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NO. 35456-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

MAXWELL DELVON JONES,

Appellant.

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

The Honorable James M. Triplet

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred when it denied the appellant's motion for relief from judgment under CrR 7.8. Clerk's Papers (CP) 187-88.<sup>1</sup>

2. The trial court erred in entering the following finding:

There is not good cause to invalidate the prior convictions as a part of the sentencing process in this case.

CP 187.

3. The trial court erred in entering the following order:

Due to the Washington State Supreme Court's decision in State v. Ammons, 105 Wn. 2d 175, 183, 713 P.2d 719 (1986), it is improper for the trial court to determine the constitutionality or validity of prior felony convictions used in the defendant's offender score; any attack on those prior convictions must be properly addressed in a P.R.P.

CP 188.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Pursuant to CrR 7.8, where a motion for resentencing was properly brought to remedy an error in calculating the appellant's offender score, did the trial court err in finding that the

matter of the validity of the prior convictions at issue was not properly before it, and could be considered only through the appellant filing a personal restraint petition (PRP)? (Assignments of Error 1, 3).

2. Is the state of Washington required to recognize the ruling in *U.S. v. Jones*<sup>2</sup>, the unpublished Ninth Circuit case that decided Jones' prior un-counseled convictions from 2003 could not be used against him at sentencing, under the Full Faith and Credit Clause of the U.S. Constitution? (Assignments of Error 1, 2)

C. STATEMENT OF THE CASE.

Maxwell Jones filed a CrR 7.8 motion for relief from judgment on December 1, 2016. CP 107-71. Jones had been sentenced on January 7, 2016, after being found guilty of one count of first degree robbery. CP 76-77, CP 79-93, CP 107-13. In the CrR 7.8 motion, Jones requested the court re-sentence him after eliminating from consideration four un-counseled felony convictions from 2003, which had counted towards his offender score at sentencing. *Id.*

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<sup>1</sup> The Order Denying Resentencing (CP 187-88) is attached as an Appendix.

<sup>2</sup> The unpublished opinion is UNITED STATES v. MAXWELL DELVON JONES, COA No. 14-30257, D.C. No. 2:13-cr-00052-WFN-1.

In sentencing Jones on the robbery, the court had calculated Jones' offender score at 9+; and the applicable standard sentence range at 129-171 months. CP 83. The court imposed 171 months.<sup>3</sup> CP 85. Jones' CrR 7.8 motion asked the court to review and correct the standard sentence range on the basis that he was without legal counsel when he pleaded guilty in the cases at issue from 2003. CP 111. Without the un-counseled convictions, Jones' offender score would be 7, and the applicable sentencing range 87-116 months. CP 112.

Jones' CrR 7.8 motion provided:

The criminal history of this defendant covers the years from 2003 through 2014. It includes three case files and four counts of conviction from 2003. Those are 03-1-00656-5, attempted second degree assault; 03-1-01409-6, two counts of conspiracy to deliver a controlled substance (methamphetamine and MDMA); 03-1-03050-4, second degree possession of stolen property. All three aforementioned files were handled by the same deputy prosecutor. All three files appear to have been negotiated through a negotiated plea in November 2003. All three files show that at the time of the entry of the plea the defendant was without counsel. All three files show that defendant had counsel at some point prior to the entry of the guilty plea, and that this attorney was

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<sup>3</sup> The sentence was ordered to be served concurrent with the 144 months Jones had received in his federal case, United States Case No. 13-CR-00052-WFN. CP 85; CP 154-58 (attachment 4).

allowed by the court to withdraw from representation of the defendant.

CP 108. Jones' CrR 7.8 motion attached the judgments, and provided key information from the 2003 cases where Jones had pleaded guilty when not represented by counsel. CP 108-09; CP 113; CP 114-145 (Attachments 1-3).

In support of his argument that the un-counseled convictions should not count in his offender score, Jones also attached the unpublished decision in *U.S. v. Jones* (holding that the district court could not count Jones' un-counseled convictions on remand for resentencing).<sup>4</sup> In that case, the government had conceded that the un-counseled convictions were invalid for sentencing purposes. *Id.*; CP 111; CP 113; CP 154-58 (Attachment 4); RP1<sup>5</sup> 27.

