we believe the prosecutor’s conduct in this case was reprehensible and departs from the prosecutor’s duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981) (citations omitted) (*quoting State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)).

Prosecutorial misconduct may violate a defendant’s due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor’s conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116

S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. *Brett*, 126 Wn.2d at 175, 892 P.2d 29.

A prosecutor's first obligation is to serve truth and justice, and assure that those accused are given a fair trial. *United States v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991).

As discussed above, the trial court erroneously ruled that it had no obligation to perform a comparability analysis between the Mr. Robinson's prior California convictions and Washington law for purposes of determining Mr. Robinson's offender score. The State was apparently aware that such a comparability test was required because the State attached documentation from the State of California regarding Mr. Robinson's prior convictions to the State's sentencing memorandum. When the State became aware that the trial court mistakenly believed it was not necessary to conduct a comparability analysis, the prosecutor, as an officer of the court and a representative of the State, had an obligation to inform the court that the comparability test was required.

The failure of the prosecutor to inform the court that the comparability test needed to be performed violated Mr. Robinson's due process and statutory rights. The failure of the prosecutor to remind the court of its duty to conduct an on the record comparability analysis

violated Mr. Robinson's due process rights and deprived him of a fair trial.

E. CONCLUSION

For the above stated reasons, this court should vacate Mr. Robinson's sentence and remand for a new trial or, alternatively, a new sentencing hearing at which the State is barred from introducing new evidence.

DATED this 22st day of May, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 22nd day of May 2007, I caused a true and correct copy of this

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