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STATE OF WASHINGTON  
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No. 86135-8

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

vs.

**Monte Hunley,**

Respondent.

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Grays Harbor County Superior Court Cause No. 09-1-00164-4

The Honorable Judge David L. Edwards

**Respondent's Supplemental Brief**

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ORIGINAL

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## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Monte Hunley was convicted of Attempting to Elude a Pursuing Police Vehicle.<sup>1</sup> CP 7. At sentencing, the prosecution submitted a Statement of Prosecuting Attorney, alleging that Mr. Hunley had four prior adult felony convictions and a Reckless Driving conviction.<sup>2</sup> CP 26-29. Mr. Hunley filed a document captioned Defense Statement on Sentencing. CP 30-31. He did not admit or acknowledge any prior convictions. Nor did he stipulate to a particular offender score or standard range. CP 30-31; RP (7/13/09) 53-59.

Without comment, the sentencing court found that Mr. Hunley had an offender score of five. RP (7/13/09) 53-59; CP 8. Mr. Hunley was sentenced within the standard range for five points.<sup>3</sup> RP (7/13/09) 55-57; CP 7-13.

Mr. Hunley appealed, and the Court of Appeals vacated his sentence in a published opinion. CP 16; *see State v. Hunley*, 161 Wash.App. 919, 253 P.3d 448 (2011).

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<sup>1</sup> The jury also made a special finding that he had endangered someone other than himself and the pursuing police officer(s). CP 7.

<sup>2</sup> The prosecutor also alleged one prior juvenile felony. CP 27.

<sup>3</sup> The court imposed an additional year of confinement based on the jury's special verdict. RP (7/13/09) 55-57; CP 7-13.

The Court of Appeals held that RCW 9.94A.500 and RCW 9.94A.530 were unconstitutional insofar as they permitted a sentencing court to make a finding of criminal history based solely on a prosecutor's statement and the defendant's failure to object. *Hunley*, at 927. The state then filed a Petition for Review, which was accepted by the Supreme Court.

### ARGUMENT

**I. AT A SENTENCING HEARING, THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE REQUIRES THE PROSECUTION TO PROVE ANY PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE.**

**A. Standard of Review**

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

**B. The existence of a prior conviction is a question of fact that must be proved by a preponderance of the evidence.**

At sentencing, the prosecution bears the burden of proving prior convictions by a preponderance of the evidence.<sup>4</sup> *In re Adolph*, 170 Wash.2d 556, 569, 243 P.3d 540 (2010); *State v. Mendoza*, 165 Wash.2d

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<sup>4</sup> Prior convictions thus comprise an exception to the general rule that any fact used to increase the penalty for an offense must be proved to a jury beyond a reasonable doubt. See *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

913, 920, 205 P.3d 113 (2009). A bare assertion, unsupported by evidence, does not constitute proof. *State v. Ford*, 137 Wash.2d 472, 482, 973 P.2d 452 (1999). The Court of Appeals recognized these holdings when it issued its opinion in this case:

Our Supreme Court has consistently held that the State meets its constitutional burden to prove prior convictions at sentencing when it proves such convictions by a preponderance of the evidence... In *Ford*, the court held that the State's "bare assertions, unsupported by evidence" are insufficient to prove a defendant's prior convictions... The *Ford* court held that, under the basic principles of due process, the facts relied on in sentencing must have some basis in the record... The court further held that the prosecutor's assertions are neither facts nor evidence, but merely argument.

*Hunley*, at 927 (citing *Ford*, at 479-80, 482, 483 n. 3.). The Court of Appeals went on to note the constitutional basis of the prosecution's burden of proof at sentencing:

"The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To 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.*" ...In other words, constitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden.

*Hunley*, at 928 (emphasis in original) (quoting *Ford*, at 482).

Because this rule is constitutionally based, it cannot be altered by the legislature. *See, e.g., Ford*, at 479-480 ("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”*) (emphasis added) (citing *State v. Ammons*, 105 Wash.2d 175, 186, 713 P.2d 719 (1986)).

The Court of Appeals invalidated the legislature’s 2008 amendments to the SRA because those amendments purported to undo the constitutional requirement that the state bears the burden of proof at sentencing:

These amendments attempt to overrule *Ford* and its progeny by providing that a criminal history summary provides prima facie evidence of criminal history, and that failure to object to this summary constitutes acknowledgement. However, the legislature has no power to modify or impair a judicial interpretation of the constitution...*Ford* was based on the constitutional principle of due process... Thus, the 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) cannot constitutionally convert a prosecutor's “bare assertions” into evidence or shift the burden of proof by treating the defendant's silence as acknowledgement.

*Hunley*, at 928-929 (citations omitted).