The state argued against setting the matter for resentencing. RP1 24, 28, 31-32; RP2 9, 20. The state argued that Jones was required to raise any issue over the use of prior convictions at sentencing with the Court of Appeals through filing a PRP. CP 184-86; RP1 23-24, 28; RP2 9, 20.

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<sup>4</sup> *U.S. v. JONES*, COA No. 14-30257, D.C. No. 2:13-cr-00052-WFN-1.

<sup>5</sup> The verbatim report of proceedings (VRP) includes three hearings (01/27/2017, 06/01/2017, 07/11/2017) transcribed by two court reporters. This brief will reference the hearings on 01/27/17 and 07/11/17 (consecutively paged) as RP1 and the 06/01/17 hearing as RP2.

The court scheduled a hearing on the merits of the CrR 7.8 motion. RP2 at 23, 24. Before this hearing, the state submitted a third response to the CrR 7.8 motion, arguing that any challenge to the validity of a prior conviction presented at sentencing could not be properly addressed by the trial court, but only by the Court of Appeals through filing a PRP. CP 184-86.

At the July 11<sup>th</sup>, 2017, hearing on the merits of Jones' CrR 7.8 motion, Jones argued that the un-counseled convictions should not count in his offender score and asked the court to set the case for resentencing. RP1 at 25. The court had been convinced by the state's last response that any question on the validity of the prior convictions at issue must first be submitted to the court of appeals, before the trial court could address it at re-sentencing. RP1 at 24, 28, 31-32.

The court denied the CrR 7.8 motion, ruling that Jones had to first collaterally attack the convictions at issue. CP 187-88, RP1 at 33. In its Order Denying Resentencing, the court entered the following finding: There is not good cause to invalidate the prior convictions as a part of the sentencing process in this case. CP

187. The court specifically ordered that, under *Ammons*<sup>6</sup>, it was “improper for the trial court to determine the constitutionality or validity of prior felony convictions used in the defendant’s offender score; any attack on those prior convictions must be properly addressed in a P.R.P.” CP 188.

This appeal timely follows. CP 191-92. Jones requests that this Court remand his case back to the superior court to consider his CrR 7.8 motion for re-sentencing at a hearing on the merits. There was good cause for the superior court to have granted Jones’ motion because it was substantively correct and procedurally proper.

D. ARGUMENT

MR. JONES IS ENTITLED TO RELIEF FROM JUDGMENT UNDER CrR 7.8.

CrR 7.8 (b)(1)-(5) allows a court to relieve a party from a final judgment for the enumerated reasons, as well as any other reason justifying relief from the operation of the judgment. Jones asserted he was entitled to relief under CrR 7.8(b)(1), that there was a mistake or irregularity in the judgment. RP2 at 12-13.

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<sup>6</sup> *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986); *cert. denied*, 479 U.S. 930 (1986).

Under the procedures set forth in CrR 7.8(c), it was proper for the court to address the merits of Jones' CrR 7.8 motion. CrR 7.8(c)(2) requires the superior court to make an initial determination of whether the motion is timely and either: 1) makes a substantial showing the moving party is entitled to relief, or 2) requires a factual hearing in order to resolve the motion. Here, the court found the CrR 7.8 motion was timely and that Jones had made a substantial showing he was entitled to relief. RP2 at 15-16, 23. Under CrR 7.8(c)(2) and (3), if the motion is timely and an initial showing has been made that the moving party has made a substantial showing that he is entitled to relief or that resolution of the motion will require a factual hearing, the superior court may order a hearing on the matter and direct the adverse party to show cause why the relief sought should not be granted. In this case, that hearing occurred on July 11, 2017.

Under CrR 7.8(c), after due consideration of the motion, the superior court may rule on the merits of the motion. Here, while the court followed the procedure outlined in CrR 7.8(c), its ultimate ruling on the merits of the motion, its Order Denying Resentencing, found it was improper for it to address the issue raised in Jones'

motion (whether a mistake in sentencing required exclusion of the un-counseled convictions at re-sentencing). CP 187-88.

The trial court has the power and the duty to correct an erroneous sentence when the error is discovered. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The denial of a motion to vacate a judgment is assessed for an abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996); *State v. Englund*, 186 Wn. App. 444, 459, 345 P.3d 859, *review denied*, 183 Wn.2d 1011, 352 P.3d 188 (2015).

The court abused its discretion where it made its ruling based upon the wrong legal standard. A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.App. 600, 609, 30 P.3d 1255 (2001). An abuse of discretion occurs where the court bases its decision on an incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Under CrR 7.8, the matter of revising Jones' offender score at re-sentencing was properly before the court. Because the three judgments offered to establish four of Jones' prior convictions indicated neither the presence of an attorney representing Jones

nor his waiver of counsel they are facially invalid and could not be properly used when sentencing Jones. *State v. Marsh*, 47 Wn. App. at 292. Under *Ammons*, this was enough for the court to reach the re-sentencing issue Jones raised in his CrR 7.8 motion.

In its final order on the CrR 7.8 motion, the trial court had found that *Ammons* specifically prevented it from considering the constitutional validity of Jones' criminal history at sentencing. CP 187-88. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). Jones maintains that the proper way to handle the issue raised in his CrR 7.8 motion is for the sentencing court to correct the standard range by eliminating the convictions for cases where he pleaded guilty without counsel. CP 112. Jones argued re-sentencing was proper considering the trial court had counted the un-counseled convictions in calculating his offender score. CP 107-13. The CrR 7.8 motion is the appropriate mechanism for reviewing and correcting the sentence range Jones received after being convicted of first degree robbery. CP 111-12.

1. The trial court erred when it denied Jones' CrR 7.8 motion because the convictions at issue are constitutionally invalid, and properly excluded when calculating Jones' sentence.

At sentencing, the State has the burden of establishing a defendant's criminal history by a preponderance of the evidence. *Ammons*, 105 Wn.2d at 186; *State v. Hunley*, 175 Wn.2d 901, 909–10, 287 P.3d 584 (2012) (citing *State v. Ford*, 137 Wn.2d 472, at 479–80, 973 P.2d 452 (1999)). A prior conviction is presumed constitutional, and a defendant normally may not contest the legality of prior convictions during sentencing proceedings on a current offense. *Ammons*, 105 Wash.2d at 187, 713 P.2d 719. Holding otherwise would “unduly and unjustifiably overburden the sentencing court.” *Ammons*, at 188, 713 P.2d 719.

There are two exceptions to the rule that the constitutional validity of prior convictions cannot be challenged. A sentencing judge may not include in criminal history a prior conviction “[1] which has been previously determined to have been unconstitutionally obtained or [2] which is constitutionally invalid on its face”. *Ammons*, at 187, 713 P.2d 719.

Jones may challenge the constitutional validity of the prior convictions at issue under either of the exceptions provided in

*Ammons* because (1) the convictions at issue were previously determined to have been unconstitutionally obtained; and (2) because such un-counseled convictions are constitutionally invalid. *Ammons*, at 187, 713 P.2d 719. A conviction that is constitutionally invalid on its face (facially invalid) may not be considered as part of criminal history when sentencing under the SRA. *State v. Ammons*, 105 Wn.2d at 187-88; accord, *State v. Manussier*, 129 Wn.2d 652, 682, 921 P.2d 473 (1996).

In deciding that the holding in *Ammons* prevented it from deciding whether re-sentencing was appropriate, the trial court did not analyze whether the two exceptions outlined in *Ammons* applied in this case. RP1 24-33; CP 187-88. The defense did not present argument regarding the applicability of *Ammons*. RP1 24-25, 27-28.

Jones fits within either exception outlined in *Ammons*. There was the unpublished Ninth Circuit decision holding that Jones' un-counseled convictions could not be used against him at sentencing, a previous judicial determination that the prior convictions were unconstitutionally obtained.

As to the second exception, the prior convictions at issue were un-counseled guilty pleas and therefore constitutionally invalid

(facially invalid) because Jones' Sixth Amendment right to counsel at a critical stage was violated. Prior convictions used at sentencing are facially invalid if they fail to show the defendant was represented at sentencing. A prior conviction is constitutionally invalid on its face if, without further elaboration, the judgment and sentence manifests infirmities of a constitutional magnitude.

*Ammons*, 105 Wn.2d at 188. For example, the Court of Appeals has held that "where the judgment and sentence itself does not reflect representation by counsel or waiver, it is deficient on its face." *State v. Marsh*, 47 Wn.App. 291, 294, 734 P.2d 545 (1987), overruled in part by *In re Petition of Williams*, 111 Wn.2d 353, 368, 759 P.2d 436 (1988) (rejecting *Marsh* analysis "[t]o the extent that [it] holds or suggests that the State must prove the constitutional validity of prior convictions at a sentencing hearing").

Here, the convictions were facially invalid because the judgments fail to show Jones was represented by counsel who was present when Jones pleaded guilty in those matters. CP 114-53 (attachments 1-3). None of the judgments for the four 2003 convictions reflect that defense counsel appeared at sentencing -- the defense attorney signature lines were all left blank. CP 126, 139, 152. There was nothing to indicate either the presence of an

attorney representing Jones during sentencing or a waiver of counsel. See *State v. Marsh*, 47 Wn. App. at 292. Jones' defense counsel in those matters had been allowed to withdraw. CP 108.

Under either exception outlined in *Ammons*, it was proper for the court to reach the re-sentencing issue raised in Jones' CrR 7.8 motion because the un-counseled convictions could not be used at sentencing. Jones was not seeking to vacate the un-counseled convictions from 2003. Rather, Jones was requesting a re-sentencing where the convictions at issue could not be used.

The un-counseled convictions are facially invalid under federal and state caselaw. The case of *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and subsequent U.S. Supreme Court and Washington caselaw partially modifying the rules in *Burgett*, illustrate the special significance of the absence of a showing of counsel, in the context of facial invalidity. In *Burgett*, the Supreme Court had reversed a conviction under a Texas recidivist statute because some of the prior convictions, which constituted a necessary element of the recidivist offense, facially raised a presumption the judgments were entered in the absence of counsel. *Burgett v. Texas*, 389 U.S. at 261-62. The Washington

Court of Appeals described *Texas v. Burgett* in the case of *State v.*

*Marsh*:

In *Burgett*, the court held that a conviction which does not indicate either presence of counsel or waiver [of counsel] may not be used to enhance punishment. Burgett was convicted of assault with intent to murder; the State sought to enhance his sentence based on four prior convictions. There were two copies of one of the prior convictions offered, one of which stated that Burgett appeared "in proper person and without Counsel", the other of which stated that he appeared "in proper person" but did not contain the additional language "without counsel." The trial court did not admit the first version of the conviction, but allowed the second. The Supreme Court reversed, holding that the conviction must be excluded, as both versions of the judgment and sentence on their face raised a presumption that the defendant had been denied his right to counsel. Presuming waiver of counsel from a silent record is impermissible. *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

*State v. Marsh*, 47 Wn. App. at 293. *Burgett* was later abrogated in part by the case of *Parke v. Raley*, 506 U.S. 20, 20-21, 113 S.Ct. 517, 518-19, 121 L.Ed.2d 391 (1992), wherein the U.S. Supreme Court ruled that, as to prior convictions used at sentencing, that the defendant was required to show facial invalidity, rather than requiring the government to prove the constitutionality of prior convictions.

In *State v. Marsh* the court emphasized that a facial showing of representation and presence of counsel were required for a conviction to be facially valid and also relied on *Burgett's* statement of the burdens of proof (the case of *In re Williams* later modified *Marsh* just as *Parke* modified *Burgett*). *In re Petition of Williams*, 111 Wn.2d at 368 (rejecting *Marsh* rule that State must prove constitutional validity of prior convictions). But the holding of the *Marsh* and *Burgett* cases, that a conviction that fails to show representation and presence of counsel is facially invalid, is not changed by the re-ordering of the burdens of production and proof in the State and federal caselaw. See *Parke v. Raley*, 506 U.S. at 29. This aspect of *Burgett v. Texas* and *State v. Marsh* stands for the proposition that for a judgment of conviction to be facially valid both representation by, and presence of counsel, are required.

Where the judgment and sentence itself does not reflect representation by counsel or waiver, it is deficient on its face. Without more, such a conviction does not meet the State's burden under *Ammons*. *State v. Marsh*, 47 Wn. App. at 295, see also 293-94 and n. 2 (noting that "[i]n *Burgett*, the court held that a conviction which does not indicate either presence of counsel or waiver may

not be used to enhance punishment"). This rule is supported by scholarly commentary:

Of course, as established in *United States v. Tucker*<sup>7</sup>, a conviction obtained in the absence of counsel or a valid waiver of counsel is "misinformation of constitutional magnitude" which may not be considered in the sentencing process. Such convictions are not "presumptively valid" and their use, in establishing the presumptive sentence range or for any other purpose, is unconstitutional.

(Footnotes omitted.) D. Boerner, Sentencing in Washington ' 6.11(b) at 6-20 (1985); see also *United States v. Owens*, 15 F.3d 995, 1001 (1994) ("Although we decline to articulate what might comprise the full scope of constitutional errors that renders a conviction presumptively void, we note that this category B which includes uncounseled convictions -- encompasses errors of such magnitude as to call into question the fundamental reliability of the conviction") (citing *United States v. Tucker, supra*, and *Burgett v. Texas, supra*).

Thus, not only was it appropriate for the court to hold a re-sentencing on the basis articulated in Jones CrR 7.8 motion, the court must properly exclude the un-counseled convictions from Jones' criminal history when calculating his offender score.

Remand to the superior court is the appropriate remedy. *State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008).

Here, Jones' case should be remanded to the superior court so that his motion can be considered after application of the correct legal standard. *Smith* at 864. On remand, the superior court should set a hearing and direct the state to appear and show cause why Jones should not be re-sentenced without inclusion of the uncounseled convictions. CrR 7.8(c)(3). Should the State argue that this Court should simply convert the motion to a PRP and consider it on its merits, *Smith* holds that this is not the proper remedy. Division II in *Smith* held that a defendant is entitled to both notice and an opportunity to object before a superior court transfers his motion to the Court of Appeals as a PRP. *Smith* at 864. This is so because conversion of the motion to a PRP "could infringe on his right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to the successive petition rule in RCW 10.73.140 as a result of the conversion of the motion." *Smith* at 864. Jones has not previously filed a PRP in this case. This Court should remand this matter to the Spokane County

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<sup>7</sup> *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972).

Superior Court for proper consideration of his motion under the correct legal standard.

2. Jones was entitled to relief in his CrR 7.8 motion, as shown by the prior decision to exclude the un-counseled convictions when calculating his sentence.

At the July 11, 2017, hearing on merits of the CrR 7.8 motion, the court was in a position to set the case for re-sentencing. But the court ruled it could not properly re-sentence Jones, ultimately agreeing with the state's position that the issue of the un-counseled convictions could only be properly addressed by raising the issue with the Court of Appeals through filing a PRP. Even so, the court seemed to recognize that ruling in favor of the state on this issue may well just be avoiding the inevitable,

Now, I'm still not sure, ... , if we're not wasting a lot of time if in fact it's – there's no real argument that the court shouldn't consider those matters, but you've convinced me that our supreme court has spoken on what the proper procedure is. But I guess if this matter gets back to me, I'm going to want to know why – I mean, the U.S. Constitution is a baseline for what people's constitutional rights are." And then the court asked about the basis for the state's argument against resentencing before stating on the record, "I just hope it's not "Let's make them jump through hoops even though this is where we're going to end up," because it seems like a waste of time, but I've agreed with you. The case seems to suggest – well, I think the case does say fairly clearly that Mr. Jones has to pursue those through PRPs."

RP1 30-32.

The trial court's decision that this matter was not properly before it reflected a misunderstanding of the holding in *Ammons*. Because the CrR 7.8 motion for re-sentencing was timely and, based on the information provided, presented a substantial showing Jones was entitled to relief, the court was required to decide whether the convictions at issue could be used at sentencing. Misreading *Ammons* to find that the issue of prior un-counseled convictions raised in Jones' CrR 7.8 motion had to first go to the Court of Appeals in a PRP before the trial court could address a mistake in sentencing was exactly the kind of "waste of time" the court feared would occur because it resulted in delaying the trial court from making its decision, as it was required to do under CrR 7.8.

a. The issue of whether Jones' un-counseled convictions from 2003 should be included in his offender score was decided by the Ninth Circuit. This issue was properly before the trial court under both CrR 7.8 and *Ammons*. Jones acted in accordance with the provisions of CrR 7.8 in seeking to correct an erroneous sentence. The decision that these un-counseled convictions could

not be used in sentencing Jones had been made in an unpublished Ninth circuit opinion. CP 154-58. Despite the issue being properly before it and having been given guidance on this exact sentencing issue by the Ninth Circuit, the court here refused to set the case for re-sentencing. Instead, the court ruled that the issue of whether these un-counseled convictions could be used against Jones at re-sentencing had to first go to the Court of Appeals. CP 187-88.

