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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
FRANK C. MENDOZA,  
  
Appellant.

No.: 34698-2-II  
**PETITION FOR REVIEW**

**A. IDENTITY OF PETITIONER.**

The State of Washington, by and through Gerald R. Fuller, Chief Criminal Deputy, Grays Harbor County Prosecuting Attorney, asks this court to accept review of the Court of Appeals decision terminating review as designated in Part B, below.

**B. COURT OF APPEALS DECISION.**

The State of Washington seeks review of the published opinion of the Court of Appeals dated July 17, 2007 which affirms the conviction and remands the matter to the trial court, directing the trial court to hold a sentencing hearing to establish the defendant's prior convictions. The State asks that the decision of the Court of Appeals be reversed and the sentence of the Superior Court reinstated. The State asks this court to find that the trial court, based upon the evidence before it at sentencing, properly determined the defendant's offender score.

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4 A copy of the decision of the Court of Appeals is attached hereto and incorporated herein  
5 by this reference.

6 **C. ISSUES PRESENTED FOR REVIEW.**

- 7 1. **Did the trial court properly determine the defendant's offender score based**  
8 **on the information presented by the State of Washington in its Statement of**  
9 **Prosecuting Attorney which was admitted at the sentencing hearing without**  
10 **objection?**

11 **D. STATEMENT OF CASE.**

12 Following jury trial, the defendant was convicted of Robbery in the Second Degree, RCW  
13 9A.56.210 and Unlawful Imprisonment, RCW 9A.40.040. A sentencing was held on April 17,  
14 2006. At that time, the court and defense counsel were provided with the Statement of  
15 Prosecuting Attorney prepared by the State of Washington. Each prior felony conviction was  
16 listed by the name of the offense and the cause number. The information concerning the  
17 defendant's criminal history was specifically referenced by the prosecutor in his remarks to the  
18 court. (RP 4, 04/17/06). No objection was made by defense counsel to the criminal history  
19 presented. Counsel for the defendant specifically acknowledged that he had reviewed the  
20 Statement of Prosecuting Attorney with the defendant. Counsel accepted the criminal history as  
21 presented and recommended a standard range sentence. (RP 6, 04/17/06). The trial court  
22 accepted the representation of the State and the defendant's acknowledgment of the defendant's  
23 prior criminal history, determined that the defendant had an offender score of 9 on each count  
24 and imposed a standard range sentence on each count.

25 **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.**

26 **The decision of the Court of Appeals presents a significant question of law**  
27 **and an issue of substantial public interest that should be determined by the**  
28 **Supreme Court.**

RCW 9.94A.530 provides as follows:

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4 (2) In determining any sentence other than a sentence above the  
5 standard range, the trial court may rely on no more information  
6 than is admitted by the plea agreement, or admitted, acknowledged,  
7 or proved in a trial or at the time of sentencing, or proven pursuant  
8 to RCW 9.94A.537. Acknowledgment includes not objecting to  
information stated in the presentence reports. Where the defendant  
disputes material facts, the court must either not consider the fact  
or grant an evidentiary hearing on the point. The facts shall be  
deemed proved at the hearing by a preponderance of the evidence,  
except as otherwise specified in RCW 9.94A.537.

9 The State of Washington presented its Statement of Prosecuting Attorney. This is a  
10 presentence report provided to the court at sentencing. The report set forth the State's  
11 understanding of the defendant's criminal history. Each felony offense was listed by reference to  
12 the Superior Court cause number. There was no objection made. Accordingly, the convictions  
13 are deemed proven. To preserve a challenge for review, the defendant is required to object to the  
14 criminal history. RCW 9.94A.530(2). State v. Handley, 115 Wn.2d 275, 283-84, 796 P.2d 1266  
15 (1990).

16 The Court of Appeals opinion attempts to assert that there is lack of proof of the  
17 existence of the prior convictions. We are not talking about convictions from foreign countries.  
18 State v. Herzog, 112 Wn.2d 419, 771 P.2d 739 (1989). Neither are we talking about convictions  
19 from other states where there may be an issue whether there are comparable elements. State v.  
20 Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). These are all convictions that occurred in the state  
21 of Washington. These are all convictions that will show by a simple check online through the  
22 Judicial Information System set up by the Administrator of the Courts. These are all convictions  
23 that were acknowledged by the defendant.

24 The Court of Appeals has artificially limited the meaning of "presentence report" to a  
25 report prepared by the Department of Corrections. CrR 7.1(d) contemplates that there may be a  
26 Department of Corrections report as well as reports from "...any interested person, as designated  
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4 by RCW 9.94A.500 [to] submit reports separate from that furnished by [DOC]. RCW 9.94A.500  
5 specifically provides:

6 The court shall consider the risk assessment report and presentence  
7 reports, if any, including any victim impact statement and criminal  
8 history, and allow arguments from the prosecutor, the defense  
9 counsel, the offender, the victim, the survivor of the victim, or a  
10 representative of the victim or survivor, and an investigative law  
11 enforcement officer as to sentence to be imposed.

12 The statute does not limit presentence reports to a report prepared by the Department of  
13 Corrections. There is nothing that requires that the criminal history be prepared by the  
14 Department of Corrections only. It is has been the practice in Grays Harbor County that the  
15 prosecuting attorney prepares a Statement of Prosecuting Attorney that lists the defendant's  
16 criminal history for the court. RCW 9.94A.500, on its face, allows consideration of  
17 "...presentence reports, if any, including any victim impact statement and criminal history..." The  
18 State submitted a presentence report which contained the defendant's criminal history. No  
19 objection was made.

20 There is no requirement that the sentencing court hold an evidentiary hearing when there  
21 is no objection made to factual statements contained in a presentence report. State v. Garza, 123  
22 Wn.2d 885, 889-890. The court in Garza also noted that the CrR 7.1(c) requires defense counsel  
23 and prosecuting attorney to notify opposing counsel and the court, at least three days prior to  
24 sentencing, of any part of a presentence report that will be controverted. No such notice was  
25 given here. Garza, 123 Wn.2d at page 890. In fact, the defendant reviewed the criminal history  
26 and made no objection. (RP 6, 04/17/06).

27 This defendant has not been deprived of any right. The Statement of Prosecuting  
Attorney is given to the defendant prior to sentencing. He has the opportunity to review the list  
of prior convictions. Upon notice that he objects, there will be a contested hearing. The

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4 defendant certainly has the right to stipulate to his prior criminal history as he did here. There is  
5 no need to unduly burden the process by requiring that certified documents of all convictions be  
6 produced at every sentencing hearing.

7 **F. CONCLUSION.**

8 For the reasons set forth, the State asks that review be accepted and the decision of the  
9 Court of Appeals be reversed.

10 DATED: this \_\_\_\_\_ day of July, 2007.

11 Respectfully Submitted,

12  
13 By: *Gerald R Fuller*  
14 GERALD R. FULLER  
15 Chief Criminal Deputy  
16 WSBA #5143

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