The Statement of Prosecuting Attorney submitted in this case contains bare assertions unsupported by any evidence. CP 26-29. The legislature cannot transform such bare assertions into proof by a preponderance of the evidence any more than it could transform a prosecutor’s declaration of probable cause into proof beyond a reasonable doubt. The legislature’s attempt to do so in RCW 9.94A.500 and .530

violates due process: it dispenses with the constitutional requirement that prior convictions be proved by evidence rather than by bare allegation.<sup>5</sup>

As the Supreme Court has noted, the state's "burden is 'not overly difficult to meet' and may be satisfied by evidence that bears some 'minimum indicia of reliability.'" *Adolph*, at 569 (quoting *Ford*, at 480–81). Thus, for example, a prior driving offense can be established with a DOL driving abstract and a DISCIS DCH, because both are "official government records, based on information obtained directly from the courts, and can be created or modified only by government personnel following procedures established by statute or court rule." *Adolph*, at 570.

Furthermore, if the defendant does not wish to hold the prosecution to its minimal burden, an explicit acknowledgment can easily be made on the record. Absent such an acknowledgment, however, the prosecution must present some minimal *evidence*—not mere unsupported *allegations*—to prove criminal history. *Ford*, *supra*. The prosecution's failure to do so in this case requires that the sentence be vacated and the case remanded for a new sentencing hearing. *Id.*

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<sup>5</sup>A prosecutor's statement of criminal history differs fundamentally from a Presentence Investigation Report, prepared by the Department of Corrections. The prosecutor is a party, and as such, plays the role of a partisan advocate. The Department of Corrections, by contrast, is (at least theoretically) a neutral third party, with no stake in the outcome of a particular proceeding. Thus the legislature can legitimately treat a PSI report as evidence, as it has done in RCW 9.94A.530.

**II. RCW 9.94A.500 AND .530 UNCONSTITUTIONALLY BURDEN A DEFENDANT'S RIGHT TO REMAIN SILENT PENDING SENTENCING.**

A. Standard of Review

A challenge to the constitutionality of a statute is reviewed *de novo*. *City of Bothell v. Barnhart*, 172 Wash.2d 223, 229, 257 P.3d 648 (2011). Statutes are presumed to be constitutional, and the challenger bears the burden of showing the statute is unconstitutional beyond a reasonable doubt. *Id.*

B. RCW 9.94A.500 and .530 unconstitutionally direct the sentencing court to draw an adverse inference from the defendant's silence.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from a defendant's silence pending sentencing. *Mitchell*, at 328-329.

RCW 9.94A.500 and .530 direct the sentencing court to draw an adverse inference from an offender's silence. Accordingly, they violate the privilege against self incrimination. *Mitchell*, at 328-329. In the absence of actual evidence, a prosecutor's bare allegations do not amount

to proof by a preponderance of the evidence, even when combined with the defendant's silence. *Ford*, at 482; *Mitchell*, at 328-329.

The procedure outlined in the current statutes results in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor's allegations, RCW 9.94A.500 and .530 violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford*, *supra*; *Mitchell*, *supra*.

In this case, the prosecutor failed to present any evidence that Mr. Hunley had criminal history. The court apparently relied in part on Mr. Hunley's silence to conclude that he had an offender score of five. This infringed Mr. Hunley's privilege against self-incrimination. Accordingly, his sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

### **III. THE ISSUE IN THIS CASE IS MOOT.**

The Supreme Court does not generally review moot issues. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash.2d 781, 796, 225 P.3d 213 (2009). An issue is moot when the Court can no longer provide effective relief. *Brown v. Vail*, 169 Wash.2d 318, 337, 237 P.3d 263 (2010).<sup>6</sup>

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<sup>6</sup> The Court may review a moot case if it presents issues of continuing and substantial public interest. One factor the court considers is the likelihood that the issue will escape review because the facts of the controversy are short-lived. *Satomi*, at 796. The possibility of relief extended for two years in this case; a much longer time period will apply

Mr. Hunley was sentenced to 24 months in prison on July 13, 2009. CP 7-15. He has served his term of confinement, and the court cannot provide him with additional relief. Accordingly, the case is moot, and the issue should not be reviewed. *Satomi, supra*.

**CONCLUSION**

The Court should affirm the Court of Appeals, vacate Mr. Hunley's sentence, and remand the case for a new sentencing hearing. This is the appropriate resolution, unless the court finds that the case is moot and not appropriate for review.

Respectfully submitted by,

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for defendants who have committed more serious crimes or whose offender scores are higher than Mr. Hunley's. Accordingly, the issue here is not likely to escape review.

CERTIFICATE OF MAILING

I certify that on today's date:

I mailed postage prepaid a copy of Respondent's Supplemental Brief to:

Monte Hunley  
141 S. River St., #5  
Montesano, WA 98563

and to:

Grays Harbor Prosecuting Attorney  
102 West Broadway, #102  
Montesano, WA 98563

and to:

Pamela Loginsky  
206 - 10<sup>th</sup> Avenue SE  
Olympia, WA 98501

**Corrected: And that I personally electronically filed the original with the Supreme Court for filing.**

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 28, 2011.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant