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NO. 80477-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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FILED  
MAY 30 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

STATE OF WASHINGTON,

Petitioner,

v.

FRANK MENDOZA,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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ERIC J. NIELSEN  
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
206-623-2373

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A. ISSUE DISCUSSED IN SUPPLEMENTAL BRIEF

Was Mendoza's failure to object to the State's unsupported assertion regarding his criminal history an "acknowledgment" of the assertion?

B. STATEMENT OF FACTS

Mendoza incorporates the statement of facts in the court of appeals decision. State v. Mendoza, 139 Wn. App. 693, 695-698, 162 P.3d 439, *review granted*, 180 P.3d 1292 (2008).

C. SUPPLMENTAL ARGUMENT

MENDOZA'S FAILURE TO OBJECT TO THE STATE'S UNSUPPORTED ASSERTION ABOUT HIS CRIMINAL HISTORY DID NOT CONSTITUTE AN ACKNOWLEDGMENT OF THE ASSERTION.

The issue is whether Mendoza's failure to object to the criminal history asserted in the written Statement of Prosecuting Attorney constituted an acknowledgement that it accurately reflected his criminal history, thereby relieving the State of the burden to prove the history. The court of appeals held it did not and that holding is correct. State v. Mendoza, 139 Wn. App. at 713.

A defendant cannot waive a challenge to a miscalculated offender score. In re Pers. Restraint of Goodwin, 146 Wash.2d 861, 874, 50 P.3d

618 (2002). A defendant, however, can waive alleged errors if they involve an agreement to facts or the trial court's discretion. Id.

A defendant's offender score is based on the defendant's prior convictions and seriousness level of the current offenses. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citing State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)). The State must prove a defendant's criminal history by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing RCW 9.94A.110<sup>1</sup>).

Prior to sentencing, the State provided Mendoza with a written Statement of Prosecuting Attorney that purported to contain Mendoza's criminal history. Mendoza did not object to the criminal history information nor did he affirmatively acknowledge or stipulate to the information.

Under RCW 9.94A.530(2) the sentencing court can rely on a defendant's acknowledgement in determining the appropriate sentence.

That provision reads in relevant part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.

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<sup>1</sup> RCW 9.94A.110 was recodified as RCW 9.94A.500 (Laws 2001, ch. 10, § 6).

Acknowledgement includes not objecting to information stated in the presentence reports.

RCW 9.94A.530(2).

The failure to object, however, is deemed an acknowledgment only “to information stated in the presentence report.” RCW 9.94A.530(2). As the court of appeals found, “[p]resentence reports are documents prepared by the Department of Corrections (DOC) at the court’s request under RCW 9.94A.500.” Mendoza, 139 Wn. App. at 702-703. See CrR 7.1 (authorizing the sentencing court to order a presentence report from the DOC, which is required to contain the defendant’s criminal history). There was no presentence report requested or filed by the DOC. Instead, the only information regarding Mendoza’s criminal history was the State’s unsupported assertion. Mendoza’s lack of objection to the assertion was not an acknowledgment under RCW 9.94A.530(2).

The State argues its written statement was, in essence, a presentence report; therefore, Mendoza’s failure to object was an acknowledgment of the State’s assertions under RCW 9.94A.530(2). That contention is contrary to this Court’s decision in Ford.

In Ford, the State asserted at the sentencing hearing that three of Ford’s prior California convictions should be classified as felonies under comparable Washington law. Ford, 137 Wn. 2d at 475-476. Ford argued

they should not be counted as convictions because they resulted in civil commitment. Id. The sentencing court nonetheless counted the convictions in determining Ford's offender score. Id. Ford appealed and the court of appeals affirmed the sentencing court, holding that because Ford did not object to the State's assertion the convictions should be classified as felonies under comparable Washington law, he waived the issue. Id.

This Court reversed and held Ford did not waive any objection to his alleged criminal history by failing to object at the sentencing hearing. Ford, 137 Wn. 2d at 475. The Ford Court, citing former RCW 9.94A.370(2), the predecessor to RCW 9.94A.530(2), held "acknowledgment does not encompass bare assertions by the State unsupported by the evidence." Id. at 483; See State v. Lopez, 147 Wn.2d 515, 523, 55 P.3d 609 (2002) (same, citing Ford); see also In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005) (defendant has no obligation to object to State's failure to include a conviction in his criminal history).

This Court reasoned "[t]o conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant." Id. at 482. This Court also noted that "[n]ot being a witness, a prosecutor's

assertions are neither fact nor evidence, but merely argument.” Id. at 483, n.3.

The prosecutor’s assertion about Mendoza’s criminal history was not a presentence report as contemplated by the statute and rules and was unsupported by any evidence. Because it was merely an assertion, as in Ford, Mendoza’s failure to object did not constitute an “acknowledgement” under RCW 9.94A.530(2). Ford, 137 Wn. 2d at 483.

In State v. Weaver, 140 Wn. App. 349, 166 P.3d 761 (2007), however, another division of the court of appeals disagreed with the holding in this case and reached a different conclusion. The Weaver court reasoned that the Legislature’s use of the term “presentence reports” in RCW 9.94A.500 and the statute’s language authorizing the sentencing court to consider a “victim impact statement and criminal history” shows the Legislature did not intend the “DOC to be the only source of criminal history subject to acknowledgment.” Weaver, 166 P.3d at 765. The Weaver court held that Weaver acknowledged the criminal history sheet attached to the plea agreement because he failed to object to the State’s understanding of his criminal history. Id. The court cited State v. Grayson, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005) as support for its holding. Weaver, 166 P.3d at 765.

The issue in Grayson was whether the trial court abused its discretion when it categorically refused to consider the statutorily authorized Drug Offender Sentencing Alternative (DOSA) sentencing alternative. There, the trial court denied Grayson's request for a DOSA stating "the State no longer has money available to treat people who go through a DOSA program." Grayson, 154 Wn.2d at 337.

Because the trial court did not find the DOSA program's underfunding the sole reason for denying the DOSA request and did not articulate any other reasons, this Court reversed "[o]n the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate." Id. at 342. In dicta, this Court discussed RCW 9.94A.530 in the context of the trial court's conclusion the DOSA program was underfunded and suggested that had Grayson objected to the court's DOSA funding statement he might have been entitled to a hearing on the issue under RCW 9.94A.530(2).<sup>2</sup> Id. at 339.

The Weaver court's reliance on the dicta in Grayson is misplaced and Grayson does not support its holding. Whether to grant a request for an alternative sentence is discretionary. Grayson, 154 Wn.2d at 335. On the other hand, a sentence based on an incorrect calculation of an offender

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<sup>2</sup> Statements in a case that do not relate to the issue and are unnecessary to decide the case constitute *orbiter dictum*, and need not be followed. Bellevue v. Acrey, 103 Wash.2d 203, 207, 691 P.2d 957 (1984).

score is a fundamental legal defect and outside the court's statutory authority. Goodwin, 146 Wn.2d at 867-868 (citing In re Personal Restraint of Johnson, 131 Wn.2d 558, 568-569, 933 P.2d 1019 (1997)). Unlike acknowledging a program is underfunded, a defendant cannot agree to a sentence that legally exceeds the court's statutory authority. Id. at 875.

In addition to its reliance on Grayson, the Weaver court also concluded the statute's language shows the Legislature intended a presentence report under RCW 9.94A.500 to include the State's assertion of a defendant's criminal history and the failure to object to the assertion an acknowledgment under RCW 9.94A.530. Weaver, 166 P.3d at 765. That conclusion, however, is unsupported.

To help clarify the original intent of a statute, a court may turn to the statute's subsequent history. Littlejohn Constr. Co. v. Department of Labor & Indus., 74 Wn. App. 420, 427, 873 P.2d 583 (1994). A material change in a statute gives rise to the presumption of change in legislative intent. Rhoad v. McLean Trucking Co., 102 Wn.2d 422, 427, 686 P.2d 483 (1984); In re Bale, 63 Wn.2d 83, 89, 385 P.2d 545, 548 (1963).

In its 2008 session, the Legislature amended both RCW 9.94A.500 and RCW 9.94A.530. RCW 9.94A.500 (Laws of 2008, ch. 231, § 3, effective June 12, 2008); RCW 9.94A.530 (Laws of 2008, ch. 231, § 4,

effective June 12, 2008). In RCW 9.94A.500 the Legislature added the sentence “A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500 (Laws of 2008, ch. 231, § 3). In RCW 9.94A.530(2) it added the clause “and not objecting to criminal history presented at the time of sentencing” to the sentence “[a]cknowledgment includes not objecting to information stated in the presentence reports.” RCW 9.94A.530 (Laws of 2008, ch. 231, § 4). When it becomes effective, that provision will now read, “[a]cknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.” Id.

These recent amendments to RCW 9.94A.500 and RCW 9.94A.530 will allow the State to assert a defendant’s criminal history in the same manner as criminal history is asserted in a presentence report and allow the court to find a defendant’s failure to object an acknowledgment of the asserted criminal history.<sup>3</sup> Because the new language changes the information a court can rely on to determine criminal history and makes

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<sup>3</sup> For the purposes of this case, it is unnecessary to address whether the amendments unconstitutionally shift the burden of proof to the defendant to prove the absence of a criminal history or violates due process.

the failure to object to that information an acknowledgment of its contents, the changes show a change in legislative intent.<sup>4</sup> Thus, the amendments imply the Legislature did not intend the failure to object to the State's assertion about a defendant's criminal history be considered an acknowledgment under the current versions of the statutes applicable to this case. The change in legislative intent support the court appeals holding in this case and belie the Weaver court's legislative intent analysis.

Mendoza's criminal history, which was used to calculate his sentence, was based solely on the State's assertion. Mendoza's failure to object is not an acknowledgment under RCW 9.94A.530. The court of appeals decision in this case is consistent with the language in RCW 9.94A.530 and the holding in Ford. This Court should reject the holding in Weaver and affirm the court of appeals decision in this case.

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<sup>4</sup> Assuming the amended versions of the statute are constitutional, under those versions Mendoza's failure to object to the State's assertions about his criminal history would be deemed an acknowledgment.

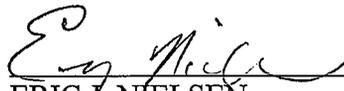
D. CONCLUSION

This Court should affirm the court of appeals decision and remand the case for a new sentencing hearing.

DATED this 29 day of May, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN

WSBA No. 12773

Office ID No. 91501

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 80477-0
vs.	)	
	)	
FRANK MENDOZA,	)	
	)	
Petitioner.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF MAY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GERALD FULLER  
GRAYS HARBOR COUNTY PROSECUTOR'S OFFICE  
102 W. BROADWAY AVENUE  
ROOM 102  
MONTESANO, WA 98563

[X] FRANK MENDOZA  
DOC NO. 813457  
WASHINGTON STATE REFORMATORY  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF MAY 2008.

x Patrick Mayovsky