As stated above, Jones' main argument on appeal is that under CrR 7.8 and *Ammons*, the court clearly erred in denying his CrR 7.8 motion for relief from judgment. However, in addition, the doctrine of "collateral estoppel" should have been applied in deciding the CrR 7.8 motion because of the prior federal court decision that the convictions at issue were unconstitutionally obtained un-counseled guilty pleas. In applying the exceptions outlined in *Ammons*, the Washington Supreme Court has explained, "[T]he first *Ammons* exception is impliedly based on the theory of collateral estoppel. That theory has been described as follows:

[Collateral estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

*State v. Jones*, 110 Wn.2d 74, 78-79, 750 P.2d 620 (1988), citing *State v. Dupard*, 93 Wash.2d 268, 273, 609 P.2d 961 (1980) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). This theory applies if the burdens of proof in the two proceedings are such that the determination in the first proceeding is actually conclusive of that in the second.

In the Ninth Circuit case, the government had conceded that the un-counseled guilty pleas could not be used in calculating Jones' sentence. CP 154-58, 159-71. Here, the State was not similarly ready to make a similar concession. RP1 31. Even so, the issue of whether the un-counseled convictions could be counted against Jones at sentencing had been determined by a valid and final judgment, therefore the issue cannot be litigated by the prosecution again. Thus, under proper application of *Ammons*, or of the collateral estoppel doctrine, the four un-counseled convictions from 2003 should not have been included in calculating Jones' offender score.

b. The Full Faith and Credit Clause of the U.S. Constitution requires the trial court to follow the prior ruling of the Ninth Circuit when determining the validity of Jones' prior convictions. Under article 4, section 1 of the U.S. Constitution, each state must give full faith and credit to judicial proceedings of another state.<sup>8</sup>

Under 28 U.S.C. § 1738, which implements U.S. Const. art. 4, § 1, a state court must accord full faith and credit to a federal court's judgment. See, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 136–37, 83 L.Ed. 104, *reh'g denied*, 305 U.S. 675, 59 S.Ct. 250, 83 L.Ed. 437 (1938); 1B J. Moore, *Federal Practice*, § 0.406[1], at 267 n. 7 (1984). The federal constitution's Full Faith and Credit Clause, art. 4, § 1, or Supremacy Clause, art. 6, cl. 2, may require that a federal court's prior judgment be given preclusive effect in a subsequent state court action. *Restatement (Second) Judgments* § 28 comment e, at 280–81 (1982).

As Washington courts have held, judgments are generally afforded full faith and credit and their validity may not be collaterally attacked, absent constitutional infirmity. *State v. Berry*, 141 Wn.2d

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<sup>8</sup> Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. United States Const. art. 4, § 1. The

121, 127, 5 P.3d 658 (2000), *citing State v. Rinier*, 23 Wn.App.

102, 105, 595 P.2d 43 (1979).

The Full Faith and Credit Clause provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States.” *In re Estate of Tolson*, 89 Wn.App. 21, 29, 947 P.2d 1242 (1997). A valid foreign judgment may be collaterally attacked only if the court lacked jurisdiction or constitutional violations were involved. Absent these grounds, “a court of this state must give full faith and credit to the foreign judgment and regard the issues thereby adjudged to be precluded in a Washington proceeding.’

*In re Tolson*, 89 Wn.App. at 30 (quoting *In re Estate of Wagner*, 50 Wn.App. 162, 166, 748 P.2d 639 (1987)).

While the full faith and credit clause applies in full force to judgments, its effect is lessened when the statutes or judicial decisions of another forum are at issue. *State v. Berry*, 141 Wn.2d 121, 127, 5 P.3d 658 (2000), *citing, Baker v. General Motors Corp.*, 522 U.S. 222, 232–33, 118 S.Ct. 657, 139 L.Ed.2d 580 (1997).

“The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’

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same applies to the full faith and credit statute (28 U.S.C. § 1738).

” *Id.* (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)).

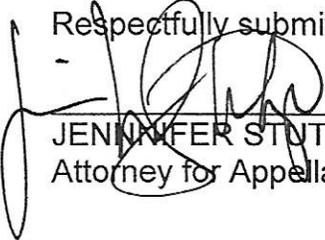
The Ninth Circuit had ruled that Jones’ un-counseled convictions from 2003 were constitutionally invalid and ordered those convictions could not count towards his offender score (when the case was remanded to district court). CP 154-58. The basic tenet that foreign judgments control in Washington court proceedings applies, consequently, the decision that Jones’ un-counseled convictions could not be used against him at sentencing, must be afforded full faith and credit. Jones is entitled to be re-sentenced under proper application of CrR 7.8. All that full faith and credit requires is that Washington respect the Ninth Circuit’s determination that the constitutionally invalid un-counseled convictions cannot count against Jones at sentencing.

E. CONCLUSION.

For the reasons stated, this Court should remand Jones’ CrR 7.8 motion to the superior court for consideration.

DATED this 27th day of March, 2018.

Respectfully submitted,

  
JENNIFER STUTZER (38994)  
Attorney for Appellant

# ATTACHMENT

SN: 77

PC: 2

FILED

JUL 11 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

(Clerk's Date Stamp)

	<b>SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE</b>
	<p><u>STATE OF WASHINGTON</u> Plaintiff.</p> <p>vs.</p> <p><u>JONES, MAXWELL</u> Defendant.</p>

CAUSE NO.: 13-1-01269-4

ORDER DENYING RE-SENTENCING

I. BASIS

THE DEFENDANT moved the court for: AN ORDER INVALIDATING  
THREE PREDER RELEASER CONVICTIONS FROM 2003.

II. FINDING

After reviewing the case record to date, and the basis for the motion, the court finds that:

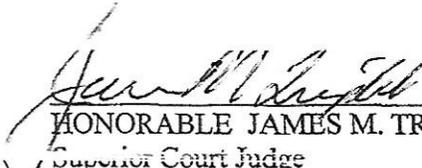
THERE IS NOT A GOOD CAUSE TO INVALIDATE  
THE PREDER CONVICTIONS AS A PART OF THE  
SENTENCING PROCESS IN THIS CASE.

III. ORDER

IT IS ORDERED that:

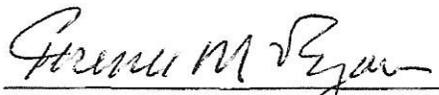
DUE TO THE WASHINGTON STATE SUPREME  
COURT'S DECISION IN STATE V. AMMONS, 105  
W.N. 2d 175, 188, 713 P.2d 719 (1986), IT IS IMPROPER  
FOR THE TRIAL COURT TO DETERMINE THE  
CONSTITUTIONALITY OR VALIDITY OF PRIOR  
FELONY CONVICTIONS USED IN THE DEFENDANT'S  
OFFENSE SCORE; ANY ATTACK ON THOSE PRIOR  
CONVICTIONS MUST BE PROPERLY ADDRESSED IN  
A P.R.P.

Dated: July 11, 2017

  
HONORABLE JAMES M. TRIPLET  
Superior Court Judge

Presented By:

  
DPA, 36642 FOR TMT.

  
ATTORNEY FOR DEFENDANT  
WSBA # 4658

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35456-3-III
	)	
MAXWELL DELVON JONES,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JENNIFER STUTZER, STATE THAT ON THE 27<sup>th</sup> DAY OF MARCH, 2018, I CAUSED THE ORIGINAL **APPELLANT'S OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN CLAYTON O'BRIEN SPOKANE CO PROS ATTORNEY 1100 W MALLON AVE SPOKANE, WA 99260-2043 bobrien@spokanecounty.org	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-FILED AND E-DELIVERED TO OPPOSING COUNSEL VIA COURT'S PORTAL
[X] MAXWELL JONES Register Number: 11203-085 USP Atwater U.S. Penitentiary P.O. Box 019001 Atwater, CA 95301	(X) ( ) ( )	U.S. MAIL HAND DELIVERY EMAIL

**SIGNED** IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF MARCH, 2018.

X  \_\_\_\_\_

**STUTZER LAW PLLC**

**March 27, 2018 - 5:19 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35456-3  
**Appellate Court Case Title:** State of Washington v. Maxwell Delvon Jones  
**Superior Court Case Number:** 13-1-01269-4

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